FEDERAL COURT OF AUSTRALIA

Duggan v Attorney General of Australia [2026] FCA 445

File number(s):	ACD 4 of 2025
Judgment of:	**STELLIOS J**
Date of judgment:	16 April 2026
Catchwords:	**EXTRADITION** – where first respondent issued determination that the applicant be surrendered to the United States of America under s 22 of the ***Extradition Act 1988*** (Cth) **ADMINISTRATIVE LAW** – judicial review of decisions made under ss 12, 16, 19 and 22 of the Extradition Act –whether decision-makers failed to read the Extradition Act subject to certain limitations, conditions, exceptions or qualifications necessary to give effect to the *Treaty on Extradition between Australia and the United States*, as amended by the Protocol done at Seoul on 4 September 1990 (**Treaty**) – whether Art II(1) of the Treaty contains a contemporaneous dual criminality requirement – no contemporaneous dual criminality requirement established – whether Art II(1) is a limitation, condition, exception or qualification on the definition of "extradition offence" in s 5, or on s 22(3)(e) of the Extradition Act – where no limitation, condition, exception or qualification established – whether first respondent fell into jurisdictional error by failing to recognise a discretion under s 22(3)(e) in circumstances where Art II(4) of the Treaty applies – where no jurisdictional error found – application dismissed
Legislation:	*Criminal Code Act 1995* (Cth) ss 83.3 and 122 *Extradition Act 1988* (Cth) ss 5, 6, 11, 12, 15, 16, 19, 22 *Extradition (Foreign States) Act 1966* (Cth) s 10(1) *Extradition (Foreign States) Amendment Act 1985* (Cth) *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth) *Judiciary Act 1903* (Cth) s 39B *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) *Extradition (United States of America) Regulations* (Cth) regs 3 and 4 *Extradition (United States of America) Regulations* (Cth) Sch 1 *Treaty on Extradition between Australia and the*

United States of America Arts I, II and XX

Extradition (United States of America) Regulations (Cth) Sch 2 *Protocol Amending the Treaty on Extradition between Australia and the United States of America* Arts 1 and 16

International Covenant on Civil and Political Rights 1966 Art 15(1)

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Arts 31 and 32

Cases cited:

AB v The Queen [1999] HCA 46; 198 CLR 111

Bollag v Attorney-General (Cth) (1997) 79 FCR 198

Commonwealth v Riley (1984) 5 FCR 8

Director of Public Prosecutions (Cth) v Kainhofer (1995) 185 CLR 528

Dutton v O'Shane [2003] FCAFC 195; 132 FCR 352

Dutton v Republic of South Africa (1999) 84 FCR 291

Evans v Air Canada [2025] HCA 22; 99 ALJR 941

Federal Republic of Germany v Parker (1998) 84 FCR 323

Hempel & Etheredge v Attorney-General (Cth) (1987) 77 ALR 641

Hermanowski v United States of America [2005] NSWSC 145; 191 FLR 83

Kennedy v Baker [2004] FCA 562; 135 FCR 520

Kingdom of Spain v Infrastructure Services Luxembourg Sarl [2023] HCA 11; 275 CLR 292

Liem v Republic of Indonesia [2018] FCAFC 135; 265 FCR 251

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12; 280 CLR 321

Matson v United Stated of America [2016] FCA 1245

McGowan v Migration Agents Registration Authority [2003] FCA 482; 129 FCR 118

Minister for Home Affairs (Cth) v Zentai [2012] HCA 28; 246 CLR 213

Mirvac Homes (NSW) Pty Limited v Airservices Australia (No 1) [2004] FCA 109

Oates v Attorney-General (Cth) [2001] FCA 84; 181 ALR 559

Oates v Attorney-General (Cth) [2003] HCA 21; 214 CLR 496

Oates v Attorney-General of the Commonwealth [2002] FCAFC 80; 118 FCR 544

Riley v Commonwealth of Australia [1985] HCA 82; 159 CLR 1

Saitta Pty Ltd v Commonwealth of Australia [2000] FCA 1546; 106 FCR 554

Secretary, Department of Social Services v Vader [2024] FCAFC 37; 302 FCR 352

Snedden v Minister for Justice [2014] FCAFC 156; 230 FCR 82

Todhunter v United States of America (1995) 57 FCR 70

Von Arnim v Group 4 Correctional Services Pty Ltd [2002] FCA 310; 117 FCR 346

White Industries Aust Ltd v Federal Commissioner of Taxation [2007] FCA 511; 160 FCR 298

Winkler v Director of Public Prosecutions (1990) 25 FCR 79

Division:	General Division
Registry:	Australian Capital Territory
National Practice Area:	Federal Crime and Related Proceedings
Number of paragraphs:	156
Date of last submission/s:	12 March 2026
Date of hearing:	16 October 2025
Counsel for the Applicant:	C Parkin
Solicitor for the Applicant:	Collaery Lawyers
Counsel for the First Respondent:	T Glover
Solicitor for the First Respondent:	Australian Government Solicitor
Solicitor for the Second Respondent:	R Roberts of ACT Government Solicitor
Solicitor for the Third and Fourth Respondents:	K Smith of Crown Solicitors Office

ORDERS

ACD 4 of 2025

BETWEEN:	**DANIEL EDMUND DUGGAN** Applicant
AND:	**ATTORNEY GENERAL OF AUSTRALIA** First Respondent
	JAMES LAWTON Second Respondent
	DANIEL REISS (and another named in the Schedule) Third Respondent

ORDER MADE BY:	**STELLIOS J**
DATE OF ORDER:	**16 APRIL 2026**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondents' costs in the amounts to be agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STELLIOS J:

1 This proceeding concerns an application under s 39B of the ***Judiciary Act*** *1903* (Cth) for judicial review of decisions made by each of the respondents under the ***Extradition Act*** *1988* (Cth) (or, the **Act**), culminating in the first respondent's decision under s 22 of the Extradition Act (the **s 22 decision**) to surrender the applicant, Mr Duggan, to the **United States** of America.

2 Mr Duggan seeks review of the impugned decisions on various bases. At the heart of the challenges is the contention that the respondents' decisions were infected by jurisdictional error because of a failure to read the Extradition Act "subject to" certain "limitations, conditions, exceptions or qualifications" that were necessary to give effect to the **Treaty** on Extradition between Australia and the United States that came into force on 8 May 1976, as amended by the **Protocol** done at Seoul on 4 September 1990.

3 Because Mr Duggan seeks to challenge the validity of decisions made pursuant to provisions of the Extradition Act, the Court has jurisdiction to hear the claims under s 39B(1A)(c) of the Judiciary Act: see *Dutton v Republic of South Africa* (1999) 84 FCR 291 at [19] (Burchett J); *Von Arnim v Group 4 Correctional Services Pty Ltd* [2002] FCA 310; 117 FCR 346 at [19]–[26] (Kenny J); *Saitta Pty Ltd v Commonwealth of Australia* [2000] FCA 1546; 106 FCR 554 at [89] (Weinberg J); *Kennedy v Baker* [2004] FCA 562; 135 FCR 520 at [9] (Branson J); *Mirvac Homes (NSW) Pty Limited v Airservices Australia (No 1)* [2004] FCA 109 at [12]–[13] (Branson J); *White Industries Aust Ltd v Federal Commissioner of Taxation* [2007] FCA 511; 160 FCR 298 at [110]–[112] (Lindgren J); cf *McGowan v Migration Agents Registration Authority* [2003] FCA 482; 129 FCR 118 at [34]–[35] (Branson J).

4 For the reasons that follow, I am not persuaded that the impugned decisions were infected by jurisdictional error. Therefore, the application must be dismissed.

BACKGROUND

The Treaty as amended by the Protocol

5 On 14 May 1974, Australia and the United States signed the Treaty. Its preamble states that the purpose of the Treaty is "to make more effective the cooperation of the two countries for

the reciprocal extradition of offenders". The Protocol was signed on 4 September 1990 "to make [the Treaty] more effective", per its preamble.

6 The relevant provisions of the Treaty as amended by the Protocol (hereafter referred to simply as the Treaty) will be considered in more detail below. It is sufficient for the moment to set out Art I of the Treaty:

> Each Contracting Party agrees, under the conditions and circumstances established by this Treaty, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offences mentioned in Article II of this Treaty committed within the territory of the other Contracting Party, or outside that territory under the conditions specified in Article IV of this Treaty.

The extradition request

7 Pursuant to the Treaty, the United States seeks the extradition of Mr Duggan to face prosecution for four offences alleged to have been committed between November 2009 and November 2012 in relation to the training of pilots in South Africa:

- Count 1: conspiracy to violate the *Arms Export Control Act* (**AECA**), and defraud the United States, in violation of Title 18, United States Code (**USC**) § 371, carrying a maximum term of imprisonment of 5 years;
- Counts 2 and 3: violations of the AECA, in violation of Title 22, USC § 2778, and Title 22, Code of Federal Regulations §§ 126.1 and 127.1, each carrying a maximum term of imprisonment of 20 years; and
- Count 4: conspiracy to commit money laundering, in violation of Title 18, USC § 1956(h), carrying a maximum term of imprisonment of 20 years.

The legislative scheme for extradition

8 The objects of the Extradition Act include "to codify the law relating to the extradition of persons from Australia to extradition countries … and, in particular, to provide for proceedings by which courts may determine whether a person is to be, or is eligible to be, extradited, without determining the guilt or innocence of the person of an offence" and "to enable Australia to carry out its obligations under extradition treaties" (s 3(a) and (c)).

