

DISTRICT COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: *BD 1907/22*

Appellant: **DREW PAVLOU**

AND

Respondent: **XU JIE**

OUTLINE OF SUBMISSIONS FOR THE APPELLANT

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I. INTRODUCTION

1. On 14 October 2019, Mr Drew Pavlou (the **appellant**) filed a complaint under section 5 of the *Peace and Good Behaviour Act 1982* (Qld) (the **PGB Act**) against Dr Xu Jie, the (then) Consul-General of the People's Republic of China in Brisbane (the **respondent**).
2. On 10 August 2020, Deputy Chief Magistrate Brassington dismissed the complaint on the ground that the respondent was a consular official and not amenable to the jurisdiction of the court.
3. The appellant appeals against that decision under s 222 of the *Justices Act 1886* (Qld). He also requires an extension of time within which to appeal under s 224(1) of the Justices Act.
4. In brief summary, the complaint against the respondent arose in the following circumstances:
 - (a) On 24 July 2019, the appellant was participating in pro-democracy demonstrations at The University of Queensland when he was assaulted by pro-Beijing counter-protestors.¹
 - (b) On 25 July 2019, the respondent issued a statement on the website of the Consulate-General of the People's Republic of China in Brisbane which stated that the respondent "affirms the self-motivated patriotic behaviour of the overseas Chinese students".²
 - (c) Subsequently, the appellant received hundreds of abusive messages and death threats directed towards himself and his family.³
 - (d) The appellant deposes that he held and continues to hold a fear of assault if he engages in protests in Australia concerning China.⁴
5. The statement issued by the respondent did not attract consular immunity. That is because by affirming the use of force and intimidation against pro-democracy protestors it interfered with the exercise of freedom of speech and freedom of assembly within Australia. Conduct of that character does not attract consular immunity, for the reasons explained below.
6. The complaint against the respondent ought not to have been dismissed. Instead, an order ought to have been made under s 7 of the PGB Act requiring the respondent to refrain from making any further public statements in connection with the appellant or his activities.

¹ Affidavit of Drew Pavlou sworn 14 October 2019 (**First Pavlou Affidavit**), paras [4] and [5].

² First Pavlou Affidavit, Annexure D (certified translation).

³ First Pavlou Affidavit, para [15].

⁴ First Pavlou Affidavit, para [17]; Affidavit of Drew Pavlou sworn 1 May 2022 (**Second Pavlou Affidavit**), para [2].

7. For the purposes of this appeal, the appellant continues to rely upon the material that was before Deputy Chief Magistrate Brassington. A list of this material is Annexure A to these submissions.
8. Further, the appellant seeks leave under s 223(1) of the Justices Act to rely upon new evidence, specifically:
 - (a) an affidavit of the appellant sworn on 1 May 2022, which explains his continuing fear of assault and the reasons for the delay in bringing this appeal;
 - (b) an affidavit of the appellant's solicitor, Mr Mark Tarrant, sworn on 12 May 2022, which provides context for understanding the statement issued by the respondent; and
 - (c) an affidavit of Mr Tarrant sworn on 8 August 2022 which provides the procedural background to the proceeding.
9. The terms of the order sought by the appellant are set out in the conclusion to these submissions.

II. FACTUAL BACKGROUND

10. In mid-2019, there was widespread reporting of violence committed in Hong Kong against pro-democracy protesters opposing a bill to allow extradition of dissidents from Hong Kong to mainland China.⁵
11. The appellant was a student at The University of Queensland. On 24 July 2019, he organised a rally at the St Lucia campus of the university supporting democracy in Hong Kong and opposing the university's ties to the Chinese Communist Party and the Confucius Institute which is located on campus.⁶
12. During the rally, the appellant was assaulted by several counter protesters. The appellant gives the following evidence concerning the assaults:
 4. On 24 July 2019 I was assaulted twice on Market Day. At around 12.20 I was sitting on the ground leading chants against PRC President Xi Jinping with a megaphone when a man in sweatshirt and sunglasses ripped the megaphone & protest sign from my hands and when I stood up to confront him he and his friend assaulted me, punching me in the ribs and the side of the head.
 5. Later in the day, another masked man struck me in the back of the head when my back was turned and ripped a poster criticizing the Confucius Institute from my hands and tore it apart.
13. Video footage of the first incident (which was in evidence before Deputy Chief Magistrate Brassington) is consistent with the description given by the appellant.

⁵ Affidavit of Mark Tarrant sworn 12 May 2022 (**First Tarrant Affidavit**), paras [4]-[15].

⁶ First Pavlou Affidavit [3].

