# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Pavlou v Xu* [2023] QDC 38 |
| PARTIES: | **DREW PAVLOU**<br>(Applicant)<br>**v**<br>**XU JIE**<br>(Respondent) |
| FILE NO: | BD No. 1907 of 2022 |
| DIVISION: | Civil |
| PROCEEDING: | Appeal |
| ORIGINATING COURT: | District Court of Queensland |
| DELIVERED ON: | 13 March 2023 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 November 2022 |
| JUDGE: | Porter KC DCJ |
| ORDER: | **1. Application for extension of time to appeal refused.** |
| CATCHWORDS: | MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – WHEN APPEAL LIES – where the respondent formerly acted as the Consul-General of the People's Republic of China in Brisbane – where the applicant engaged in protests relating to that country – where the applicant alleged that in the course of those protests acts of violence were committed against him – where the applicant alleged that a statement published by the respondent as Consul-General impliedly approved of the alleged acts of violence – where the applicant made a complaint under the *Peace and Good Behaviour Act 1982* (Qld) against the respondent – where immunity is conferred by the *Consular Privileges and Immunities Act 1972* (Cth) for acts done in the course of discharging consular functions – where the learned Magistrate dismissed the complaint on the basis that the Court had no jurisdiction over the respondent by reason of consular immunity– where the applicant needed leave to appeal out of time, the appeal being brought some two years after dismissal of the complaint – where there was no allegation of any other relevant conduct by the respondent apart from the statement – where the respondent had since left Australia and taken up |

another diplomatic post overseas – whether an order under the *Peace and Good Behaviour Act 1982* (Qld) could in those circumstances be made in favour of the applicant even if otherwise successful on the issues raised by the complaint

COUNSEL: A Stumer for the Appellant

No Appearance for the Respondent

SOLICITORS: Mark Tarrant Lawyers for the Appellant

No Appearance for the Respondent

**Summary**

[1] On 10 August 2020, Deputy Chief Magistrate Brassington (as the Chief Magistrate then was) dismissed the applicant's complaint under the *Peace and Good Behaviour Act 1982* (Qld) (the **PGBA**) against the respondent, the then Consul-General in Brisbane for the People's Republic of China (the **PRC**). Her Honour did so on the basis that the respondent had consular immunity for the acts alleged by the applicant under the *Consular Privileges and Immunities Act 1972* (Cth) (the **Immunities Act**).

[2] An appeal was lodged against that order on 8 August 2022, nearly two years after the expiry of the time limit for appealing her Honour's order.[1] The applicant needed an extension of time to appeal.

[3] The respondent ceased to hold the position of Consul-General and left Australia in about March 2022. As of November 2022, it appeared he was the ambassador of the PRC to the Cape Verde Islands and had held that position since at least October 2022.[2] In those circumstances, there is no utility in making orders under the PGBA against the respondent, even if the applicant could otherwise sustain the complaint. Further, there is no evidence of any alleged conduct since 25 July 2019 which could be characterised as relevant conduct by the respondent, and I think it fair to assume that the respondent no longer has any duty nor interest in involving himself in events in Queensland.

[4] For those reasons, an order under the PGBA would be both unnecessary and futile even if:

(a) The basis for an order under the PGBA could be established on the evidence; and

(b) It could be established that the conduct proved would not be protected by consular immunity.

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[1] See PGBA s 89(3)(a).

[2] Affidavit of Mr Tarrant sworn 21 November 2022 at paragraphs 1 and 2.

[5] Accordingly, there is no prospect that an order would be made on the appeal even if the applicant otherwise succeeded on the issues in the appeal. As such, an order granting an extension of time to bring an appeal is of no utility.

[6] I therefore dismiss the application for an extension of time to appeal.

