RESPONSE OF THE AUSTRALIAN GOVERNMENT TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN COMMUNICATION NO 2005/2010 (HICKS V AUSTRALIA)

1. The Australian Government (Australia) presents its compliments to the members of the Human Rights Committee.

2. Australia has given careful consideration to the views of the Committee expressed in Communication No 2005/2010 (Hicks v Australia), transmitted to Australia on 16 February 2016. In accordance with the Committee's request, these views will be published on the website of the Australian Attorney-General's Department.[1]

3. Australia makes the following comments regarding certain aspects of the Committee's views.

Views regarding the period the author spent in United States custody (December 2001 to May 2007)

4. Australia welcomes the Committee's view that for the duration of the time the author spent in the custody of the United States of America (the United States), he could not be considered to be subject to Australia's jurisdiction under article 2(1) of the International Covenant on Civil and Political Rights (the Covenant) and article 1 of the First Optional Protocol to the Covenant.

5. Australia notes the Committee's comment, in relation to the author's time in the custody of the United States, that it appeared to the Committee that Australia was in a position to take positive measures to ensure that the author was treated in a manner consonant with the United States's obligations under the Covenant.[2] To the extent that this comment indicates the Committee considers that Australia could have ensured the United States acted in other ways in relation to the author's treatment, Australia respectfully disagrees with that view. As the Committee itself concluded, the author was neither within Australia's territory nor subject to Australia's jurisdiction during that time and was in the custody of another sovereign State, the United States.

[1] Human Rights Communications, Australian Attorney-General's Department website: https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx.
[2] Committee's views at [4.4].

6. Consistent with the approach Australia adopted in its submissions to the Committee, Australia does not comment on the issue of whether the United States breached its obligations under the Covenant with respect to the author at any time, as that is a matter for the United States.

7. Australia observes that the communication brought by the author was brought against Australia only and not the United States and that the United States was not consulted in the preparation of Australia's response.

Views regarding the enforcement of the author's sentence under the transfer arrangement

Admissibility and relevance issues

8. Australia refers to the Committee's view that the fact that the United States had not ratified the First Optional Protocol to the Covenant did not prevent the Committee from examining the author's claims under article 9 of the Covenant relating to unlawful and arbitrary detention while in United States custody.[3] Australia notes the Committee asserted in this context that it was clear the author was complaining about Australia's conduct, not that of the United States,[4] and accordingly found the claims admissible.

9. With respect, Australia considers that the Committee's views in this regard are inconsistent with the clear terms of article 1 of the First Optional Protocol, the Committee's own past views concerning that article and the fundamental principle of international law recognised by the International Court of Justice (ICJ) in *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States) (Preliminary Question)* [1954] ICJ Rep 19 (the Monetary Gold case).

10. Article 1 of the First Optional Protocol explicitly prohibits the Committee from receiving a communication 'if it concerns a State Party to the Covenant which is not a party to the [First Optional] Protocol'. As the ICJ recognised in its decision on the preliminary question in the Monetary Gold case, and subsequent decisions in other cases, under international law a court cannot decide upon an issue where it is required first to make a determination as to the lawfulness of actions of a State that has not consented to the exercise of jurisdiction by the court.[5] Australia considers that the prohibition in article 1, although it concerns communications brought to the Committee in relation to which the

[3] Committee's views at [2.6] and [2.7].
[4] Ibid at [2.6].
[5] Monetary Gold case; *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

views of such treaty bodies are not binding on States Parties, rather than judicial proceedings, reflects this fundamental principle.

11. Consistent with this principle and article 1 of the First Optional Protocol, the Committee itself has taken the view that a number of communications to it were inadmissible in whole or part because they were directed against a State not party to the First Optional Protocol. Those communications included *Garcia v Ecuador,*[6] *EMEH v France*[7] and *Wilfred v Canada.*[8]

12. The author relevantly claimed in his communication that his imprisonment in Australia was based on the United States's imposition of a retroactive offence upon him and flowed directly from his alleged unfair and unlawful trial before a US military commission.[9]

13. It was thus not possible for the Committee to determine the lawfulness under article 9(1) of the Covenant of Australia's detention of the author without first reaching the view that the United States breached the Covenant; the former depended on the latter. Australia considers that it is this inherent necessity of examining and reaching a view about the United States's conduct—not the fact that the author also complained about Australia's conduct—that the Committee should have concluded was the crucial factor in determining whether the claims in question 'concerned' the United States for the purposes of article 1 of the First Optional Protocol.