14. The protests and counter-protests at the university were the subject of extensive media reporting on 24 July 2019.⁷ This reporting emphasized the use of violence by pro-Beijing protestors.⁸

(a) ABC News published an article with the headline “UQ student protest turns violent in clash of views on freedom in China and Hong Kong”. The article commenced with the following description:⁹

Punches have been thrown at the University of Queensland as students clashed over their views on China and pro-democracy protesters in Hong Kong.

The ABC understands pro-China activists gate-crashed a protest by fellow Chinese students showing solidarity for persecuted minorities in their homeland.

(b) The Brisbane Times published an article with the headline “‘I was shocked’: UQ protest against Chinese government turns violent.” The article stated:¹⁰

A peaceful protest at the University of Queensland against the Chinese government’s treatment of Uyghur Muslims and Hong Kong citizens turned violent at the St Lucia campus.

...

Tensions grew when a pro-Chinese Communist Party counter-protester pulled a megaphone from the protest organiser and threw it before punches were thrown and drinks were poured over them.

...

Mr Greenop-Roberts, who was pro-democracy, said he arrived when the crowd became aggressive.

“I was shocked at the violence,” he said.

(c) Guardian Australia published an article with the headline “Pro-China and pro-Hong Kong students clash at University of Queensland”. The article stated:¹¹

Pro-Hong Kong and pro-China students have clashed at the University of Queensland during a protest against Hong Kong’s controversial extradition law.

The protest, organised by Hong Kong international students to coincide with the university’s market day, turned violent when it was interrupted by other students.

Nilsson Jones, an editor of the university’s student magazine *Semper Floreat*, told Guardian Australia pro-Chinese students ripped up signs supporting Hong Kong and protesting against the Chinese state’s treatment of its Uighur population.

⁷ First Tarrant Affidavit, Annexures C, D and E.

⁸ The appellant does not rely upon these media reports as evidence of the truth of the matters stated in them. Rather, the content of publications about the events on 24 July 2019 is relevant context for the interpretation of the statement made by the respondent on the following day.

⁹ First Tarrant Affidavit, Annexure C.

¹⁰ First Tarrant Affidavit, Annexure D.

¹¹ First Tarrant Affidavit, Annexure E.

15. The following day, on 25 July 2019, the respondent published a statement in Chinese on the website of the Consulate-General of the People's Republic of China in Brisbane in support of the counter protestors (the **Consul-General Statement**).¹²
16. The Consul-General Statement (translated into English) was in the following terms:¹³

Consulate-General of the People's Republic of China in Brisbane

Statement by the spokesperson of the Consulate-General in Brisbane to express the stance regarding the self-motivated overseas Chinese students at the University of Queensland in Australia to oppose the anti-China separatist activities.

2019/07/25

According to our knowledge, during the afternoon of the 24th of July, a small number of people with ulterior motives carried out anti-China separatist activities at the University of Queensland in Australia, causing indignation and protest from overseas students of the mainland and Hong Kong.

The Consulate General regards highly the importance of the safety of the overseas Chinese students and affirms the self-motivated patriotic behaviour of the overseas Chinese students. The Consulate General resolutely opposes to any conduct by words or behaviour to split the country, opposes to some people using the matter described above as excuse to provoke the confrontation between students from mainland China and from Hong Kong, and to incite anti-China sentiment.

The Consulate General will continue to pay close attention to monitor this matter, and will firmly safeguard the legitimate rights of the overseas Chinese students. We hope that the overseas Chinese students will abide the Australian laws and regulations, to pay attention to their personal safety, and to express their appeals and demands in accordance to the law.

17. On 25 July 2019, the Global Times, which is owned by the Chinese Government, published an article with the headline "Chinese consulate in Australia praises patriotic students for counter-protest against separatists".¹⁴ The article repeated parts of the statement by the respondent and named the appellant as one of the organisers of the demonstrations.
18. Following the Consul-General Statement and the publication of the appellant's name, the appellant's social media profiles were flooded with hundreds of abusive messages and the appellant received multiple death threats directed towards him and his family.¹⁵ A sample of the abuse and death threats was in evidence before Deputy Chief Magistrate Brassington.¹⁶

¹² First Pavlou Affidavit, Annexure C.

¹³ First Pavlou Affidavit, Annexure D (certified translation).

¹⁴ First Pavlou Affidavit, Annexure F.

¹⁵ First Pavlou Affidavit, para [15(a)].

¹⁶ First Pavlou Affidavit, Annexure I.