**The context of the complaint**

[7] The applicant alleges that on 24 July 2019, he was assaulted twice during a pro-Hong Kong democracy rally at the University of Queensland in which he was participating. He alleged that at about 12.20pm, while sitting on the ground chanting through a megaphone, a man ripped the megaphone and a protest sign from his hands. When the applicant stood up, he says the man and another man punched him in the ribs and the side of the head. Later in the day, he alleges, another masked man struck him in the back of the head and ripped a poster from his hands and tore it up.

[8] The next day, a statement was published in Chinese on the website of the Consulate-General of the PRC in Brisbane (the **Statement**). A copy of the post and a translation of it, apparently undertaken by an NAATI translator, appear in the material. The translation states:

> **Statement by the spokesperson of the Consulate General in Brisbane to express the stance regarding the self-motivated overseas Chinese students at the University of Queensland in Australia to oppose the anti-China separatist activities**
>
> According to our knowledge, during the afternoon of the 24th of July, a small number of people with ulterior motives carried out anti-China separatist activities at the University of Queensland in Australia, causing indignation and protest from overseas Chinese students of the mainland and Hong Kong.
>
> The Consulate General regards highly the importance of the safety of the overseas Chinese students and affirms the self-motivated patriotic behaviour of the overseas Chinese students. The Consulate General resolutely opposes to any conduct by words or behaviour to split the country, opposes to some people using the matter described above as excuse to provoke the confrontation between students from mainland China and from Hong Kong, and to incite anti-China sentiment.
>
> The Consulate General will continue to pay close attention to monitor this matter, and will firmly safeguard the legitimate rights of the overseas Chinese students. We hope that the overseas Chinese students will abide the Australian laws and regulations, to pay attention to their personal safety, and to express their appeals and demands in accordance to the law.

[9] Much of the applicant's case turns on the implications and sub-text ascribed to the words of the Statement. While I have no reason to question the skill or impartiality of the translator, it must be borne in mind that reasonable minds can differ as to subtle points of translation. In any event, I accept the translation as accurate for present purposes. The Statement:

(a) Does not mention any acts of violence by the indignant mainland Chinese students to which it refers;

(b) Does not identify their "self-motivated patriotic behaviour" as including the alleged assaults;

(c) Does not mention the applicant; and

(d) Carries, at the end, advice that Chinese students abide by Australian law.

[10] However, the Statement was published the day after the alleged assaults on the applicant and the applicant contends the Statement was referring to those assaults when referring to the "self-motivated patriotic behaviour". The applicant's material included the following further points.

[11] His affidavit includes evidence that the designation of a person as an "anti-China separatist" is provocative because to do acts which could be characterised as separatist can be a serious offence in the PRC.

[12] He also exhibits an article from an English language newspaper published in the PRC on 25 July 2019 which linked the Statement to the applicant personally. That article provided:

> China's Consulate-General in Brisbane, Australia, on Thursday issued a statement praising Chinese students, including those from the Hong Kong Special Administrative Region, at the Australian University of Queensland (UQ) who staged a voluntary patriotic rally in response to two consecutive anti-China and secessionist protests held at the university campus on Wednesday afternoon.
>
> The statement said the consulate attaches great importance to the safety of overseas Chinese students and firmly opposes any words and deeds intended to split China.
>
> The consulate also vowed online to stand against any instigation of anti-China sentiments or the use of protests to create bad blood between Chinese mainland students and those from Hong Kong.
>
> Dozens of students from the Chinese mainland at the university reached by the Global Times called for a calm and rational response toward the protests and speeches organized by the Australian protester Drew Pavlou.
>
> Two Facebook events "Stand with Hong Kong on UQ Market Day" and "Action for Hong Kong and Xinjiang! Public Event" were organized by Australian national Pavlou and Jack Yiu Chak whose nationality has yet to be confirmed, both students at the university, to coincide with the university's crowded market day. The events turned violent.
>
> According to videos circulating online and Chinese students reached by the Global Times, protesters sitting at the main entrance to campus were spreading rumours about Xinjiang and Hong Kong.
>
> The Anti-China protestors accused the Chinese government of violating human rights and asked the university to close its Confucius Institute, which provoked anger among Chinese onlookers.