9 As a Full Court said in ***Liem*** *v Republic of Indonesia* [2018] FCAFC 135; 265 FCR 251 at [21], referring to *Harris v Attorney-General (Cth)* (1994) 52 FCR 386 at 389, there are:

> [F]our stages under the *Extradition Act*, all of which must be successful, before a person will be forcibly extradited. … The four stages are:

(a) the commencement of the extradition process (see s 12 and s 16);

(b) the arrest and remand or bail of a person (see s 15);

(c) the determination of whether a person is eligible for surrender (s 19 and s 21);

(d) the discretionary decision of the Attorney-General of whether a person, if eligible, should be surrendered (s 22).

10 "Each stage involves a decision of a binary nature based on stated criteria. If the relevant criteria are satisfied, the extradition process continues. If they are not, the process comes to an end": *Snedden v Minister for Justice* [2014] FCAFC 156; 230 FCR 82 at [6] (Middleton and Wigney JJ).

Stages 1 and 2: Commencement of the extradition process, arrest and remand

11 Subsection 12(1) of the Extradition Act provides:

12 Extradition arrest warrants

(1) Where:

(a) an application is made, in the statutory form, on behalf of an extradition country to a magistrate or eligible Judge for the issue of a warrant for the arrest of a person; and

(b) the magistrate or Judge is satisfied, on the basis of information given by affidavit, that the person is an extraditable person in relation to the extradition country;

the magistrate or Judge shall issue a warrant, in the statutory form, for the arrest of the person.

12 Section 15 of the Act relevantly provides:

15 Remand

(1) A person who is arrested under an extradition arrest warrant shall be brought as soon as practicable before a magistrate or eligible Judge in the State or Territory in which the person is arrested.

(2) The person shall be remanded by a magistrate or eligible Judge in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under one or more of sections 15A, 18 and 19 to be conducted.

…

13 An "extradition country" is defined in s 5 of the Act to include "any country (other than New Zealand) that is declared by the regulations to be an extradition country" (para (a)). Regulation 3 of the *Extradition (United States of America)* ***Regulations*** (Cth) provides that the United States is declared to be an extradition country. An "extraditable person" is defined

in s 6 of the Extradition Act. Of relevance to Mr Duggan, to be such a person, there must be a warrant in force for the arrest of the person in relation to an "offence … against the law of a country that the person is accused of having committed" (s 6(a)(i)). The offence in question must be "an extradition offence in relation to the country" (s 6(b)).

14 On 31 August 2022, the United States made a provisional arrest request to Australia in relation to Mr Duggan. It does not appear to be in dispute that the Attorney-General's Department sought an arrest warrant under s 12(1) on the same day. On 19 October 2022, the second respondent (**Magistrate Lawton**) made a decision under s 12 of the Act to issue a warrant for the applicant's arrest in Australia. The applicant was subsequently arrested on 21 October 2022 and remanded in custody pursuant to s 15(2).

15 Section 16 of the Extradition Act relevantly provides:

> **16 Notice by Attorney-General**
>
> (1) Where the Attorney-General receives an extradition request from an extradition country in relation to a person, the Attorney-General may, in his or her discretion, by notice in writing in the statutory form expressed to be directed to any magistrate or eligible Judge, state that the request has been received.
>
> *Person must be extraditable person in relation to extradition country*
>
> (2) The Attorney-General must not give the notice unless the Attorney-General is of the opinion that the person is an extraditable person in relation to the extradition country.
>
> …

16 "Extradition request" is defined in s 5 of the Act to mean "a request in writing by an extradition country for the surrender of a person to the country". On 9 December 2022, the United States requested Mr Duggan's extradition pursuant to the Treaty. On 21 December 2022, the first respondent (**Attorney-General**) issued a notice of receipt of the United States' extradition request under s 16 of the Extradition Act.

Stage 3: Determination of whether a person is eligible for surrender

17 Section 19 of the Extradition Act relevantly provides:

> **19 Determination of eligibility for surrender**
>
> (1) Where:
>
> (a) a person is on remand under section 15;
>
> (b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;

(c) an application is made to a magistrate or eligible Judge by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and

(d) the magistrate or Judge considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;

the magistrate or Judge shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

…

(c) the magistrate or Judge is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

…

18 On 13 February 2023, the United States applied for proceedings to be conducted under s 19. On 24 May 2024, the third respondent (**Magistrate Reiss**) made the decision under s 19 of the Extradition Act that the applicant was eligible for surrender to the United States (the **s 19 decision**) and issued a warrant under s 19(9) of the Extradition Act ordering that Mr Duggan be committed to prison to await a surrender warrant or a temporary surrender warrant or release pursuant to an order under s 22(5) of the Extradition Act.

19 The jurisdiction of the Federal Court to review the s 19 decision pursuant to s 21 of the Extradition Act is not invoked in this proceeding.

Stage 4: The Attorney-General's decision on the question of surrender

20 Section 22 of the Extradition Act relevantly provides:

22 Surrender determination by Attorney-General

(1) …

(2) The Attorney-General shall, as soon as is reasonably practicable, having regard to the circumstances, after a person becomes an eligible person, determine whether the person is to be surrendered in relation to a qualifying extradition offence or qualifying extradition offences.

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

…

(e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:

(i) surrender of the person in relation to the offence shall be refused;

(ii) surrender of the person in relation to the offence may be refused;

in certain circumstances—the Attorney-General is satisfied:

(iii) where subparagraph (i) applies—that the circumstances do not exist; or

(iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; and

(f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

…

21 An "eligible person" is defined in s 22(1) to include a person who has been committed to prison by order under s 19(9) (in subsection (b) of that definition). A "qualifying extradition offence, in relation to an eligible person", where subsection (b) of the definition of "eligible person" applies, is "any extradition offence in relation to which … the magistrate or Judge who made the order under subsection 19(9) … determined that the person was eligible for surrender within the meaning of subsection 19(2)": s 22(1), subsection (b)(i) of the definition of "qualifying extradition offence".

22 On 19 December 2024, the Attorney-General made the s 22 decision that the applicant be surrendered to the United States in relation to the offences set out at [7] above, and issued a surrender warrant under s 23 of the Extradition Act.

23 As can be seen, the statutory provisions operate by reference to an "extradition offence" (defined in s 5). It will be necessary to return to consider that definition in due course.

The application of Treaty provisions to the legislative scheme

24 Section 11 of the Extradition Act relevantly provides:

11 Modification of Act in relation to certain countries

(1) The regulations may:

(a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations,

…

> (1C) For the purposes of subsections (1) and (1A), the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies to the country concerned subject to that treaty.
>
> …

25 Regulation 4 of the Regulations states that "[t]he Act applies in relation to the United States of America subject to the [Treaty], as amended by the [Protocol] (being, respectively, the treaty a copy of the text of which is set out in Schedule 1 and the protocol a copy of the text of which is set out in Schedule 2)". The way in which s 11 operates to apply treaty provisions to the provisions of the Extradition Act will be considered further below.

26 Importantly for the issues to be determined in this proceeding, s 11(6) provides that, for the purpose of a proceeding under s 19(1), "no limitation, condition, qualification or exception otherwise applicable under [s 11] … has the effect of requiring or permitting a magistrate or eligible Judge to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d)". I will return below to the significance of s 11(6).

GROUNDS OF REVIEW

27 The applicant relies on the following grounds of review:

> **Ground 1**: In respect of each decision, the decision-maker acted without power because there was no relevant "extradition offence" or, with respect to the decision under Extradition Act 1988 (Cth) s 22, no "qualifying extradition offence".
>
> **Ground 2**: Further, or in the alternative to, Ground 1, in determining that Mr Duggan was to be surrendered under Extradition Act s 22, the Attorney-General misunderstood his function by failing to appreciate that the Act applied to the USA subject to a limitation, condition, qualification or exception that had the effect that surrender of Mr Duggan was to be refused, namely, that the conduct said to give rise to the "extradition offence" constitute an offence punishable by imprisonment for at least one year under the laws of the USA and Australia at the time that the conduct was engaged in.
>
> **Ground 4**: The Attorney-General's decision under section 22 of the Act was infected by jurisdictional error in that the Attorney-General failed to recognise that he had a discretion to exercise under Art II(4) of the [Treaty] in relation to each of the purported qualifying extradition offences, because he erroneously considered that each were offences in respect of which Australian law provided for the punishment of if committed outside of its territory in similar circumstances.

28 In written submissions, Mr Duggan contended that "[t]he essence of these grounds is that [Art II(1) of the Treaty] operated, through section 11 of the [Extradition] Act to require that any offence for which extradition might be granted between the [United States] and Australia

must be one which was an offence against the law of each country at the time it was alleged to have been committed". At least in relation to Grounds 1 and 2, Mr Duggan accepted that success on both grounds depended on acceptance of that contention.

29 Mr Duggan relied on the fact that, in seeking extradition, the United States relied on ss 83.3 and 122 of the ***Criminal Code*** *Act 1995* (Cth), which were introduced by the ***National Security Legislation Amendment*** *(Espionage and Foreign Interference)* ***Act*** *2018* (Cth) after the alleged conduct took place, and were in force from 30 June 2018.

30 Two additional grounds, Grounds 3 and 5, pleaded in the amended concise statement were not pressed.

CONSIDERATION

Preliminary issue

31 The questions under Ground 1 in this proceeding arise because it is contended by Mr Duggan, in essence, that the decisions under ss 12, 16, 19 and 22 are invalid because the conduct in relation to which extradition has been sought must have amounted to a criminal offence or offences against the law of each country at the time they were alleged to have been committed.

32 There was uncertainty from the material before the Court in relation to what offences, if any, were in operation in New South Wales (**NSW**) at the time of the alleged conduct, and how that might impact Mr Duggan's challenge in this proceeding.