19. On 9 October 2019, the appellant was assaulted and abused by a “pro-Chinese Communist party individual” while campaigning for student elections on 9 October 2019.¹⁷
20. On 14 October 2019, the appellant filed a complaint against the respondent in the Brisbane Magistrates Court under section 5 of the PGB Act. The complaint was supported by an affidavit in which the appellant deposed that:

I fear for my safety and that of my parents including on campus and feel afraid to conduct further pro-Hong Kong democracy and other pro-human rights demonstrations.
21. On 14 October 2019, a justice of the peace issued a summons under s 5(2A) of the PGB Act requiring the respondent to appear at the Magistrates Court in Brisbane at 9am on 22 November 2019 to answer the complaint.¹⁸
22. The summons was duly served on the respondent on 14 October 2019 under s 56(1) of the Justices Act by leaving the document at the offices of the Consulate-General of the People’s Republic of China in Brisbane.¹⁹
23. There were hearings in respect of the complaint at the Brisbane Magistrates court on 22 November 2019, 18 December 2020, 24 July 2020 and 10 August 2020.²⁰
24. The respondent did not appear at any of the hearings but the court received a legal memorandum prepared by the Embassy of the People’s Republic of China in the Commonwealth of Australia (**Chinese Embassy Memorandum**), which argued that the court did not have jurisdiction over the acts of the respondent.²¹
25. On 10 August 2020, the complaint was dismissed by Deputy Chief Magistrate Brassington on the ground that the respondent was a consular official and not amenable to the jurisdiction of the court.
26. The appellant appeals against the dismissal of his complaint on the ground that Deputy Chief Magistrate Brassington erred in law by finding that the respondent was entitled to consular immunity in respect of the Consul-General Statement.

III. EXTENSION OF TIME FOR FILING A NOTICE OF APPEAL

27. Section 222(1) of the Justices Act requires an appeal to the District Court to be filed within 1 month after the date of the order appealed against. Under s 224(1)(a), a District Court judge may extend the time for filing a notice of appeal.
28. The grounds for extending time are set out in the affidavit of the appellant sworn on 1 May 2022. In that affidavit, the appellant gives the following evidence:

¹⁷ First Pavlou Affidavit, para [15(b)].

¹⁸ Affidavit of M Tarrant sworn 8 August 2022 (**Second Tarrant Affidavit**) para [3].

¹⁹ Second Tarrant Affidavit, para [4].

²⁰ Second Tarrant Affidavit, paras [7]-[22].

²¹ Second Tarrant Affidavit, Annexure E.

- (a) The reason for the delay in bringing the appeal includes his struggle to find counsel prepared to argue the case on a pro bono basis.²²
 - (b) He was able to obtain pro bono representation by counsel after approaching LawRight.²³
 - (c) He continues to hold a fear of assault if he engages in protests in Australia concerning China.²⁴
 - (d) On the evening of 30 April 2022, he was subjected to abuse and assaults while holding a peaceful pro-Uighur and pro-Hong Kong democracy protest at a pedestrian mall in Eastwood, northern Sydney, an area that includes a large mainland Chinese migrant community.²⁵
29. That affidavit explains the reasons for delay in bringing the appeal and explains the continuing fear held by the appellant. The Consul-General Statement is continuing to contribute to an environment of hostility and physical threat to the appellant in connection with his human rights activism concerning China. For these reasons, the court should grant an extension of time within which to appeal.
30. Section 223 provides that an appeal under s 222 is by way of rehearing on the evidence given in the proceeding before the magistrate, however, under s 223(1) the District Court may give leave to adduce fresh, additional or substituted evidence if the court is satisfied there are special grounds for giving leave.
31. On an appeal under s 222, the District Court must conduct a real review of the original hearing and the magistrate's decision and make its own determination on the evidence giving due deference and attaching significant weight to the magistrate's reasons. To succeed on appeal the appellant must establish some legal, factual, or discretionary error.²⁶

IV. GROUND OF APPEAL: CONSULAR IMMUNITY

The Vienna Convention

32. The Vienna Convention on Consular Relations (VCCR) was adopted under the auspices of the United Nations on 25 April 1963 and entered into force on 19 March 1967.
33. Certain provisions of the VCCR have been incorporated into Australian law by s 5(1) of the *Consular Privileges and Immunities Act 1972* (Cth). Section 5(1) states:

²² Second Pavlou Affidavit, para [12].

²³ Second Pavlou Affidavit, para [12].

²⁴ Second Pavlou Affidavit, para [2].

²⁵ Second Pavlou Affidavit, para [3]-[6].

²⁶ *Sinclair v Lynch* [2021] QDC 190 at [4] (McGuinness DCJ) (citing *Laidlaw v Hulett* [1998] 2 Qd R 45). See also *Evans v NBN Co Ltd* [2021] QDC 227 at [3] (Long DCJ).

Subject to this section, the provisions of Articles 1, 5, 15 and 17, paragraph 1, 2 and 4 of Article 31, Articles 32, 33, 35 and 39, paragraphs 1 and 2 of Article 41, Articles 43 to 45 (inclusive) and 48 to 54 (inclusive), paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1, 2 and 3 of Article 58, Articles 60 to 62 (inclusive), 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Convention have the force of law in Australia and in every external Territory.