[13] Again, this article does not mention any assaults on the applicant, though again, looked at through the prism of the alleged assaults, it might be thought those acts are what is being referred to in the last line: i.e. the anger provoked.

[14] The applicant goes on to allege that he was harassed on social media immediately following the Statement and to refer to a public statement by an Australian government minister critical of the Statement. He also refers to a public statement by the embassy of the PRC in the following terms:

> We believe that the remarks made by the [respondent] on July 25th are appropriate and measured. Any misrepresentation of and over-reaction to the remarks are regrettable and unacceptable.

[15] The applicant contends that in those broader circumstances, the Statement should be construed as encouraging the assaults on him and as giving rise to a threat by the respondent to procure others to carry out further assaults. The applicant swears in those circumstances that he feared for his safety. The applicant links the broader conduct he describes to the respondent by swearing to a belief that it is the respondent who co-ordinated and encouraged the alleged assaults and subsequent threats. Other than the text of the Statement, and the respondent's position as consul-general, however, there is no evidence which provides an objective basis for that belief.

[16] The applicant alleges that on 9 October 2019 while campaigning for student elections, he was assaulted and insulted by a person he characterised as pro-Chinese Communist Party. It might be that event (assuming it occurred as described) that precipitated the applicant's complaint.

**The complaint and summons**

[17] On 14 October 2019, the applicant swore a complaint and summons under the PGBA against the respondent.

[18] The PGBA relevantly to this matter, provides:

(a) By s 5:

> (1) A person (the **complainant**) may make a complaint to a justice of the peace that a person has threatened:
>
> (a) to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or
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> (b) to procure any other person to assault or to do any bodily injury to the complainant or to any other person under the care or charge of the complainant; or
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> (c) to destroy or damage any property of the complainant; or
>
> (d) to procure any other person to destroy or damage any property of the complainant;
>
> and that the complainant is in fear of the person complained against (the **defendant**).
>
> (2) A person (also the **complainant**) may make a complaint to a justice of the peace that the intentional conduct of a person (also the **defendant**) directed at the complainant has caused the complainant to fear that the defendant will destroy or damage any property of the complainant.
>
> (2A) If the matter of a complaint under subsection (1) or (2) is substantiated to the justice's satisfaction, and the justice considers it is reasonable in the circumstances for the complainant to have the fear mentioned in the subsection, the justice may issue:

(a) a summons directed to the defendant requiring the defendant to appear at a stated time and place before the court; or

(b) a warrant to apprehend the defendant and to cause the defendant to be brought before a court;

to answer the complaint and to be further dealt with according to law.

(3) If the justice before whom the complaint mentioned in subsection (1) or (2) is made considers that the matter would be better resolved by mediation than by proceedings before a court, the justice may, with the complainant's consent, order the complainant to submit the matter to mediation under the *Dispute Resolution Centres Act 1990*.

(4) In this section:

**Complaint** means a written complaint made on oath.

(b) By s 7:

(1) The court before which the defendant appears in obedience to the summons or is brought pursuant to the warrant, as the case may be, shall hear and determine the matter of the complaint.

(2) Without limiting any other evidence given by or on behalf of the defendant, the defendant may produce evidence that the complaint is made from malice or for vexation only.

(3) Upon a consideration of the evidence, the court may:

(a) dismiss the complaint; or

(b) make an order that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the court thinks fit.

(4) The order made by the court may contain such other stipulations or conditions as the court thinks fit.

[19] Before this Court, the applicant principally relied on s 5(1)(b). He contended that the Statement, taken in context, amounted to a threat from the respondent to procure others to assault persons who participate in demonstrations critical of the conduct of the PRC, including the applicant. The power to make an order also requires the applicant to establish that he is in fear of the person complained against, in this case the respondent. The applicant swore to that fear directly in his primary affidavit.