14. Australia notes that, notwithstanding that the Committee's views do not cite specific articles that it considers that the United States breached, the Committee patently did reach the view that the United States breached the Covenant. For example, the views describe the United States Military Commission proceedings as 'proceedings in which the defendant's rights were clearly violated' and the sentence that the Commission imposed as 'resulting from a flagrant denial of justice'.[10] The Committee describes the measures Australia allegedly could have taken in respect of the United States's treatment of the author (discussed above) as including 'measures intended to remedy violations of the author's rights'.[11] They also state that 'the ruling dated 18 February 2015' of the

[6] 319/1988, inadmissibility decision of 18 October 1990.
[7] 409/1990, inadmissibility decision of 2 November 1990.
[8] 1638/2007, inadmissibility decision of 30 October 2008.
[9] See summary of claims in Annex II to Committee's views at [11]-[15].
[10] Committee's views at [4.9].
[11] Ibid at [4.4].

United States Court of Military Commission Review, setting aside the author's sentence, 'leaves no doubt as to the unfairness of the proceedings followed against [the author] and that the offence that had given rise to his conviction was retrospective'.[12]

15. Australia remains strongly of the view that the Committee should not have found the author's claims under article 9 of the Covenant to be admissible.

16. In addition—and without commenting on the correctness of the Committee's views adverse to the United States (noting the United States was not accorded procedural fairness in relation to the Committee reaching adverse views regarding its conduct)—it appears to Australia that the Committee may have taken into account the 18 February 2015 ruling of the United States Court of Military Commission Review, which set aside the author's sentence, in reaching those views. In particular, Australia again notes the Committee's statement that the proceedings followed against the author were unfair and that the relevant offence in relation to which the author was convicted had a retrospective operation.[13] Australia infers that the Committee has also taken into account the 18 February 2015 ruling in reaching the view that Australia violated the author's rights under article 9(1) of the Covenant.

17. However, the 18 February 2015 ruling was made more than seven years after the author was transferred to Australia and completed his period of detention in Australia. That 2015 ruling is therefore irrelevant to the question of whether Australia violated the author's rights under article 9(1) in 2007 by entering into the transfer arrangement with the United States[14] with the consent of the author and detaining the author in Australia in accordance with that arrangement. Australia welcomes Committee member Seetulsingh's acknowledgement of this fact in his dissenting individual opinion.[15]

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[12] Ibid at [4.8].
[13] Ibid.
[14] The Arrangement between the Government of Australia and the Government of the United States of America on the Transfer of Prisoners Sentenced by United States Military Commissions, scheduled to the *International Transfer of Prisoners (Military Commission of the United States of America) Regulations* (Cth).
[15] Individual opinion by Committee member, Dheerujlall Seetulsingh (dissenting) (Appendix II to Committee's views) at [3].

Australia's obligations in the circumstances

18. Australia acknowledges its obligations under article 9(1) of the Covenant not to subject individuals to unlawful, arbitrary detention. However, Australia respectfully disagrees with the Committee's view that Australia violated the author's rights under article 9(1) by agreeing to give effect to the remainder of the author's sentence and detaining the author in Australia for seven months.