34. Article 43.1 of the VCCR states:

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

35. The term “consular officer” is defined in Article 1.1(1)(d) as follows:

“consular officer” means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.

36. The appellant accepts that the respondent, as Consul-General in Brisbane, falls within the definition of “consular officer”.

37. However, his acts in causing the Consul-General Statement to be issued did not attract consular immunity because they did not meet the definition of “acts performed in the exercise of consular functions”.

Consular Functions

38. Consular immunity must be distinguished from diplomatic immunity, which is the subject of a separate treaty.²⁷ While diplomats have a broad immunity for both official and private acts which subsists while the diplomat retains that status, a consul has a more limited immunity “in respect of acts performed in the exercise of consular functions” (Article 43.1).²⁸

39. “Consular immunity from the jurisdiction of receiving State courts is based on the functions a consul performs.”²⁹ A consul is entitled to immunity in respect of acts performed within the consul’s “official” capacity but is not entitled to immunity in respect of acts performed in a “private” capacity.³⁰ However, the fact that an act is done under the auspices of consular authority is not determinative of whether the act attracts consular immunity.³¹

²⁷ Vienna Convention on Diplomatic Relations (1961) (adopted on 18 April 1961 and entered into force on 24 April 1964). Much of this convention has been incorporated into Australia law under s 5 of the *Diplomatic Privileges and Immunities Act 1967* (Cth).

²⁸ See *The Republic of Turkey v Mackie Pty Ltd* (2021) 64 VR 467 at 479 [41] (Tate JA).

²⁹ L Lee and J Quigley, *Consular Law and Practice* (Oxford University Press, Oxford, 3rd Edition, 2008), 440. See also CT Milhaupt “The Scope of Consular Immunity under the Vienna Convention on Consular Relations: Towards a Principles Interpretation” (1988) 88 *Columbia Law Review* 841.

³⁰ *Ibid*, 440-441.

³¹ See *Arcaya v Paez*, 145 F. Supp 464, 470-471 (S.D.N.Y. 1956). See also *Bigelow v. Princess Zizianoff* (Court of Appeal of Paris) (1929) AJIL 172

40. Instead, the distinction between “official” acts and “private” acts requires close attention to the definition of “consular functions” in the VCCR.

41. Article 5 of the VCCR states (relevantly):

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

...

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

...

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

42. The Chinese Embassy Memorandum, which was before Deputy Chief Magistrate Brassington, relied upon each of Articles 5(a), 5(e) and 5(m) in the VCCR.

43. The terms of the various paragraphs in Article 5 should be read together, and interpreted within the context and purpose of the VCCR as a whole. In this respect, Article 55 of the VCCR is relevant to the meaning of “consular functions” within Article 5.³²

44. Article 55(1) of the VCCR states:

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

45. Article 55(1) imposes constraints on each of the consular functions within the definition in Article 5.³³ Specifically, conduct does not fall within the definition of consular functions if the function in question (a) does not respect the law and regulations of the receiving State; or (b) constitutes an interference in the internal affairs of the receiving State.

46. Further, since Article 5 must be read as a whole, express provisos applying to one limb must also apply to the other limbs, even where the proviso is not expressly stated. For instance, it would be incongruous if a function that was excluded from the definition of consular functions because it was not within the limits permitted by international law

³² Article 55(1) is not within the list of provisions in s 5(1) of the *Consular Privileges and Immunities Act 1972* (Cth) that have the force of law in Australia. Nonetheless, it is relevant to the meaning of consular functions within Article 1(1)(d) and Article 43 of the VCCR, which both have the force of law in Australia.

³³ See *Gerritsen v de la Madrid Hurtado* 819 F. 2d 1511, 1516 (9th Cir 1987).

(Article 5(a)) nonetheless satisfied the definition because it fell within one of the other limbs that does not include that express proviso (Article 5(e) and (m)).

47. This point is made by the authors of *Consular Law and Practice*:³⁴

Beyond the question of overlap in the sub-paragraphs of VCCR Art. 5, the focus on whether a qualifying clause appears in a particular sub-paragraph may not be an appropriate method for resolving the question of immunity. A consul is required, in the exercise of any function, to respect receiving State law. Even a consul who exercises a function described in a sub-paragraph that lacks a qualifying clause must respect receiving State law.

48. The submissions below address the three relevant limbs of Article 5 separately. However, the ultimate question is whether the act in question was performed in the exercise of a consular function and that question requires Article 5 to be interpreted as a whole.
49. The appellant submits that the publication of a political statement that suppresses the exercise of freedom of speech and freedom of assembly within Australia is not the exercise of a consular function.
50. That is because a publication of that nature is not within the limits permitted by international law, constitutes an interference in the internal affairs of the receiving State (Australia) and does not respect, or is prohibited by, the laws of the receiving State.