## The proceedings in the Magistrates Court

[20] On 14 October 2019, a Justice of the Peace issued a summons under s 5(2A) of the PGBA requiring the respondent to appear at the Magistrates Court in Brisbane at 9am on 22 November 2019 to answer the complaint.[3] The summons was served on the respondent on 14 October 2019 under s 56(1) of the *Justices Act 1886* (Qld) by leaving the document at the offices of the Consulate-General of the PRC in Brisbane.[4] There were hearings in respect of the complaint at the Brisbane

[3] Affidavit of Mr Tarrant sworn 8 August 2022 at paragraph 3.
[4] Affidavit of Mr Tarrant sworn 8 August 2022 at paragraph 4.

Magistrates Court on 22 November 2019, 18 December 2019, 24 July 2020 and 10 August 2020.[5]

[21] The respondent did not appear at any of the hearings but a submission was provided, indirectly, to the Court on behalf of the respondent (the **Submission**).[6] That Submission contended that the respondent had immunity under the *Consular Privileges and Immunities Act 1972* (Cth) (the **CPIA**). It also contended that the allegations in the affidavits filed in support of the complaint did not make out the alleged threat in any event.

## The *Consular Privileges and Immunities Act*

[22] The CPIA gives effect in Australian domestic law to the *Vienna Convention on Consular Relations* (the **VCCR**),[7] to the extent set out in the CPIA.[8] The key provision of the Convention relevant to this proceeding is Article 43(1) which provides:

> Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

[23] It can be seen that the scope of the jurisdictional exclusion is in respect of acts performed in the exercise of consular functions. Consular functions are defined in Article 5 as follows:

> Consular functions consist in:
>
> (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
>
> (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
>
> (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
>
> (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
>
> (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

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[5] Affidavit of Mr Tarrant sworn 8 August 2022 at paragraph [7] – [22].
[6] Affidavit of Mr Tarrant sworn 8 August 2022 at paragraph [19] – [20] and Annexure F.
[7] *Vienna Convention on Consular Relations,* opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
[8] CPIA s 5.

(g) safeguarding the interests of nationals both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising the rights of supervision and inspection provided for in the law and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

[24] There appears to be an extension to the definition of 'consular functions' under Article 5(m) in an agreement between the Commonwealth and the PRC, though no reliance was placed on any such extension in argument.[9]

[25] I note that the CPIA does not adopt into Australian law Article 55(1) of the VCCR which provides:

> Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

[26] I observe, however, that even if it were included, that article does not seem to me to cut down the scope of the immunity in Article 43.1, given the introductory words used.

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[9] *Agreement on Consular Relations between Australia and the People's Republic of China,* opened for signature 8 September 1999, [2000] ATS 26 (entered into force 15 September 2000).

**The respondent's Submission**

[27] Though the respondent was served, he did not appear. As noted above, a submission was provided indirectly to the Court. In my view, the respondent was entitled to proceed in that manner. In *Zhang v Zemin* (2010) 79 NSWLR 513, the Court of Appeal was dealing with the immunity conferred on foreign states under section 9 of the *Foreign States Immunities Act 1985* (Cth). Section 9 provided that except as provided by that Act, "*a foreign State is immune from the jurisdiction of the courts of Australia in any proceeding*". The Court held that the section was intended to be self-executing, it did not have to be raised by the foreign State appearing in the proceeding. Rather, the Court must satisfy itself it has jurisdiction to proceed.[10] The analogy between s 9 of that Act and Article 43(1) of the VCCR is a strong one, and the policy consideration which informed the approach adopted in *Zhang* seem to apply equally to consular officers acting within the scope of the Convention. That policy was articulated by Spigelman CJ as follows:[11]

> This conclusion is, in my opinion reinforced by a purpose of the legislative scheme, one of which is to prevent foreign states from being subject to the necessity to participate in proceedings at any stage. That is one reason why s 9 is directed to the jurisdiction of the courts, rather than to the powers of the courts. Imposing a necessity on a foreign state to contest the issue of immunity in all circumstances is inconsistent with the attainment of that object.