33 In making the s 19 decision, Magistrate Reiss was satisfied:

> That if the conduct of Mr Duggan constituting the offences in relation to the USA, or equivalent conduct, had taken place in New South Wales, Australia at the time at which the extradition request in relation to Mr Duggan was received, being 9 December 2022, that conduct or that equivalent conduct would have constituted extradition offences in relation to New South Wales, Australia. The relevant NSW and Australian law being identified provisions of the Criminal Code Act 1995 (Cth) and the Crimes Act 1900 (NSW) …

34 The reasons of Magistrate Reiss do not identify these provisions in specific terms.

35 The advice provided to the Attorney-General ahead of the s 22 decision referred to the magistrate being "satisfied that the conduct would have constituted *at least*" a number of offences including:

(1) Sections 83.3 and 122 of the Criminal Code;

(2) Part 10.2 of the Criminal Code (and "Crimes Act equivalents");

(3) Section 11.5 of the Criminal Code (the **conspiracy provision**) in relation to each of the offences in (1) and (2); and

(4) Sections 70 and 79 of the *Crimes Act 1914* (Cth), which the advice described as offences which "*were* in force at the time of the alleged conduct and pre-dated it by at least 50 years".

36 At the hearing, counsel for the Attorney-General referred to the offences identified in [35(1)-(3)]. Counsel further acknowledged that ss 83.3 and 122 of the Criminal Code were not in existence at the time of the alleged conduct giving rise to the extradition request, however, made no mention of the status of the other provisions.

37 As indicated earlier, in written submissions, Mr Duggan referred to ss 83.3 and 122 of the Criminal Code as provisions that did not come into force until the enactment of the National Security Legislation Amendment Act. That was extended in oral submissions to the conspiracy provision.

38 It is not necessary for me to take this issue further because the Attorney-General has not sought to respond to Mr Duggan's case on the basis that there were offences in respect of which extradition was sought which were in operation in NSW at the time that the alleged conduct took place.

Ground 1

39 By Ground 1, Mr Duggan challenges the decisions made under ss 12, 16, 19 and 22 on the basis that:

(1) Subsection 11(1) of the Extradition Act and reg 4 of the Regulations operate to apply Art II(1) of the Treaty to qualify the definition of "extradition offence";

(2) That qualified definition of "extradition offence" is incorporated into the meaning of an "extraditable person"; and

(3) Those definitions are deployed in their qualified terms into the operation of ss 12, 16, 19 and 22 of the Extradition Act.

40 At the heart of Ground 1 is Mr Duggan's contention that the meaning of "extradition offence" in s 5 of the Extradition Act is modified by Art II(1) of the Treaty to require that the offence in question be one which is punishable under the laws of both Australia and the United States

by a term of imprisonment of one year or more at the time that the conduct constituting the offence occurred. As is evident from what has been said, that modification is contended to be effected by s 11(1) and reg 4 of the Extradition Act. It is important, then, to commence the analysis with a proper understanding of the operation of those provisions.

The operation of s 11(1) and reg 4

41 Subsection 11(1) authorises the making of regulations that "state that this Act applies … subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty". Regulation 4 of the Regulations takes the contracted form permitted by s 11(1C) of the Act which provides that "the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies … subject to that treaty". The effect is that any limitations, conditions, exceptions or qualifications to the Act are located in the terms of the Treaty itself.

42 Two points may be made about the operation that s 11(1) and reg 4 have in respect of treaty provisions.

43 ***First***, s 11(1) does not give the Treaty free-ranging legislative force. Nor does s 11(1C), which deals with the form in which a regulation under s 11(1) can be expressed. As French J (as his Honour then was) said in ***Hempel*** *& Etheredge v Attorney-General (Cth)* (1987) 77 ALR 641, when discussing the operation of the equivalent provision in s 10(1) of the ***Extradition (Foreign States) Act*** *1966* (Cth) (at 652):

> Contrary to the submission of counsel for the applicants, this regulation does not purport to give to the treaty between Australia and Israel the force of municipal law: *Barton v The Commonwealth* (1974) 131 CLR 477; 3 ALR 70 (CLR at 507; ALR at 94) per Jacobs J. …
>
> It is to the content of the regulation that one must look to see the source of the modifications.
>
> When, as in the present case, the regulation applies the Act "subject to" the treaty, it embodies only the consequential modifications to the Act's operation, not every provision of the treaty.

44 The effect that s 11(1) and reg 4 give to the text of an extradition treaty has been described in different ways: as "giv[ing effect]" or "giv[ing] force" to the provisions (*Minister for Home Affairs (Cth) v* ***Zentai*** [2012] HCA 28; 246 CLR 213 at [5]; ***Todhunter*** *v United States of America* (1995) 57 FCR 70 at 74; *Liem* at [73]); "draw[ing]" or "carr[ying]" them 'into" domestic law (*Todhunter* at 76); "incorporat[ing]" them "into" domestic law (*Hermanowski v United States of America* [2005] NSWSC 145; 191 FLR 83 at [12] (Bell J)); bringing them

"into effect as part of the domestic law" (*AB v The Queen* [1999] HCA 46; 198 CLR 111 at [63] (Kirby J)); or causing them to "form[] part of" domestic law (*Federal Republic of Germany v Parker* (1998) 84 FCR 323 at 328 and 334 (Ryan, Einfeld and Foster JJ)).

45 While some of these characterisations have been criticised as not being "strictly correct" (Cuthbertson S, "Extradition Treaties: The Vagaries of Their Status under Australian Law" (2019) 93 *Australian Law Journal* 111 at 114), the essence of the position is that s 11(1) "authorises the making of regulations which apply the Act in relation to a specified foreign State with modifications to take account of particular features of the relevant treaty" (*Hempel* at 652 (French J, describing the operation of s 10(1)(b) of the Extradition (Foreign States) Act)). As Smithers, Sheppard and Wilcox JJ said about s 10(1) of the Extradition (Foreign States) Act in *Commonwealth v Riley* (1984) 5 FCR 8 at 14 (***Riley* (FCAFC)**), "[t]he effect of such regulations is to make the Act apply in relation to that foreign state subject to any relevant limitations, conditions, exceptions or qualifications".

46 Consequently, the correct position is that, when s 11(1) and reg 4 operate, the Extradition Act applies subject to textual modifications arising from any limitations, conditions, exceptions or qualifications in a relevant extradition treaty.

47 ***Secondly***, for s 11(1) and reg 4 to operate in this way, the relevant treaty provision must be capable of characterisation as a limitation, condition, exception or qualification. That requires a comparison between the Extradition Act and the terms of the relevant extradition treaty. The nature of that comparison was considered by Wilcox and O'Loughlin JJ in ***Winkler** v Director of Public Prosecutions* (1990) 25 FCR 79. When considering the operation of s 10(1) of the Extradition (Foreign States) Act, their Honours said (at 90, emphasis added):

> As a general proposition it is correct to say that, wherever there is a <u>conflict</u> between the terms of the Act and that of the Treaty, the Treaty is to prevail. This is the effect of reg. 3 making the application of the Act to the United States subject to the Treaty. Although the notion that the operation of an Act may be limited by the terms of a regulation would normally be heretical, it was a notion specifically countenanced by s. 10 of the *Extradition (Foreign States) Act*. And this course was often taken in relation to extradition treaties, so that it was commonplace for an extradition treaty to prevail over this Act.

48 French J expressed the approach in similar terms in *Hempel* (at 652, emphasis added):

> Broadly speaking, it may be said to do no more than effect the application of the Act subject to modifications where there is some <u>inconsistency</u> between its terms and those of the treaty.

49 Similarly, in ***Oates*** *v Attorney-General (Cth)* [2001] FCA 84; 181 ALR 559, Lindgren J described the relationship between the Extradition Act and a treaty in the following way (at [16], emphasis added):

> [T]he application of the Act is not affected by [a treaty] unless the Act would "apply" in some manner that is inconsistent with it.

50 On appeal in *Oates v Attorney-General of the Commonwealth* [2002] FCAFC 80; 118 FCR 544 (***Oates*** **(FCAFC)**), O'Loughlin and Whitlam JJ saw no error in Lindgren J's use of the word "inconsistency" rather than the formulation of "conflict" as used in *Winkler* (at [22]).

51 While counsel for the applicant submitted at the hearing that Lindgren J in *Oates* was plainly wrong, his Honour's view accords with the statements in *Winkler*, *Hempel* and *Oates* (FCAFC) and, with respect, appears to me to be correct.

52 In summary, the extent to which the Extradition Act "applies … subject to" relevant treaty provisions that are capable of characterisation as limitations, conditions, exceptions or qualifications is determined by the existence of a "conflict" or "inconsistency" between the Extradition Act and those treaty provisions.

53 Furthermore, it has been accepted that s 11(1) of the Extradition Act can only authorise regulations that "limit but not extend the scope of the Act": *Riley* (FCAFC) at 14. In *Bollag v Attorney-General (Cth)* (1997) 79 FCR 198, Merkel J said that (at 216):

> The ambit of [the relevant provisions in the Act] is not expanded; the sections remain unchanged in their operation save to the extent that their operation might be read down to accord with provisions in the Treaty which restrict its operation in defined circumstances.

54 The upshot is that, for Mr Duggan to succeed on Grounds 1 and 2, he must establish, as a threshold condition, that Art II(1) of the Treaty is a limitation, condition, exception or qualification to the application of the Extradition Act. Applying the tests that have been accepted by this Court, Mr Duggan must establish that there is a conflict or inconsistency between the Extradition Act and Art II(1) of the Treaty.

Is there a conflict or inconsistency between the Extradition Act and Art II(1)?