Protecting Interests of the Sending State and its Nationals (Article 5(a))

51. Article 5(a) includes within the definition of “consular functions”:

protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

52. The Chinese Embassy Memorandum (para 21) relied upon Article 5(a) arguing that the Consul-General Statement was directed at protecting the interests of China and its nationals.
53. However, even assuming the Consul-General Statement had that purpose,³⁵ its publication fell outside Article 5(a) because it was not “within the limits permitted by international law”. Specifically, read in its context and as a whole, it interfered with the rights of freedom of expression and freedom of association that are protected by Article

³⁴ L Lee and J Quigley, *Consular Law and Practice* (Oxford University Press, Oxford, 3rd Edition, 2008), 461.

³⁵ It may be debated whether the Consul-General Statement in fact protects the interests of the People’s Republic of China or its nationals. However, paragraph 5(a) does not require the court to assess whether the conduct in fact protects the interests of the sending State or its nationals. It is sufficient that the conduct can be characterised as having that purpose from the point of view of the sending state. It would undermine the purpose of consular immunity if paragraph (a) required an investigation into the merits of the sending State’s views as to its own interests. The court need not undertake an analysis of that nature.

19³⁶ and Article 21³⁷ of the *International Covenant on Civil and Political Rights* (ICCPR).³⁸

54. There is no Australian case law concerning the meaning of the “the limits permitted by international law” within Article 5(a).
55. An interpretation of Article 5(a) that requires regard to the rights of freedom of speech and freedom of assembly is supported by the decision of the United States Court of Appeals for the Ninth Circuit in *Gerritsen v de la Madrid Hurtado* 819 F. 2d 1511 (9th Cir 1987).
56. In that case, the plaintiff filed a complaint alleging various torts and civil rights violations by the President of Mexico, the Mexican Consulate and several consular employees and officials. The complaint alleged that on several occasions when the plaintiff was distributing leaflets critical of the Mexican government in front of the Mexican consulate in Los Angeles, consulate staff acted in various unlawful ways to stop him from distributing leaflets, including striking him, threatening him with a club and a gun, kidnapping and interrogating him, and forcibly taking his leaflets and camera. The complaint also alleged that on one occasion the consulate staff asked the Los Angeles police to arrest him.
57. The defendants challenged the jurisdiction of the court and succeeded in the District Court in having the complaint dismissed. On appeal, the Court of Appeals for the Ninth Circuit concluded that in order to determine the power of the district court to exercise jurisdiction over the defendants it was necessary to examine the provisions of the VCCR.³⁹
58. The Court of Appeals stated:⁴⁰

There appears to be no authority interpreting the vague term “within the limits permitted by international law” in Article 5(a) of the Vienna Convention. It would appear, however, that the treaty does not include interference with the internal affairs of the receiving state within the scope of consular functions. See Vienna Convention, Article 55(1), 21 U.S.T. at 113 (consular officials protected by the treaty “have a duty not to interfere in the internal affairs of that [receiving]State”).
59. Hence, the Court of Appeals acknowledged that Article 55(1) was relevant to the interpretation of Article 5(a). By analogy, Article 55(1) must be relevant to each of the limbs of Article 5.

³⁶ Article 19(2): “Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

³⁷ Article 21: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

³⁸ Adopted on 16 December 1966, entered into force on 23 March 1976. Australia is a party to the ICCPR.

³⁹ 819 F. 2d 1511, 1515 (9th Cir 1987).

⁴⁰ 819 F. 2d 1511, 1516 (9th Cir 1987).

60. The Court of Appeals continued:⁴¹

Wrongful acts committed by an official or employee of a Mexican consulate within the United States to suppress criticism of Mexico within this country constitute an interference with the United States' internal affairs because these acts impair the citizenry's ability to promote self-government through robust discourse concerning issues of public import. Therefore, the acts of the two consuls general and the vice consul alleged in the complaint are not "within the limits permitted by international law" and thus are not consular functions as defined in Article 5(a).

Similarly, many of the consular officials' and employees' acts alleged in the complaint are not consular functions under Article 5(m). Assault with a deadly weapon and kidnapping, for instance, are not consistent with penal laws applicable in the United States. These acts are, therefore, "prohibited by the laws and regulations of the receiving State," and thus cannot constitute consular functions under Article 5(a).

61. The Court of Appeals consequently found that the defendants were not entitled to consular immunity on the basis of the pleaded facts. The Court of Appeals remanded the action to the District Court and gave leave to amend the pleadings.

62. In a subsequent decision of the District Court in *Gerritsen v Escobar Y Cordova* 721 F. Supp 253 (C.D. Cal 1988), Judge Rymer again considered the question of consular immunity, noting that the issue needed to be re-examined in light of the narrower allegations then on the record.