[28] The Submission invoked Articles 5(a), 5(e) and 5(m) of the VCCR as bringing the publication of the Statement within the scope of the respondent's consular functions. It should be noted however, that the Submission does not adopt the position that inciting violence or another breach of the law, or threatening violence against the applicant, would be protected by Article 43(1). Referring to the limitation on Article 5(a) that conduct must be "within the limits permitted by international law", paragraph 22 observes (perhaps a little equivocally):

> For the [applicant] to have any prospect of success on this issue, the Statement would, at the very least, need to be obviously inciting a breach of the law or positively threatening the [applicant].

[29] It then proceeds to develop an argument based on the applicant's allegations that the Statement cannot be read as doing any such thing. The Submission contends that the Statement, read fairly, does not meet the pre-conditions for an order in s 5 PGBA and is not otherwise unlawful.

**The hearing before her Honour**

[30] The only appearance at the hearing before her Honour was Mr Morris KC who appeared seemingly as *amicus curiae* at the request of the applicant to address the question of consular immunity. During argument, her Honour expressed some scepticism as to the merits of the complaint on the basis that the PGBA is

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[10] *Zhang v Zemin* (2010) 79 NSWLR 513, 522 – 523 (Spigelman CJ, Allsop P agreeing at 540 – 543, McClellan CJ at CL agreeing at 543).

[11] Ibid [36]. See also *Compania Naviera Vascongado v Steamship "Christina"* [1938] AC 485, 498.

concerned with particular threats by a particular person, which her Honour plainly thought was a difficulty for the applicant on his material.[12]

[31] However, the matter was disposed of based on Article 43(1). Mr Morris KC submitted that if the act of publishing the Statement objectively fell within the scope of Article 5, then the immunity applied and the appropriateness of the respondent's conduct was then a political matter. Her Honour agreed.

[32] Her Honour's reasons were brief, but to the point. After setting out the legal context in which the Consul-General's immunity arose, a brief summary of the allegations by Mr Pavlou as to what occurred and the content of the Statement, her Honour held:

> However, I am satisfied and indeed satisfied to the requisite standard that the issue of the press release was well within the consular function of the Consular-General in protecting both the interests of its nationals, individuals and bodies – safeguarding the interests of those nationals. It is not a matter whether it is an issue where someone may well disagree with those matters, but whether it is within, and reasonably within, the consular functions that any – that anybody could find so, and I do find so.
>
> I am therefore satisfied that because it's reasonably open that the consular – that [the respondent], as a consular officer, performed the issue of the press release which is relied upon in the exercise of his consular functions, I am satisfied it is not amenable to the jurisdiction of this Court. It is appropriate I consider the remedy upon that finding is to stay the complaint.

**The proceedings in this Court**

[33] The applicant filed an Application for an Extension of time to Appeal and a Notice of Appeal in this Court on 8 August 2022. The only ground of appeal for which leave was sought was that her Honour erred by finding that the respondent:

> ...was not amenable to jurisdiction by reason of Article 43 of the Vienna Convention on Consular Relations.

[34] The explanation for the failure to appeal within time was that the applicant had been unable to locate counsel to represent him on the appeal but that he had eventually located counsel through 'LawRight's Pro Bono Connect scheme'. That counsel was apparently Mr Stumer, who appeared on the application.

[35] Mr Stumer prepared submissions on the application for leave and on the appeal proper. Notice was given to the Commonwealth Attorney-General who was invited to indicate if the Commonwealth wanted to be heard. Ultimately, the Commonwealth responded that a decision on whether to appear would not be made until late February 2023. As the matter was initially listed for 11 November 2022 and adjourned until 25 November to give the Commonwealth an opportunity to decide whether to intervene, I decided sufficient time had been allowed for that decision to be made, and I proceeded with the hearing on 25 November 2022.

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[12] Transcript of 10 August 2020 page 6, lines 10 – 24.