55 The premise of Ground 1 is that Art II(1) of the Treaty contains a temporal requirement to be assessed at the time the alleged conduct occurred (the **claimed temporal requirement**) or, as Mr Duggan described it, a **contemporaneous dual criminality requirement**. For

convenience, I will adopt these descriptions as shorthand expressions to describe the claimed temporal requirement contended by Mr Duggan for the operation of Art II(1).

56 Article II of the Treaty relevantly provides as follows:

> (1) An offence shall be an extraditable offence if it is punishable under the laws in both Contracting Parties by deprivation of liberty of more than one year, or by a more severe penalty. …
>
> (2) The following offences shall be extraditable if they meet the requirements of paragraph (1): conspiring to commit, attempting to commit, aiding or abetting, counselling or procuring the commission of, or being an accessory after the fact to, any offence described in that paragraph.
>
> (3) For the purposes of this Article, an offence shall be an extraditable offence:
>
> > (a) whether or not the laws in the Contracting Parties place the offence within the same category of offences or describe the offence by the same terminology; and
> >
> > (b) whether or not the offence is one for which United States federal law requires proof of … use of … facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.
>
> (4) If the offence has been committed outside the territory of the requesting State, extradition shall be granted if the laws in the requested State provide for the punishment of an offence committed outside of its territory in similar circumstances. If the laws in the requested State do not so provide, the executive authority of the requested State may, in its discretion, grant extradition.
>
> …

57 For the reasons that I explain below at [103]–[111], I accept that Art II(1) contains a dual criminality requirement, but with no stated temporal reach. Whether that dual criminality requirement has the claimed temporal requirement can be left to one side for the moment. For now, the question is whether the dual criminality requirement in Art II(1), whatever the precise content may be, is capable of operating as a limitation, condition, exception or qualification to the definition of "extradition offence" in s 5 of the Act as Mr Duggan asserts.

58 An "extradition offence" is defined in s 5 of the Extradition Act to mean:

> (a) in relation to a country other than Australia—an offence against a law of the country:
>
> > (i) for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months; or
> >
> > (ii) if the offence does not carry a penalty under the law of the country—the conduct constituting which is, under an extradition treaty in relation to the country, required to be treated as an offence for which the surrender of persons is permitted by the country and Australia; or

> (b) in relation to Australia or a part of Australia—an offence against a law of Australia, or a law in force in the part of Australia, for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months.

59 The Attorney-General accepted that s 11(1) and reg 4 can apply some aspects of Art II to modify the definition of "extradition offence". ***First***, it was accepted that the prescription of the punishment in Art II(1) (deprivation of liberty of "more than one year") could modify the prescription of the penalty in the definition of "extradition offence" in s 5 of the Act (deprivation of liberty "of not less than 12 months"). That prescription in Art II(1) would place a limit on the meaning of "extradition offence" in s 5.

60 ***Secondly***, it was accepted that Art II(3) could be applied as a limitation on the definition of "extradition offence".

61 Yet, the Attorney-General denied that the dual criminality aspect of Art II(1) is capable of application by s 11(1) and reg 4. It was argued that s 5 does not relate generally to "offences"—rather, it maintains a clear division between offences in relation to a country other than Australia, and offences in relation to Australia. No inconsistency arises because Art II(1) and s 5 "speak of different things".

62 To assess these submissions, it is important to appreciate the scheme of the Act. The definition of "extradition offence" applies distributively across two separate fields of operation (emphasis added):

(1) "[I]n relation to a country other than Australia", an "extradition offence" is "an offence <u>against a law of the country</u>" that has certain features (para (a) of the definition in s 5);

(2) "[I]n relation to Australia or a part of Australia", an "extradition offence" is "an offence <u>against a law of Australia</u>, <u>or a law in force in the part of Australia</u>" that has certain features (para (b) of the definition in s 5).

63 Each paragraph applies across the Act, where relevant, to corresponding provisions that operate by reference to the relevant part of the definition. Each paragraph seeks to identify an offence of the relevant country; that is, paragraph (a) is a reference to an offence against a law of another country (which cannot include Australia) and paragraph (b) refers to an offence against a law of Australia, or a part of Australia.

64 The concept of an "offence" within the definition of "extradition offence" can be readily identified as relevant to each field of operation. Accordingly, it can be accepted that the definitional features of an offence that are prescribed by Art II (ie, the penalty in Art II(1)), are capable of application by s 11(1) and reg 4 to read down the definition in s 5 (see *Matson v United Stated of America* [2016] FCA 1245 at [16] (Rangiah J)).

65 However, more difficulties arise when provisions of the Treaty deal with the mutuality of criminal offences between the two countries in circumstances where, as will be explained below, dual criminality is dealt with in s 19(2)(c) of the Extradition Act. In this respect, guidance can be drawn from the decision of a Full Court of this Court in *Liem.*

66 In *Liem*, the Full Court considered the following provisions in the extradition treaty between Australia and Indonesia (extracted at [31], [72]).

> [Art 2(1):] Persons shall be extradited according to the provisions of this Treaty for any act or omission constituting any of the following offences provided the offence is punishable by the laws of both Contracting States by a term of imprisonment of not less than one year or by a more severe penalty.
>
> …
>
> [Art 2(3):] For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:
>
> > (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
> >
> > (b) the totality of the acts or omissions alleged against the person whose extradition is requested shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.

67 It can be seen that Art 2(3)(a) is in materially similar terms to Art II(3)(a) of the Treaty (see above at [56]), and is concerned with determining the mutuality of offences between the two States. In *Liem,* the Full Court said that Art 2(3) had no (at [79]):

> particular role to play in the anterior question of whether [the Indonesian offence in question] is an "extradition offence" within the meaning of s 5 of the Act, read with the [relevant treaty]. That question falls to be decided by the terms of Art 2(1) of the Treaty…

68 That conclusion is inconsistent with the Attorney-General's submission that Art II(3) of the Treaty can be applied as a limitation on the definition of "extradition offence". Rather, in *Liem*, it was accepted that "in determining dual criminality, Art 2(3) could be seen to operate as a qualification on the way the terms of s 19(2)(c) need to be understood" (*Liem* at [75]).

69 A similar view can be taken of the dual criminality requirement in Art II(1) of the Treaty, so far as its effect on the definition of "extradition offence" is concerned. It is not a matter that is capable of operating as a limitation, condition, exception or qualification on the definition of "extradition offence" in s 5 because the mutuality of criminality between two States does not go to the definition of an offence that is capable of application to each field of operation (recalling that the Extradition Act maintains a division between offences in relation to a country other than Australia, and offences in relation to Australia, or a part of Australia). In other words, there is nothing in the definition alone which conflicts with, or is inconsistent with, the dual criminality requirement in Art II(1). Whether the dual criminality requirement in Art II(1) can be applied by s 11(1) and reg 4 will depend on how the definition of "extradition offence" in s 5 is put to work by the operative provisions and within the overall scheme of the Act, notably, by s 19, which is when an assessment of mutuality of criminality arises. Indeed, the fact that the Act specifically contemplates a kind of dual criminality (in s 19), and uses "extradition offence" as a term therein, tends against an interpretation of that term which is itself embedded with a dual criminality requirement.

70 Accordingly, Mr Duggan's challenge cannot succeed by relying alone on the application of Art II(1) to the definition of "extradition offence". I now turn to the operative provisions under which the decision-makers purported to make the decisions that are challenged in this proceeding.

Sections 12, 16 and 19

71 The relevant provisions in ss 12, 16 and 19 of the Extradition Act have been set out at paragraphs [11], [15] and [17] above. In short:

(1) Upon application on behalf of an "extradition country", a magistrate or eligible Judge shall issue a warrant for the arrest of a person if the magistrate or Judge is satisfied that the person is an "extraditable person" in relation to the extradition country: s 12(1).

(2) Subsection 16(1) confers a discretion on the Attorney-General to give a magistrate or Judge written notice that the Attorney-General has received an extradition request from an extradition country. The Attorney-General must not give the notice unless of the opinion that the person is an "extraditable person" in relation to the extradition country: s 16(2).

(3) Where a s 16 notice has been given and an application is made to a magistrate or Judge, the magistrate or Judge is to conduct proceedings to determine whether the person is eligible for surrender in relation to an "extradition offence" for which surrender is sought by an extradition country: s 19(1). A person is only eligible for surrender in relation to an extradition offence for which surrender is sought by the extradition country if the conditions in s 19(2) are satisfied.

72 As preliminary steps in the extradition process from Australia to an extradition country, ss 12 and 16 must be understood in the context of the legislative scheme as a whole for decision-making under the Extradition Act. As the Full Court said in *Liem* (at [21]), ss 12 and 16 are provisions that commence the extradition process. It is not until a proceeding is held under s 19 that an assessment is undertaken as to a person's eligibility for surrender. Amongst other conditions to be satisfied for surrender, a person is only eligible for surrender if (s 19(2)(c) (emphasis added)):

> the magistrate or Judge is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia;

73 That requirement in s 19(2)(c) has been described as one of "dual criminality" (*Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 552 (Gummow J); *Liem* at [26]) or "double criminality" (*Dutton v O'Shane* [2003] FCAFC 195; 132 FCR 352 at [47]).

74 In determining whether s 11(1) and reg 4 can apply Art II(1) to the dual criminality assessment in s 19(2)(c), s 19(1) must be read alongside s 11(6) which relevantly provides:

> For the purpose of determining under subsection 19(1) whether a person is eligible for surrender in relation to an extradition offence for which surrender of the person is sought by an extradition country, no limitation, condition, qualification or exception otherwise applicable under this section … has the effect of requiring or permitting a magistrate or eligible Judge to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d).