19. Australia interprets the Committee's views at paragraphs 4.7-4.10 to mean that the Committee considers that Australia violated rights under article 9(1) in this case because:

    a. Australia 'was in a good position to know the conditions of the author's trial'[16] by the time of the author's transfer to Australia[17]

    b. the sentence the United States Military Commission imposed on the author resulted from a flagrant denial of justice/proceedings in which the United States 'clearly violated' the author's rights[18]

    c. the author was an Australian national[19]

    d. the author had either 'little choice'[20] or 'no other choice'[21] but to accept the conditions of the voluntary transfer arrangement, because of 'the detention conditions and ill-treatment to which he was subjected'[22] in United States custody—meaning his acceptance was not decisive[23]

    e. in the circumstances set out at [19.a]-[19.d] above, Australia was obliged under article 9(1) to 'ensure that the terms of the transfer arrangement did not cause it to violate the Covenant'[24] and/or 'to show that [Australia] did everything possible to ensure that the terms of [that arrangement] did not cause it to violate the Covenant',[25] and

[16] Committee's views at [4.8].
[17] Although, as outlined at [16]-[17] above, Australia infers the Committee may also have taken into account information that Australia could not have known at that stage, namely the 18 February 2015 ruling of the United States Court of Military Commission Review.
[18] Committee's views at [4.9].
[19] Ibid at [4.10].
[20] Ibid at [4.9].
[21] Ibid at [4.10].
[22] Ibid at [4.9].
[23] Ibid at [4.9]-[4.10].
[24] Ibid at [4.9].
[25] Ibid at [4.10].

f. Australia did not satisfy that obligation or obligations.[26]

20. With respect, Australia considers that this reasoning as outlined in the previous paragraph fails to articulate the basis of the alleged violation. It is unclear whether the Committee considers a receiving State in comparable circumstances must ensure, outright, that a transfer arrangement does not apply to prisoners who may not have received a fair trial under article 14 of the Covenant in the sending State, or must take such steps towards that outcome as are within the receiving State's power. Moreover, whatever the alleged threshold is, the Committee has not identified what, in fact, Australia could have done to meet it—a deficiency that both Committee member Rodley and Committee member Seetulsingh acknowledged in their individual dissenting opinions.[27]

21. The Committee's reasoning is also circular. In particular, by reasoning that Australia violated the Covenant because it either did not ensure or did not do everything possible to ensure the transfer arrangement 'did not cause it to violate the Covenant',[28] the Committee has presupposed the existence of an obligation or obligations in order to create a duty which it then asserts Australia failed to fulfil, leaving it in violation of its asserted obligation under the Covenant.

22. In Australia's view, the Committee's reasoning misconstrues the relevant circumstances and the nature of arrangements for the international transfer of sentenced persons and assumes the existence of an obligation or obligations under the Covenant that Australia does not have.

23. As Australia submitted to the Committee, the author's transfer to Australia and detention was lawful under the Commonwealth *International Transfer of Prisoners Act 1997* (the Act) and consistent with the terms of the transfer arrangement between Australia and the United States.[29] That arrangement drew on elements of a treaty to which both Australia and the United States are party, the 1983 Council of Europe Convention on the Transfer of Sentenced Persons (European Treaty Series—no 112).[30]

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[26] Ibid at [4.10].
[27] Individual opinion of Committee member, Sir Nigel Rodley (dissenting) (Appendix I to Committee's views) at [2]; individual opinion by Committee member Seetulsingh, above n 15 at [4].
[28] See [19.e] above.
[29] Australian Government Submissions on Admissibility and Merits, October 2011 at [79]-[91]; Australian Government Further Submissions on Admissibility and Merits, June 2012 at [65], [77].
[30] Australian Government Submissions, October 2011, above n 29 at [57]; Australian Government Further Submissions, June 2012, above n 29 at [69].

24. Australia reiterates that this legal framework for the author's transfer to and detention in Australia did not involve an evaluation or endorsement of, or make Australia responsible for, the author's trial and conviction in the United States.[31] Nor did it give Australia full responsibility for enforcing the author's sentence.[32] These characteristics are evident from the specific terms of the arrangement and the Act. Those terms include that the competent authorities of Australia are to continue the enforcement of the prisoner's sentence immediately upon his or her being taken into Australian custody;[33] that Australia may not change the legal nature or duration of the sentence, except in so far as the sentence would need to be adapted to avoid incompatibility with Australian law;[34] and that on transfer of a prisoner to Australia, no appeal or review lies in Australia against the sentence of imprisonment imposed by the court or tribunal of the country from which the prisoner was transferred.[35]

25. Rather, as Australia submitted to the Committee, the function of the legal framework under which the author was transferred to and detained in Australia—and the international framework for the transfer of sentenced persons generally—is to enable the consensual return of a person to his or her State of nationality (or a State to which he or she has community ties) to serve a sentence imposed elsewhere.[36] This transfer scheme has primarily humanitarian, rehabilitative and social objectives, such as enabling the prisoner to be closer to family networks[37] (as it did in the author's case).