63. The consular officials contended that the actions they took were to protect the peace and dignity of the consulate and therefore fell within Article 5(m) of the VCCR. Judge Rymer held that the protection of consular premises was a "legitimate consular function with Article 5(m)".⁴² Judge Rymer continued (citations omitted):⁴³

The next question is whether the acts allegedly taken against plaintiff by these defendants were within this function. There is little case law or international practice that serves as a guide in developing useful criteria for determining whether a particular act is within the scope of consular function. However, courts that have dealt with this question have considered: (1) whether there is a logical connection between the act and the purported function; and (2) whether the act is a reasonable means of the fulfillment of the function. Some of the relevant criteria in determining these issues are: (1) the subjective intent of the consular official, based on objective evidence, in performing a particular act...; (2) whether the act furthered some function of the consulate...; (3) whether the act is of a "personal" character"...; (4) the seriousness of the act...; and (5) the absence or presence of a malicious motive in the performance of a particular act...

64. Judge Rymer found the defendants were entitled to consular immunity because each of the alleged acts was an attempt to protect the consulate and there was nothing to suggest that the defendants acted against the plaintiff except when he was in proximity to the consulate.⁴⁴ On appeal, the Court of Appeals affirmed the decision of Judge Rymer.⁴⁵

65. Nothing in the decision of the District Court cast doubt on the principle expressed by the Court of Appeals in the first *Gerritsen* decision that conduct inconsistent with

⁴¹ 819 F. 2d 1511, 1516-1517 (9th Cir 1987).

⁴² 721 F. Supp. 253, 259 (C.D. Cal. 1988).

⁴³ 721 F. Supp. 253, 259 (C.D. Cal. 1988).

⁴⁴ 721 F. Supp. 253, 259 (C.D. Cal. 1988).

⁴⁵ *Gerritsen v Consulado General de Mexico* 989 F. 2d 340 (9th Cir. 1993).

freedom of speech and freedom of assembly is not “within the limits permitted by international law” and is therefore not the exercise of a consular function.

66. The Consul-General Statement, read in its context and as a whole, was inconsistent with the exercise of freedom of speech and freedom of assembly. In short, the Consul-General Statement affirmed the use of force and intimidation against people exercising their rights to freedom of speech and freedom of assembly and implicitly encouraged further such acts.
67. The issuing of a statement of that character is not a consular function within the meaning of Article 5 of the VCCR.
68. The following five features of the Consul-General Statement are of particular significance.
69. **First**, the Consul-General Statement included the following words (underlining added):

The Consulate-General regards highly the importance of the safety of the overseas Chinese students and affirms the self-motivated patriotic behaviour of the overseas Chinese students.
70. When interpreted in context, the “behaviour” that was affirmed by the statement included the use of force and intimidation by the pro-China counter protestors at the university on 24 July 2019. The statement itself hints at the use of force during the protests by referring to “the safety of the overseas Chinese students”.
71. Moreover, the news reporting of the events the previous day had emphasized acts of physical force and “violence” by pro-China counter protestors (see above). A reasonable person with knowledge of the reporting of the events that had taken place the previous day would have concluded that the Consul-General Statement was affirming the use of these tactics.
72. **Secondly**, the Consul-General Statement used highly charged language to describe the actions of the pro-Hong Kong protesters on 24 July 2019. Specifically, the Consul-General Statement referred to:
 - (a) “anti-China separatist activities”;
 - (b) “conduct by words or behaviour to split the country”; and
 - (c) incitement of “anti-China sentiment”.
73. A reasonable person reading the Consul-General Statement would have interpreted it as characterizing the pro-Hong Kong protesters as opposed to China and Chinese unity. The appellant deposes that, to his understanding, “separatists” face severe penalties under Chinese law.⁴⁶ A reasonable person with that same understanding would interpret the Consul-General Statement as an attack on the legitimacy of the protesters.

⁴⁶ First Pavlou Affidavit, para [7], Annexure E.