[36] Mr Stumer adopted a quite different position from Mr Morris on the application of the immunity under the Convention to the allegations by the applicant. In a careful and scholarly submission, he contended that:

(a) The Statement did, on its proper construction and in context, comprise a threat by the respondent of the kind identified in s 5(1)(b) PGBA; and

(b) On the proper construction of the VCCR as applied in Australian domestic law, the act of publishing the Statement fell outside the scope of the immunity conferred on the respondents as a consular officer.

[37] The gravamen of the arguments underpinning the latter point is conveniently summarised in Mr Stumer's written submissions as follows:

> 46. Further, since Article 5 must be read as a whole, express privisos applying to one limb must also apply to other limbs, even where the proviso is not expressly stated. For instance, it would be incongruous if a function that was excluded by the definition of consular functions because it was not within the limits permitted by international law (Article 5(a)) nonetheless satisfied the definition because it fell within one of the other limbs that does not include that express proviso (Article 5(e) and (m)).
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> 47. This point is made by the authors of *Consular Law and Practice*:
>
> > Beyond the question of overlap in the sub-paragraphs of VCCR Art. 5, the focus on whether a qualifying clause appears in a particular sub-paragraph may not be an appropriate method for resolving the question of immunity. A consul is required, in the exercise of any function, to respect receiving State law. Even a consul who exercises a function described in a sub-paragraph that lacks a qualifying clause must respect receiving State law.
>
> 48. The submissions below address the three limbs of Article 5 separately. However, the ultimate question is whether the act in question was performed in the exercise of a consular function and that question requires Article 5 to be interpreted as a whole.
>
> 49. The appellant submits that the publication of a political statement that suppresses the exercise of freedom of speech and freedom of assembly within Australia is not the exercise of a consular function.
>
> 50. That is because a publication of that nature is not within the limits permitted by international law, constitutes an interference in the internal affairs of the receiving State (Australia) and does not respect, or is prohibited by, the laws of the receiving State.

**The extension of time application**

[38] It is important to keep in mind the nature and purpose of an order under the PGBA. Proceedings for an order that a person be of good behaviour are not criminal in character, despite the use made of *Justices Act* procedures in the PGBA. They are civil proceedings.[13] Further, an order under the Act is not a sentence, nor is the purpose of such an order to punish. Rather, the Act is concerned with restraining or deterring future breaches of the peace. In *Laidlaw v Hulett* [1998] 2 Qd R 45, 50-37, McPherson JA, speaking of the historical form of the procedure, observed:

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[13] *Laidlaw v Hulett* [1998] 2 Qd R 45, 49, 51 ("*Laidlaw*").

> Binding over to keep the peace was, as Blackburn J described in *ex parte Davis* (1871) 35 J.P. 551, "a precautionary measure to prevent a future crime, and not by way of punishment for something past". Consistently with this approach to the jurisdiction, evidence of past events, although admissible, was relevant only as suggesting reasons why a breach of the peace was apprehended in the future.

[39] While that comment did not relate specifically to the modern version of the procedure in the PGBA, it is evident from the Act itself that it remains concerned with ameliorating the risk of future acts, not passing judgment on past acts. Section 4(1) of the Act provides:

> The main object of this Act is to protect the safety, welfare, security, and peace and good order of the community from risks presented by people engaging in antisocial, disorderly or criminal conduct.

[40] If a complainant makes out one or more of the pre-conditions which may underpin a complaint under s 5 of the PGBA by evidence before the Court, s 7(3) creates a discretion as to the course the Court may take. The Court is not compelled to make an order. Ordinarily, one might think that if the pre-conditions are made out, that discretion will be exercised in favour of making an order against the defendant. However, in my view, a relevant factor in exercising the discretion would be whether there is any prospect or risk of any further act by the defendant which will breach the peace, even if past acts are made out which meet the pre-conditions in s 5. Indeed, given the historical and statutory purpose of the proceeding, if there is no sufficient risk of future breaches of the peace demonstrated, then ordinarily one might expect the complaint to be dismissed.