75 Mr Duggan advanced alternative submissions on the operation of s 11(6). The primary submission was that s 19(2)(c) was unaffected by Art II(1) which operates to impose an *additional* dual criminality requirement to be taken into account in the making of decisions under ss 12 and 16 (when understood as subject to Art II(1)). The magistrate or Judge does not have to take Art II(1) into account under s 19 and, indeed, could not do so because of s 11(6).

76 The alternative submission arose in the event that I do not accept that ss 12 and 16 are limited by a contemporaneous dual criminality requirement from Art II(1). In that case, Mr Duggan submitted that a distinction was to be drawn between a treaty provision that *added to* the requirements under s 19(2)(c) and a treaty provision that *removed* a requirement under s 19(2)(c). It was contended that: (a) s 11(6) applied to prevent the application of the former, but not the latter, and (b) Art II(1) could be characterised as a provision that *removed* a requirement from s 19(2)(c) and, thus, Art II(1) could be applied to s 19(2)(c) notwithstanding s 11(6).

77 For the following reasons, the decisions made under ss 12, 16 and 19 are not invalid on the basis of Ground 1.

78 ***First***, while *Liem* indicated that a treaty provision affecting the dual criminality assessment might be applied by s 11(1) to affect the operation of s 19(2)(c), I do not consider that the dual criminality requirement in Art II(1) can be applied in that way. If Art II(1) does not have the claimed temporal requirement, then there is no conflict or inconsistency between s 19(2)(c) and Art II(1). If, however, Art II(1) does contain a contemporaneous dual criminality requirement, then s 11(6) precludes the operation of s 11(1) on Art II(1). That is because assessing dual criminality *at the time the alleged conduct was committed* would be a matter *other than a matter set out in paragraph 19(2)(c)* (which requires assessment of dual criminality *at the time the request was received*). By contrast, in *Liem*, the relevant treaty provision informed "the way the terms of s 19(2)(c) need[ed] to be understood": *Liem* at [75]. In other words, it informed how the dual criminality assessment was to be undertaken under s 19(2)(c) *at the time the request was received*. Accordingly, there is simply no scope for s 11(1) and reg 4 to apply Art II(1) as a limitation, condition, qualification or exception to the dual criminality condition in s 19(2)(c).

79 ***Secondly,*** under the legislative scheme established by the Act, Parliament has determined that the dual criminality assessment is to be undertaken at the s 19 stage of the decision-making process. The preliminary stages at ss 12 and 16 are directed towards bringing the administrative process to that point where eligibility for surrender is determined. When properly understood within the legislative scheme, ss 12 and 16 commence the extradition process that leads to a dual criminality determination under s 19(2)(c) that is immunised, by s 11(6) (where its terms are satisfied), from the operation of s 11(1) and reg 4.

80 Accordingly, there is no conflict or inconsistency between, on the one hand, ss 12 and 16 of the Extradition Act and, on the other hand, the dual criminality requirement in Art II(1) because, when the Act is understood as a whole, ss 12 and 16 are directed to an earlier stage of the extradition process before dual criminality is assessed when determining eligibility for surrender. In determining a conflict or inconsistency for the purposes of s 11(1) and reg 4, ss 12 and 16 cannot be divorced from the legislative scheme as a whole.

81 While, at the commencement of the Extradition Act, the giving of a s 16 notice was also conditioned on the Attorney-General being of the opinion that, if the conduct of the person constituting the extradition offence, for which surrender was sought, had taken place in Australia at the time the extradition request was received, that conduct or equivalent conduct would have constituted an extradition offence in relation to Australia, that condition was repealed by the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth) (no 7 of 2012); schedule 2, item 41. The Revised Explanatory Memorandum (at [2.85]) indicated that the purpose of the amendment was to "remove the existing overlap in consideration of the same factors by both the Attorney-General at the section 16 stage and a magistrate, and thereby streamline the extradition process". In my view, the amendment reinforces the view that the current legislative scheme of the Extradition Act is designed to present the question of eligibility for extradition, and the assessment of dual criminality, at the s 19 decision-making stage. No conflict or inconsistency arises at the ss 12 and 16 stages of decision-making, and resort to s 11(1) and reg 4 is precluded by s 11(6) at the s 19 decision-making stage.

82 Other than the incorporation of the definition of "extradition offence" into the relevant provisions, Mr Duggan did not suggest that there were any textual features of ss 12, 16 or 19, nor in the definition of "extraditable person" in s 6, that could be read down to accommodate the dual criminality requirement of Art II(1) of the Treaty.

83 Accordingly, the challenges to the ss 12, 16 and 19 decisions on the basis of Ground 1 must fail.

84 Even if I am wrong with this analysis and these conclusions, Mr Duggan's submissions on ss 12, 16 and 19 fail nonetheless. As I will explain below, I do not accept that Art II(1) of the Treaty contains a contemporaneous dual criminality requirement. It contains a dual criminality requirement with no stated temporal reach. As Mr Duggan correctly accepted, that conclusion is sufficient for Ground 1 to fail. Because (a) Art II(1) is not subject to the

claimed temporal requirement, and (b) in any event, the assessment of dual criminality is undertaken under s 19 of the Extradition Act, in the terms set out in s 19(2)(c), with no scope for limitation, condition, qualification or exception otherwise applicable by virtue of s 11(6), no inconsistency or conflict would arise between the Extradition Act, when viewed as a whole, and the terms of Art II(1).

Section 22

85 The Attorney-General's power under s 22(2) of the Extradition Act is premised on the precondition of a person becoming an "eligible person" (in this case, through Mr Duggan having been committed to prison by order under s 19(9)—see para (b) of the definition in s 22(1)). The determination to be made by the Attorney-General is whether the person is to be surrendered in relation to a "qualifying extradition offence" (in this case, any extradition offence in relation to which "the magistrate … who made the order under s 19(9) … determined that the person was eligible for surrender within the meaning of s 19(2)—see para (b) of the definition of "qualifying extradition offence" in s 22(1)).

86 Thus, there were two matters to be determined by the Attorney-General before exercising the power in relation to Mr Duggan: ***first***, the existence of the precondition that there was an order under s 19(9); and, ***secondly***, identifying the extradition offence in relation to which Magistrate Reiss determined Mr Duggan was eligible for surrender.

87 Neither the precondition for the exercise of power, nor the identification of that offence, was capable of being affected by Art II(1). Each was a factual matter, the existence of which was determined by reference to the decision made by Magistrate Reiss. Accordingly, there is simply no scope for Art II(1) to have an independent application to the definition of "extradition offence" as it is applied in the definition of "qualifying extradition offence".

88 It follows that the Ground 1 challenge to the s 22 decision must be dismissed. Again, even if I am wrong with this analysis and my conclusion, Mr Duggan's Ground 1 challenge to the s 22 decision fails nonetheless because, as I will explain below, Art II(1) does not contain a contemporaneous dual criminality requirement.

Ground 2

89 By Ground 2, Mr Duggan alleges that the contemporaneous dual criminality requirement was an additional limitation, condition, exception or qualification for the purposes of s 22(3)(e),

the effect of which being that surrender of Mr Duggan was to be refused where that condition was not satisfied.

90 Subsection 22(3) provides that an eligible person "is only to be surrendered in relation to a qualifying offence if" certain conditions are satisfied. The condition in s 22(3)(e) provides that (emphasis added):

> (e) where, because of section 11, this Act applies in relation to the extradition country subject to a limitation, condition, qualification or exception that has the effect that:
>
> (i) surrender of the person in relation to the offence shall be refused; or
>
> (ii) surrender of the person in relation to the offence may be refused;
>
> in certain circumstances—the Attorney-General is satisfied:
>
> (iii) where subparagraph (i) applies—that the circumstances do not exist; or
>
> (iv) where subparagraph (ii) applies—either that the circumstances do not exist or that they do exist but that nevertheless surrender of the person in relation to the offence should not be refused; …

91 Mr Duggan submitted that:

(1) In making a decision under s 22(2), the Attorney-General was to be positively satisfied under s 22(3)(e)(iii) that those circumstances did not exist;

(2) The Attorney-General did not turn his mind at all to the contemporaneous dual criminality requirement imposed by the Treaty; and

(3) Consequently, the Attorney-General misunderstood his task under s 22(2) of the Act and committed jurisdictional error, and the error was material.

92 In Mr Duggan's submissions, the requirement for the Attorney-General to be satisfied of the condition in s 22(3)(e)(iii) was described as a mandatory consideration. However, that characterisation does not take the argument any further.

93 The question to be addressed is whether the dual criminality element of Art II(1) enlivens s 22(3)(e)(i), requiring the Attorney-General to reach the state of satisfaction set out in s 22(3)(e)(iii). That turns on whether Art II(1) is "a limitation, condition, qualification or exception that has the effect that … the surrender of the person … shall be refused".

94 However, unless Art II(1) contains a contemporaneous dual criminality requirement, I would not be prepared to accept that the terms of s 22(3)(e)(i) were capable of being satisfied to condition the Attorney-General's power in s 22(2). If all that Art II(1) contains is a dual criminality requirement without a temporal reach, then that is given effect to by the

assessment undertaken under s 19(2)(c). As Gummow, Crennan, Kiefel and Bell JJ said in *Zentai* at [58], "[t]he limitations on the power to surrender a person for extradition under the Act are not concerned with whether the person may be exposed to criminal punishment for conduct that was not a crime at the time it took place".

95 In that case, there would not be a conflict or inconsistency between the Act, when understood as a whole, and Art II(1). There would then be no limitation, condition, qualification or exception having the effect that surrender shall be refused. Consequently, the terms of s 22(3)(e)(i) would not be satisfied and the power in s 22(2) would be unaffected by Art II(1).