74. **Thirdly**, the Consul-General Statement stated:
- The Consulate General resolutely opposes to any conduct by words or behaviour to split the country, opposes to some people using the matter described above as excuse to provoke the confrontation between students from mainland China and from Kong Kong, and to incite anti-China sentiment.
75. That sentence made clear that the Consul General was resolutely opposed to the pro-Hong Kong protesters and regarded them as responsible for the confrontations that had taken place the previous day. The sentence therefore further affirmed the steps taken by the counter protesters to oppose the position taken by the pro-Hong Kong protesters.
76. **Fourthly**, the Consul-General Statement included the following sentence:
- The Consulate General will continue to pay close attention to monitor this matter and will firmly safeguard the legitimate rights of the overseas Chinese students.
77. In the context of the statement as a whole, that sentence communicated that the Consul General:
- (a) would continue to monitor pro-Hong Kong protests;
 - (b) regarded the tactics used by counter protesters on 24 July 2019, including the use of force and intimidation, as an exercise of the “legitimate rights” of overseas Chinese students; and
 - (c) would take steps to safeguard those “legitimate rights”.
78. In effect, the Consul-General Statement encouraged the further use of force and intimidation against pro-Hong Kong protesters and communicated that the Consul General would support any overseas Chinese student who used such tactics.
79. **Fifthly**, the Consul-General Statement concludes with the following words:
- We hope that the overseas Chinese students will abide the Australian laws and regulations, to pay attention to their personal safety, and to express their appeals and demands in accordance to the law.
80. Those words do not detract from the message of the preceding sentences in the Consul General Statement to the effect that the use of force and intimidation was affirmed by the Consul General and regarded as a legitimate means to oppose pro-Hong Kong protestors. Notably:
- (a) The sentence states merely that “we hope” that overseas Chinese students would abide by Australian law and express their demands in accordance with Australia law. There is no direction in that sentence that overseas Chinese students must do so or that their actions will not be supported by the Consulate General if they act in breach of Australian law.
 - (b) The sentence refers to overseas Chinese students paying “attention to their personal safety”. This implicitly suggests that the personal safety of overseas

Chinese students may be threatened by pro-Hong Kong protesters. In effect, it encouraged overseas Chinese students to be ready to use force to protect their personal safety from pro-Hong Kong protesters.

81. The overall effect of the Consul-General Statement was to act as a threat against pro-Hong Kong protesters that any future protests would be met by resistance from overseas Chinese and that the Consulate General would support the actions of those overseas Chinese.
82. That interpretation of the Consul-General Statement is further supported by the numerous abusive messages and death threats that were sent to the appellant following the issuing of the statement and the publication of the appellant's link to the pro-Hong Kong protests.
83. The Consul-General Statement was consequently in opposition to the exercise of freedom of speech and freedom of assembly. It was not "within the limits permitted by international law" and therefore the act of publication was not in the exercise of a consular function that attracted consular immunity from the jurisdiction of a Queensland court.
84. The appellant submits that once it is found that a function is not "within the limits permitted by international law" within the meaning of Article 5(a), that function is not a consular function. It is not strictly necessary separately to consider the other limbs of Article 5 because each limb is implicitly subject to the same proviso. The reasons for this were explained above.
85. Nonetheless, since the Chinese Embassy Memorandum relies upon the other limbs, they are addressed below.

Helping and Assisting Nationals of the Sending State (Article 5(e))

86. Article 5(e) includes within the definition of "consular functions":

helping and assisting nationals, both individuals and bodies corporate, of the sending State;

87. The Commentaries to the Draft Articles on Consular Relations, adopted by the International Law Commission in 1961,⁴⁷ provide the following explanation of the distinction between paragraph (a) and paragraph (e):⁴⁸

⁴⁷ The text of the Draft Articles on Consular Relations, with commentaries, was adopted by the International Law Commission at its thirteenth session in 1961, and submitted to the United Nations General Assembly as part of the Commission's report covering the work of that session: Yearbook of the International Law Commission, 1961 Vol II. Article 5 of the Draft Articles is in relevantly the same terms as Article 5 of the VCCR. The Commentaries form part of the *travaux préparatoires* to the VCCR and consequently regard may be had to the Commentaries as an aid to interpretation to the extent that terms of the VCCR are ambiguous or obscure after application of the general principles of interpretation: see *Vienna Convention on the Law of Treaties 1969* (Done at Vienna on 23 May 1969, entered into force on 2 January 1980), Article 32.

⁴⁸ Yearbook of the International Law Commission, 1961 Vol II, p 96.

The provision of paragraph (a) concerning the protection of the interests of the State and its nationals is distinct from that of paragraph (e), which concerns the help and assistance to be given to the nationals of the sending State, in that the former relates to the function which the consular official exercises vis-à-vis the authorities of the receiving State, whereas the latter covers any kind of help and assistance which the consul may extend to nationals of his State: information supplied to a national, provision of an interpreter, introduction of commercial agents to business concerns, assistance in case of distress, assistance to nationals working in the receiving State, repatriation and the like.