[41] It should also be borne in mind that an order under the Act is analogous to injunctive relief commonly granted to restrain unlawful conduct.[14] It is a civil order which gives rise to a statutory injunction restraining the defendant from future breaches of the peace. As a general rule, Courts should avoid making futile orders including orders that cannot be enforced. Bearing that in mind, it is also relevant to the exercise of the discretion if it is demonstrated that any such order can be ignored with impunity because, for example, the defendant is not within the jurisdiction of the Court and is unlikely ever to be so. That is not to say that an order would never be made in those circumstances, just that that circumstance would tend against exercising the discretion to make an order.

[42] In my view, the evidence before the Court engages both considerations.

[43] **First**, the applicant does allege events which have occurred since the dismissal of the complaint which tend to suggest that the applicant continues to encounter difficulties arising from the conduct of persons unknown which he links with the PRC. However, there is no suggestions that the respondent has done any of the alleged acts, nor that he has had anything to do with them. It is now well over 3 years since the publication of the Statement. Even on the applicant's version of events, there is no suggestion of any act of alleged threat or incitement by the respondent since publication of the Statement.

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[14] *Laidlaw* 52.

[44] **Second**, the respondent has left Australia, seemingly for good, and now has another diplomatic office on the other side of the world. In those circumstances the respondent no longer has any duty to involve himself in events in Queensland or Australia. Indeed, it is to be doubted that he has any interest in doing so.

[45] In those circumstances, it is difficult to see how there is any realistic risk of any future acts by the respondent which might breach the peace in Queensland, even if the applicant otherwise makes out his case in relation to the Statement.

[46] **Third**, the second point above also highlights the likely futility of making an order against the respondent. Given his location, any order made against him is likely to be futile as the Court would have no power to deal with the respondent, even in the unlikely event he breached the order.

[47] For these reasons, even if the applicant otherwise made out his case against the respondent as articulated in Mr Stumer's submissions, a Court will almost certainly dismiss the complaint in the proper exercise of its discretion under s 7. In that case, there is no point extending time to appeal and I dismiss the application to do so.

**Other issues**

[48] Given the above, it is moot whether s 5 is engaged and if so, whether the immunity under Article 43(1) of the VCCR avails the respondent. I would only make these comments.

[49] **First**, consular immunity as conferred by Article 43(1) is limited to the defined consular functions. In my view, there is considerable merit in the arguments advanced by Mr Stumer which are summarised in paragraph [37] above and developed more fully in his written outline. Consular immunity is not absolute, and care must be taken when a consul's conduct might impinge on, *inter alia*, the free exercise of civil and political rights.

[50] **Second**, nothing in this judgment should be taken to be an endorsement or rejection of the merits of the case advanced by the applicant on the threshold issue raised by s 5 PGBA in relation to the Statement. My analysis assumes the correctness of that case only for the purposes of demonstrating that as of now, any further action is both unnecessary and futile.

[51] **Third**, it was submitted by the applicant that if I granted leave, this Court should proceed to determine the complaint without the respondent having an opportunity to be heard on the merits of the complaint.[15] Although it is unnecessary to express a concluded view on this issue, it seems to me that such a course should not be followed. As stated in the quote from *Zhang* above, the purpose of the legislative scheme which creates immunity by the device of exclusion of jurisdiction is to prevent consular officers from having to participate at all in proceedings which impugn the carrying out of consular functions. If the consequence of a Magistrate deciding that the Court has jurisdiction is that the matter can then proceed in the absence of the consular official, that purpose would be frustrated. A consular

[15] Applicant's submissions at paragraphs 112 – 114.

official would have not only to appear, but also put on material, just in case the jurisdictional issue was decided against him or her.

[52] If a matter arises where the jurisdiction of the Court is likely to be affected by consular or indeed some other diplomatic of foreign state immunity, it seems to me that that should be decided on the allegations made in the proceeding by the other party in the absence of the consular official first, and if jurisdiction is confirmed, notice should be given so that the consular official can decide what substantive steps next to take in the proceedings.