96 In other words, it is only if Art II(1) were in conflict or inconsistent with the dual criminality test embedded in s 19(2)(c), could it be said that there is a limitation, condition, qualification or exception having the effect that surrender shall be refused within the terms of s 22(3)(e)(i). And, it is only if Art II(1) contains a contemporaneous dual criminality requirement, that the provision would create such a conflict or inconsistency. For the following reasons, I do not consider that Art II(1) can be read in this way.

Does Art II(1) contain a contemporaneous dual criminality requirement?

97 There did not appear to be any dispute between the parties in relation to the principles to be applied to the interpretation of the Treaty. Mr Duggan contended that those principles are set out in Arts 31 and 32 of the ***Vienna Convention*** *on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). While the United States is not a party to the Vienna Convention, I accept that Arts 31 and 32 are "declaratory of customary international law": *Kingdom of Spain v Infrastructure Services Luxembourg Sarl* [2023] HCA 11; 275 CLR 292 at [38] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

98 In *Evans v Air Canada* [2025] HCA 22; 99 ALJR 941, the High Court said (at [7]–[8] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ) (citations omitted)):

> Article 31(1) of the Vienna Convention requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The definition of "context" in Art 31(2) is narrow, referring to (in addition to the general text of the treaty, including the preamble and any annexes) certain agreements and instruments related to the treaty. Nevertheless, consistently with ordinary conventions of language, the International Law Commission and the International Court of Justice have emphasised that treaty interpretation is a holistic exercise to ascertain meaning, without separation of "context" in Art 31(1) from the broad range of materials which can be considered as part of the "supplementary means" of interpretation in Art 32.

> Article 32 permits resort to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", to confirm the meaning of the provision arising from the application of Art 31, or to determine the meaning of the provision if that meaning is ambiguous (including latent ambiguity) or obscure or "[l]eads to a result which is manifestly absurd or unreasonable". The distinction in Art 32 between confirming a meaning and determining a meaning was not intended to be, and has not been, applied rigidly or independently of the considerations of context, object, and purpose in Art 31. The intention was one of "frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear".

See also *Secretary, Department of Social Services v Vader* [2024] FCAFC 37; 302 FCR 352 at [39]–[40], [81] and [82].

99 The *travaux préparatoires* were not before the Court and, accordingly, no assistance could be drawn from them.

Mr Duggan's submissions on dual criminality under Art II(1)

100 Mr Duggan submitted that, under Arts 31 and 32 of the Vienna Convention, six considerations support the conclusion that Art II(1) contains a contemporaneous dual criminality requirement:

(1) Art II(1) fixes on whether an offence "is punishable" by the laws of the Contracting States. An offence will not be "punishable" in either Australia or the United States if the acts comprising the offence were committed at a time where the commission of the acts relied upon was not an offence.

(2) Art I makes it clear that the Treaty is based on reciprocity and that the obligation to extradite is confined to the offences identified in Art II. The Treaty would not be truly reciprocal unless there was temporal coincidence as to the unlawfulness of the conduct in both Contracting Parties.

(3) The clear intention of Art II is to require consistency between the requirements of the Contracting Parties with respect to the offences which shall be extraditable. It was submitted that so much is evident from Arts II(1) and II(4) which prescribe a common requirement of territoriality. By contrast, it was contended that Art II(3) expressly contemplated two situations where commonality between offences can be derogated from: that is, where coincidence of the category or terminology of the offence is not required (Art II(3)(a)) and where elements of a United States federal offence which are formal requirements to establish jurisdiction in a United States federal court are to

be disregarded (Art II(3)(b)). These carve outs demonstrate that the policy of Art II is to require commonality unless otherwise provided.

(4) A temporal requirement is consistent with principles of international law to which both Australia and the United States are parties; notably, Art 15(1) of the *International Covenant on Civil and Political Rights 1966* (**ICCPR**) provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

In light of this international commitment, it would be implausible that the Treaty was intended to impose double criminality at any time other than when the offence was committed.

(5) Because the legal systems in both the United States and Australia deprecate retrospective criminal laws, it would be "implausible that Australia and the [United States] would have intended, in an extradition treaty based on reciprocity, to provide for a state of affairs whereby dual criminality would be established where the extraditable offence was not criminal in both States at the time that it is said to have been committed". If that were the intention, express words would have been used.

(6) The legislative and treaty history of dual criminality in Australia suggests that contemporaneous dual criminality was intended to be a requirement of Art II(1).

The Attorney-General's submissions on dual criminality under Art II(1)

101 The Attorney-General denied that Art II(1) contains a contemporaneous dual criminality requirement. Indeed, in written submissions, it was further contended that the words "under the laws in both Contracting Parties" in Art II(1) "are not concerned with dual criminality", seemingly suggesting that there is no dual criminality requirement of any kind.

102 However, at the hearing, the Attorney-General accepted that Art II(1) contemplated a requirement of dual criminality, but emphasised that the text was silent on (a) how that analysis was to be undertaken and (b) the stage at which the dual criminality analysis was to be undertaken.

103 That Art II(1) contains a dual criminality requirement cannot be doubted given the observations by the High Court in *Riley v Commonwealth of Australia* [1985] HCA 82; 159 CLR 1 (***Riley* (HCA)**) and *Zentai,* and by the Full Court in *Liem*.

104 In *Riley* (HCA), the Court considered the original wording of Art II(1) of the Treaty which provided (at 9, emphasis added):

> Persons shall be delivered up according to the provisions of this Treaty for any of the following offences provided these offences are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year or by death: …

105 There followed a list of offences. In *Riley* (HCA), Gibbs CJ, Wilson and Dawson JJ said that Art II(1), in its original form, "expressly requires double criminality" (at 12).

106 *Zentai* considered an extradition treaty provision that defined "extraditable offences" as "offences however described which are punishable under the laws of both Contracting Parties" (extracted at [20] and [66], emphasis added). French CJ described that provision as embodying dual criminality (at [20]). The joint judgment of Gummow, Crennan, Kiefel and Bell JJ said that the provision gave "effect to the principle of double criminality" (at [68]).

107 Similarly in *Liem*, the relevant extradition treaty provisions were drafted with a similar expression denoting dual criminality. Arts 2(1) and 2(3) were extracted earlier at [66]. Art 2(2) provided (at [34]):

> Extradition may also be granted at the discretion of the Requested State for any other act or omission constituting an offence if the offence, according to the laws of both Contracting States, is one for which extradition can be granted.

108 The Full Court considered that the words, "the law[s] of both Contracting States", indicated a requirement of dual criminality (at [74] and [78]).

109 In addition to these statements, I also note the following observations of Deane J in *Riley* (HCA) (at 16):

> … the principle of double criminality constitutes an important part of the matrix of rules of international law and of internationally accepted standards against which the provisions of an extradition treaty must be construed. The terms of the Treaty which are in issue in the present appeals must be interpreted in the light of that principle.

110 Despite the slight difference in drafting between, on the one hand, the relevant treaty provisions considered in these cases and, on the other hand, the relevant wording of Art II(1) (i.e., "laws of both Contracting Parties" vs "laws in both Contracting Parties"), I see no reason why Art II(1), in its current form, should not be read as containing a dual criminality requirement.

111 Nonetheless, as Deane J said in *Riley* (HCA) at 17, "the precise content of the principle remains unsettled" and, as the parties accepted, Art II(1) on its face is silent on its temporal

reach. For the following reasons, I am not persuaded that Mr Duggan's submissions on the interpretation of Art II(1) should be accepted.

Consideration of Mr Duggan's submissions

112 ***First***, there is no express reference in the text of Art II(1) to any temporal requirement for dual criminality. That can be compared with the provisions considered in *Zentai*. Similar words to those used in Art II(1) were used in Art 2.1 of the bilateral extradition treaty considered in that case ("…extraditable offences are offences however described which are punishable under the laws of both Contracting States" (at [66])). Those words alone were not seen by the High Court as giving effect to a contemporaneous dual criminality requirement. Rather, additional treaty provisions explained and qualified the dual criminality requirement (*Zentai* at [27]), including qualifications or elaborations equivalent to Art II(3)(a) of the Treaty (see Art 2.2(a); *Zentai* at [27] and [66]) and Art II(4) of the Treaty (see Art 2.4; *Zentai* at [27])). Importantly, Art 2.5 contained "a further qualification or elaboration of the dual criminality requirement" (*Zentai* at [28] (French CJ)):

> Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:
>
> > (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and
> >
> > (b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State.

113 In addressing the operation of Art 2.5, French CJ said (at [29]):

> Article 2.5(a) should be regarded as a proviso or condition upon which Art 2.5 dispenses with a requirement for dual criminality at the time of the commission of the acts or omissions said by the requesting state to constitute the extradition offence.

114 While addressing the relationship between the chapeau to Art 2.5 and Art 2.5(a), his Honour did not squarely address the relationship between Art 2.5 and Art 2.1 of that treaty. Accordingly, it is unclear whether his Honour saw the chapeau to Art 2.5 as a "qualification" or, alternatively, an "elaboration" of Art 2.1. The joint judgment of Gummow, Crennan, Kiefel and Bell JJ described Art 2.5(a) as "reflect[ing] the adoption by Australia and Hungary of a policy against the imposition of criminal liability or punishment retrospectively" (at [70]). However, the relationship between Art 2.1 and Art 2.5(a) was not clearly addressed.

115 The fact that, in *Zentai*, there was a further treaty provision addressing the temporal requirement of dual criminality necessarily affected the context in which the interpretive exercise was undertaken. I accept that the fact that temporal requirements have been specifically included in other extradition treaties does not preclude the argument that Art II(1) contains a temporal requirement. It is, after all, Art II(1) that needs to be interpreted in the context of the Treaty. However, it cannot readily be assumed that, in light of the wider treaty landscape, a generally worded provision without a temporal condition should be read as including such a requirement.