26. Contrary to the Committee's view, consent of the prisoner to the transfer was critical in this case—the Act would have precluded the author's transfer had he not given that consent—and Australia maintains the author gave that consent freely (including to the terms of sentence enforcement in Australia upon transfer). Both Committee member Rodley and Committee member Seetulsingh recognised these facts in their dissenting

[31] Australian Government Submissions, October 2011, above n 29 at [70], [89]; Australian Government Further Submissions, June 2012, above n 29 at [65]; Australian Government Submission in Response, February 2013 at [15].
[32] Australian Government Submissions, October 2011, above n 29 at [91].
[33] Transfer arrangement at [9(1)].
[34] Ibid at [10].
[35] Section 45(1) of the Act.
[36] Australian Government Submissions, October 2011, above n 29 at [55].
[37] Australian Government Further Submissions, June 2012, above n 29 at [65]-[66], [75], [77]; Australian Government Submission in Response, February 2013, above n 31 at [15].

individual opinions.[38] Australia respectfully considers that theirs was the proper approach to this issue.

27. For these reasons Australia considers it fulfilled its legal obligations in relation to the author's transfer to and detention in Australia. It did not have the obligation or obligations in relation to article 9(1) of the Covenant that the Committee has asserted.

28. Further, Australia observes that the Committee's views seem to suggest that in circumstances such as those that were present in this case, Australia's legal obligations under the Covenant should be interpreted as incompatible with, and prevail over, its legal obligations under schemes for the international transfer of prisoners. With respect, Australia disagrees. Australia considers that in fact, the two bodies of legal obligations are compatible; that in this case, Australia was required to satisfy and was capable of satisfying both bodies of obligations at once; and that it did so. Australia welcomes Committee member Seetulsingh's comments to this effect, in his dissenting individual opinion.[39]

29. Finally, with respect, Australia maintains that in addition to being incorrect as a matter of law, the interpretation of the Covenant that the Committee has adopted may have a significant, negative human consequence. Specifically, it may undermine Australia's and other States' schemes for the international transfer of prisoners, to the detriment, primarily, of the prisoners themselves.

30. Mutual respect for each State's sovereignty and recognition of the laws of each State are underlying principles of the international framework for the transfer of sentenced persons. This framework is only able to operate if terms of transfer are honoured by the States who have consented to them. In future instances where there is a prospect of a prisoner's international transfer, returning States may be reluctant to transfer a prisoner for fear their legal processes will not be respected, Receiving States may be reluctant to agree to receive a prisoner, in case they too are criticised for allegedly breaching the Covenant. Both Committee member Rodley and Committee member Seetulsingh emphasised these points, in explaining their dissent from the Committee's views,[40] and Australia welcomes their comments and strongly agrees with them.

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[38] Individual opinion of Committee member Rodley, above n 27 at [3]; individual opinion by Committee member Seetulsingh, above n 15 at [3].
[39] Individual opinion by Committee member Seetulsingh, above n 15 at [4], [7]-[8].
[40] Ibid at [2]-[9]; individual opinion of Committee member Rodley, above n 27 at [3].

31. In this instance, the alternative to the author's transfer to and detention in Australia was for the author to remain in Guantanamo Bay. Australia again recalls that the author's sentence in the United States was not set aside until more than seven years after he was released in Australia.

Committee's recommendation

32. As Australia does not agree with the Committee's view that a violation of article 9(1) of the Covenant has occurred, Australia does not accept the Committee's view that Australia is obliged to take steps to prevent similar violations in the future.

33. Australia avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.