116 ***Secondly,*** there is also no necessary implication of a temporal requirement from the reciprocity or mutuality that is embedded in Art I or, for that matter, the Treaty more widely. It is clear from its preamble that the Treaty is directed to the "reciprocal extradition of offenders". That treaty obligations are reciprocal or mutually accepted says little about the precise content of that reciprocity or mutuality, which is then identified and defined throughout the Treaty. While I accept that Art II(1) contains a dual criminality requirement, I am not persuaded that the objective of reciprocity or mutuality requires an additional temporal requirement in this respect.

117 ***Thirdly***, as submitted by Mr Duggan, Art II(1) fixes on whether an offence "is punishable" by laws of the parties to the Treaty. However, the fact that it fixes on an *offence* being punishable tends against Mr Duggan's interpretation. As the Attorney-General submitted, (a) the focus of Art II(1) is *not* on the alleged conduct or the circumstances of the alleged conduct, and whether that is punishable, but on the offence itself and (b) other Treaty provisions refer specifically to conduct constituting the offence (the Attorney-General referred to Art XI(2)(b) of the Treaty; a similar example is the reference to the *commission* of an offence in Art XX (as to which see below)).

118 That the "ordinary, grammatical, meaning" of the words used in Art II(1) does not include the temporal requirement contended by Mr Duggan finds some support by way of analogy to the approach of Gummow, Crennan, Kiefel and Bell JJ in *Zentai* (at [70]). That case concerned the operation of Art 2.5(a) of the relevant treaty (see above at [112]). A majority of the Court concluded that (at [72], underlining added):

> The inquiry to which Art 2.5(a) directs attention is not whether the acts or omissions particularised in the request were capable of giving rise to *any* form of criminal liability under the laws of the Requesting State at the time they were committed, but whether, at that time, those acts or omissions constituted the offence for which

extradition is sought.

119 In doing so, their Honours observed that (at [70]):

> Had the intention been to confine [the protection offered by Art 2.5(a)] to a consideration of whether the acts or omissions alleged against the eligible person constituted *any* offence against the law of the Requesting State at the time of their alleged commission, it might be expected that the opening words of Art 2.5(a) would have mirrored those of Art 2.5(b) … which asks whether "the acts or omissions alleged would, if they had taken place in the territory of the Requested State … have constituted an offence".

120 That is, the words chosen for the drafting of Art 2.5(a), when other wording was used in the treaty, had significance for the interpretation of the provision.

121 The short point is that Art II(1) does not expressly refer to the conduct constituting the offence or the commission of an offence, whereas other provisions in the Treaty are expressed in such terms. If it were intended for Art II(1) to be subject to a temporal limitation assessed at the time of the impugned conduct or the commission of an offence, it might have been expressly referred to. Instead, Art II(1) refers only to the "offence", and whether that offence is punishable in both Contracting Parties.

122 ***Fourthly***, while it might be accepted that Art II(3) and (4) have features that qualify or elaborate on the commonality in the requirements of Art II(1), that does not take the interpretive exercise as far as Mr Duggan suggests. The question remains what feature of commonality is required—one with or one without the claimed temporal requirement.

123 ***Fifthly***, the mutual obligations of Australia and the United States under the ICCPR are only of tangential relevance. While I accept that "[t]reaties dealing with a specific subject, such as extradition, must also be construed in the light of any particular principles of international law and of any particular standards accepted by the member states of the international community in relation to that subject" (*Riley* (HCA) at 15 (Deane J)), the obligation in Art 15(1) of the ICCPR relates to the way that member states deal with their criminal offences. The Treaty's preamble makes it clear that the Treaty deals with a different subject matter—that is, "to make more effective the cooperation between the two countries for the reciprocal extradition of offenders".

124 ***Sixthly,*** for similar reasons to those that I have just set out, how the domestic legal and constitutional systems treat the possibility of retrospective criminal law has little to say about the commitments agreed to in bilateral treaties on the topic of extradition.

125 ***Seventhly***, the legislative and treaty history does not provide the support for which Mr Duggan contends. I understand the high point of those submissions to be that:

(1) ***First***, at the time the Treaty entered into effect in 1976; and

(2) ***Secondly,*** up to 1985 when the *Extradition (Foreign States) Amendment Act 1985* (Cth) was enacted, which was 5 years before the Protocol amending the Treaty was agreed to;

the prevailing position under Australian extradition law was to require dual criminality at the time of offending.

126 The ultimate submission based on history was that:

> … the Treaty was originally agreed against the backdrop of an Australian domestic extradition law that had a dual criminality temporal requirement. The Australian domestic law removed this requirement in 1985 without any corresponding amendment to the Treaty. The Treaty was subsequently revised in 1990 with the adoption of the Protocol without using any language which is suggestive of an intention to bring about change to the temporal requirement for dual criminality.

127 It is not necessary to consider whether Mr Duggan's submission in this respect is correct. It is enough to say that, even if correct, it would have little bearing on the way in which Art II(1) of the Treaty is to be interpreted. That is because the legislative schemes in the Extradition (Foreign States) Act and the Extradition Act have operated subject to limitations, conditions, exceptions and qualifications, the contents of which have been determined on a bilateral basis between Australia and another country (Extradition Act s 11; Extradition (Foreign States) Act ss 10 and 11). As the High Court said in *Oates v Attorney-General (Cth)* [2003] HCA 21; 214 CLR 496 at 509:

> As is reflected in the heading of s11, from the time of the Act of 1870, the legislation has always allowed for extradition arrangements with particular states to be subject to limitations, conditions, exceptions or qualifications seen as appropriate to the particular circumstances.

128 Accordingly, in my view, little assistance can be gained from the provisions of the extradition Acts for the interpretation of Art II(1) in circumstances where the negotiated treaty provisions can be applied as limitations, conditions, exceptions or qualifications to the provisions in those extradition Acts.

129 ***Finally,*** there is a strong textual and contextual indication in Art XX of the Treaty and Art 16 of the Protocol that suggests that there is no temporal requirement in Art II(1) of the kind for which Mr Duggan contends. Art XX provides (emphasis added to the **proviso**):

> This Treaty applies to offences mentioned in Article II committed before, on or after the date on which this Treaty enters force, provided that no extradition shall be granted for an offence committed before that date which was not an offence under the laws of both Contracting Parties at the time of its commission.

130 Art 16 of the Protocol provides:

> Notwithstanding Article XX of the Treaty, this Protocol shall apply in all cases in which the request for extradition is made after its entry into force regardless of whether the offence was committed before or after that date.

131 The parties did not deal with these provisions in written or oral submissions. Following the hearing, I requested the parties to provide further submissions addressing the question of how these provisions affected the interpretation of Art II of the Treaty.

132 Mr Duggan submitted that Art XX demonstrates that the parties to the Treaty intended that (a) dual criminality is required; and (b) whether it exists is to be assessed as at the time of the impugned conduct. Those submissions were developed in the following way:

(1) Because treaties do not have retroactive effect unless the parties otherwise provide, Art XX evidenced an intention to (a) derogate from that position, and (b) ensure that extradition is possible with respect to all offences mentioned in Art II, whenever committed, but subject to the proviso.

(2) The proviso simply acknowledges the possibility that the retroactive operation of the Treaty might result in contemporaneous dual criminality not necessarily being satisfied with respect to the enumerated offences identified by the parties as at 1974, and that it was necessary to ensure that contemporaneous dual criminality was present in any case where the Treaty was to be invoked. The proviso is thus a powerful indicator of the existence of the contemporaneous dual criminality requirement and its importance to the parties. It reinforced a requirement which already existed in Art II which risked being overlooked in requests concerning pre-Treaty conduct.

(3) Art 16 concerns only the temporal application of the Protocol, not the Treaty as a whole. Because of the principle of non-retroactivity, the Protocol would presumptively only apply to requests/conduct occurring on or from the date of its entry into force. It thereby ensures that all requests for extradition on and from that date would be governed by the Treaty as amended by the Protocol.

(4) The reference in Art 16 to "Notwithstanding Article XX" is, when properly understood, directed to ensuring that the unamended Treaty did not continue to operate with respect to future requests in relation to pre-Protocol conduct. It does not

narrow or widen the scope of the Treaty, or alter its substantive operation. At most, it is a clarification to ensure the Protocol's operation is not impeded, or called into doubt, by the broad terms of Art XX which is expressed to apply to offences in Art II committed before, on or after the date on which the Treaty entered into force.

133 By contrast, the Attorney-General submitted:

(1) Article XX expressly ensures that offences committed *before* and *after* the Treaty entered into force would be subject to the Treaty. That is important because Art XXI(4) provided that the Treaty terminated and replaced the previous Treaty on Extradition between Great Britain and the United States, as made applicable to Australia.

(2) The proviso to Art XX creates a mandatory bar to extradition for offences committed *before* the Treaty entered into force where the offence was not an offence in both the Contracting Parties at the time of its commission. In effect, this creates an express requirement for dual criminality *at the time of the offence* for offences allegedly committed before May 1974.

(3) The inclusion of the proviso displays an active choice by the parties to address dual criminality for offences committed *before* the date the Treaty entered into force.

(4) Article 16 of the Protocol disapplies Art XX in respect of all requests for extradition made after the Protocol's entry into force *irrespective* of when the offence was committed. This displays an active choice by the parties to remove the only *express* requirement in the Treaty for consideration of dual criminality *at the time of an offence*.

(5) When the two articles are read together, they (a) provide additional textual and contextual support for the submission that Art II of the Treaty does not incorporate any dual criminality standard and (b) elucidate a decision by the parties to break with and not continue any then existing practice with respect to a requirement for dual criminality at the time the offence was allegedly committed.

134 Art XX was an original provision of the Treaty before its amendment by the Protocol and, therefore, must be understood in its original context. The original form of Art II(1) is set out above at [104]–[105]. Arts II(2), (3) and (5) (now deleted) then provided:

> (2) Extradition shall also be granted for any other offences that are made extraditable under the extradition laws of Australia and which are felonies under the laws of the

> United States of America.
>
> (3) Extradition shall also be granted for any offence against a federal law of the United State of America of which one of the above-mentioned offences is a substantial element, even if transporting or transportation or the use of the mails or of interstate facilities is also an element of the specific offence.
>
> …
>
> (5) If extradition is requested for any offence mentioned in a preceding paragraph of this Article and that offence is punishable under the laws of both Contracting Parties by a term of imprisonment exceeding one year or by death, that offence shall be extraditable under the provisions of this Treaty whether or not the laws of both Contracting Parties would place that offence within the same category of offences made extraditable by that preceding paragraph of this Article and whether or not the laws of the requested State denominate the offence by the same terminology.

135 In *Riley* (HCA), the Court held that Art II(2) and (3) did not require double criminality. Gibbs CJ, Wilson and Dawson JJ said (at 12, emphasis added):

> In the Treaty, Art. II, par. (1) expressly requires double criminality and par. (5) of Art II. also refers to an offence "punishable under the laws of both Contracting Parties". By comparison, pars. (2) and (3) of Art. II do not contain a similar requirement, and the words of par. (2) strongly suggest that nothing more is required to warrant extradition than compliance with the two conditions expressly set out in the paragraph. The principle of construction expressed in the maxim expressio unius exclusio alterius supports the view that no requirement of double criminality should be implied. The provisions of Art. XX further support that view.

136 It is apparent that Art XX was seen as supporting the view that double criminality was not to be implied into Art II(2) and (3). That appears to be on the understanding that Art XX operated to ensure the requirement of dual criminality for offences committed before the Treaty entered into force in circumstances where the proviso was applicable.

137 In light of its original context, I am not persuaded by Mr Duggan's construction of Art II. Art II, in its original form, did not invariably require dual criminality. In relation to Art II(2) and (3), there was no such requirement, yet Art XX operated to ensure the requirement of dual criminality in relation to offences committed before the Treaty entered into force, and it did so in terms that required the offences to be in force at the time of the impugned conduct.

138 While Art XX no doubt also operated on offences listed in Art II(1) (in its original form) which contained a dual criminality requirement, it could not be said, as Mr Duggan contended, that Art XX reinforced a requirement already existing in Art II which risked being overlooked in requests concerning pre-Treaty conduct, or that Art XX was necessary to ensure that contemporaneous dual criminality was present in any case where the Treaty was

to be involved. Consequently, the force of Mr Duggan's postulated implication is considerably diminished.

139 In my view, the implications that the Attorney-General submitted arise from Art XX of the Treaty and Art 16 of the Protocol accord to a greater extent with a natural reading of those provisions and the historical context of the original Treaty provisions.

140 In summary, I have not been persuaded that Art II(1) contains a contemporaneous dual criminality requirement. It contains a dual criminality requirement without a temporal condition. Nor, as the Attorney-General submitted, does it (a) contain a requirement of dual criminality of conduct, or (b) prescribe the decision-making stage at which dual criminality must be assessed. Consequently, there is no conflict or inconsistency between the Extradition Act and Art II(1) so as to attract the operation of s 11(1) and reg 4.

Summary of conclusions on Grounds 1 and 2

141 The conclusions on Ground 1 can be summarised as follows:

(1) The challenge to the decisions under ss 12 and 16 fails because those provisions are directed to the commencement of the extradition process. They are not concerned with an assessment of dual criminality. Under the legislative scheme established by the Extradition Act, that assessment of dual criminality occurs at the stage of the s 19 decision.

(2) Subsection 11(1) and reg 4 cannot apply the dual criminality requirement in Art II(1) to the operation of s 19. That is because either (a) there is no conflict or inconsistency (if Art II(1) has no temporal condition) or (b) such an application is precluded by s 11(6) (if there is a contemporaneous dual criminality requirement).

(3) There is no scope for s 11(1) and reg 4 to apply Art II(1) to s 22(2). Whether (a) there was a "qualifying extradition offence" and (b) Mr Duggan was an "eligible person" were factual matters to be determined by the Attorney-General based upon the decision of Magistrate Reiss. Those determinations were not capable of being affected by Art II(1).

(4) It follows from points (1)–(3) above that there is no conflict or inconsistency between the Act and Art II(1) of the Treaty that is capable of attracting the operation of s 11(1) and reg 4.

(5) In any event, the challenge to the decisions under ss 12, 16, 19 and 22 fails because I do not accept that Art II(1) contains the claimed contemporaneous dual criminality requirement.

142 In relation to Ground 2, because Art II(1) does not contain the claimed contemporaneous dual criminality requirement, (a) Art II(1) is not a limitation, condition, qualification or exception having the effect that surrender shall be refused; and (b) the terms of s 22(3)(e)(i) are not satisfied and the power in s 22(2) is unaffected by Art II(1).

143 It follows that Mr Duggan has not established error and, accordingly, Grounds 1 and 2 must fail.

Ground 4

144 By Ground 4, Mr Duggan contends that the Attorney-General's decision under s 22 was vitiated by jurisdictional error because the Attorney-General failed to recognise that he had a discretion to exercise under s 22(3)(e) in circumstances where Art II(4) applied. Article II(4) is set out above at [56].

145 The premise of the argument is that s 11(1) and reg 4 apply Art II(4) as a limitation, condition, qualification or exception to the operation of s 22(3)(e) of the Extradition Act.

146 The departmental advice to the Attorney-General before making his decision was that the Treaty gave him a "discretion to refuse extradition where the offence for which the person is wanted occurred outside the territory of the US and the laws of Australia do not provide for punishment of an offence committed outside Australia in similar circumstances". The advice continued:

> Three of the four offences alleged against Mr Duggan occurred entirely outside of US territory. However, each of the like Australian offences that are contained in the Criminal Code have extended geographical jurisdiction, allowing Australian citizens to be prosecuted for conduct that occurred wholly outside of Australia. Accordingly, this ground for refusal does not apply.

147 Mr Duggan contended that, in the absence of reasons given by the Attorney-General, it could be inferred that the Attorney-General relied on this advice.

148 In written submissions, Mr Duggan suggested two errors. ***First***, that the departmental advice mischaracterised the discretion in Art II(4) in its description as a "discretion to refuse extradition". ***Secondly***, that the departmental advice erred in its conclusion that the ground for refusal in Art II(4) does not apply. That was because the expression "'[s]imilar

circumstances' must be understood as including consideration of the time at which the offending is said to have occurred" and "[i]t is difficult to see how considerations of time could be excluded from the circumstances for the purposes of comparison". Ground 4 was not developed further in oral submissions.

149 Ground 4 can only succeed if Mr Duggan can establish that the departmental advice was incorrect in its conclusion that the discretion in Art II(4) did not apply. That turns on whether the conditions set out in the first sentence of Art II(4) were satisfied; namely, whether Mr Duggan is correct in his submission as to the meaning of the expression "similar circumstances".

150 I do not accept that the expression "similar circumstances" includes consideration of the time at which the offending is said to have occurred. Art II(4) is addressed to a circumstance where the offence is committed outside the territory of the requesting State. It qualifies the obligation for extradition under the Treaty by the condition that "the laws in the requested State provide for the punishment of an offence committed outside of its territory in similar circumstances". The first sentence of Art II(4) is directed to conditioning the obligation of extradition on a correspondence of legislative commands in both the requested and requesting States. The reference to the offence being "committed outside" the respective territories merely serves to identify the circumstances where correspondence is required between the territorial reach of the respective offences.

151 In that context, the words "similar circumstances" recognise that the extraterritorial reach of the offence of the requested State is being compared, on a hypothetical basis, with the extraterritorial reach of the offence of the requesting State. The expression "similar circumstances" serves to ensure the necessary correspondence between the respective offences being compared.

152 It does not involve a further step of reading those words as containing the claimed temporal requirement. Indeed, in the absence of a general temporal requirement in Art II(1) of the kind contended by Mr Duggan, there is no obvious reason for such a temporal requirement applying only to the particular circumstances of an offence committed in a territory outside the requesting State. Art II(4) is better understood as an elaboration of Art II(1) in circumstances where the offence has been committed outside the territory of the requesting State.

153 Once that is accepted, then the first sentence of Art II(4) operates, and the second sentence does not. Accordingly, there was no error in the departmental advice that the discretionary ground for refusal (in the second sentence of Art II(4)) did not apply. Any misdescription of the character of the discretion (i.e., as a discretion to refuse extradition) is immaterial to the validity of the s 22 decision and would not constitute jurisdictional error: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 280 CLR 321 at [7].

154 Given these conclusions, it is unnecessary to decide whether s 11(1) and reg 4 apply Art II(4) as a limitation, condition, qualification or exception to the operation of s 22(3)(e).

DISPOSITION

155 Given these conclusions, it is not necessary to consider Mr Duggan's further submission that the decisions under ss 16, 19 and 22 are invalid as the cascading consequence of an antecedent invalid decision.

156 Mr Duggan's challenge to the decisions under ss 12, 16, 19 and 22 of the Extradition Act must fail and, accordingly, the application is dismissed with costs to be agreed or assessed.

I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stellios.

Associate:

Dated: 16 April 2026

SCHEDULE OF PARTIES

ACD 4 of 2025

Respondents

Fourth Respondent:	GOVERNOR BRETT LEES OF MACQUARIE CORRECTIONAL CENTRE