88. The Chinese Embassy Memorandum argues that the Consul-General Statement constituted “helping and assisting nationals...of the sending State” because it is “addressed to assisting Chinese nationals to legitimately express protest and indignation” (para 20).
89. However, Article 5(e) is limited to consular functions of the kind referred to in the passage above where help or assistance is provided to **particular** individuals. Article 5(e) is not concerned with statements of general application to nationals of the sending State. Such statements are better interpreted as indications of the official position of the sending State vis-à-vis the authorities of the receiving State, in connection with the interests of the sending State or its nationals, and therefore more naturally fall within Article 5(a). Accordingly, the Consul-General Statement does not fall within the ordinary meaning of paragraph (e) of the definition of consular functions.
90. Even if the publication of the Consul-General Statement is capable of falling within Article 5(e) (which is denied), it is excluded as a consular function because
 - (a) it was not within the limits permitted by international law because it constituted an interference with freedom of speech and freedom of assembly (as explained above);
 - (b) it constituted an interference with the internal affairs of Australia to the extent that it interfered with freedom of political communication within Australia (see VCCR, Article 55(1) and *Gerritsen*);
 - (c) it did not respect or was prohibited by the laws and regulations of Australia (as explained below).
91. Article 5(e) is not expressly limited to functions “within the limits permitted by international law” (cf Article 5(a)) or to those that are “not prohibited by the law and regulations of the receiving State” (cf Article 5(m)). However, as argued above, the various limbs of Article 5 must be read together. It would be incongruous if an act could constitute a consular function with Article 5(e) even though it was excluded by the express provisos in other limbs of Article 5.

Any other Functions, not Prohibited by Laws and Regulations (Article 5(m))

92. Article 5(m) includes within the definition of “consular functions”:

performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken

by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

93. The Chinese Embassy Memorandum relies upon this paragraph in support of the argument that the Consul-General Statement constituted the exercise of a consular function (para 24).
94. Article 5(m) applies only to “functions entrusted to a consular post by the sending State”. There is no evidence that the function of issuing political statements (or any statements) has been entrusted to the Consulate-General in Brisbane by the People’s Republic of China. The Chinese Embassy Memorandum does not assert that this has occurred.
95. It cannot be assumed that the issuing of political statements is a function that has been entrusted to the Consulate General in Brisbane. On the contrary, the exercise of political functions does not fall within the ordinary authority of a consul which is limited to “non-political and technical services for the sending State and its nationals”.⁴⁹
96. Even assuming that the function of issuing political statements that suppress free speech has been entrusted to the Consulate-General in Brisbane by the People’s Republic of China (and there is no evidence of this), that function does not fall within Article 5(m) because:
 - (a) the function is not within the limits permitted by international law; and
 - (b) the function is prohibited by the law and regulations of the receiving State (Australia);
 - (c) such a function has been the subject of an objection by Australia’s Minister for Foreign Affairs.
97. As to (a), Article 5(m) does not contain an express proviso that the function must be “within the limits permitted by international law” (cf Article 5(a)). However, as argued above, each limb of Article 5 must be read as subject to the express provisos in the other limbs. For the reasons explained above, the Consul-General Statement was not “within the limits permitted by international law”.
98. As to (b), the law of Queensland prohibits threats of assault including in connection with the exercise of political rights.⁵⁰ For the reasons explained above, when read in its context and as a whole, the Consul-General Statement was a threat of assault against persons who might demonstrate in connection with China. The issuing of such

⁴⁹ *Halsbury’s Law of England*, 4th Edition, Vol 18(2), Foreign Relations Law, title 898.

⁵⁰ See *Criminal Code Act 1899* (Qld), Schedule 1, sections 78(1) and 245(1).

statements is not the exercise of a consular function that is protected by consular immunity.⁵¹

99. As to (c), Australia's Minister for Foreign Affairs, Marise Payne, made statements to the media in connection with the Consul-General Statement. The Minister stated:⁵²

The right to free speech and to peaceful and lawful protest is protected in Australia, even on contentious and sensitive issues.

The Australian Government expects all foreign diplomatic representatives to respect these rights.

The Government would be particularly concerned if any foreign diplomatic mission were to act in ways that could undermine such rights, including by encouraging disruptive or potentially violent behaviour.

100. That statement constituted an "objection" to the exercise of a function by any foreign representative in Australia that undermines the rights to freedom of speech and lawful protest. Accordingly, functions that have that effect are not within Article 5(m).

Conclusion on Consular Immunity

101. For the reasons set out above, the publication of the Consul-General Statement did not attract consular immunity. Accordingly, the decision of the magistrate should be set aside and this court should consider the merits of the complaint under s 5 of the PGB Act and assess whether to make an order under s 7 of the PGB Act.

V. PEACE AND GOOD BEHAVIOUR ACT

102. Section 5(1) of the PGB Act states (relevantly):

- (1) A person (the *complainant*) may make a complaint to a justice of the peace that a person has threatened --
- (a) to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or
 - (b) to procure any other person to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or
 - (c) to destroy or damage any property of the complainant; or
 - (d) to procure any person to destroy or damage any property of the complainant;
- and that the complainant is in fear of the person complained against (the *defendant*).

⁵¹ When applying the VCCR, "the sending State takes the receiving State as it finds it" and "[i]f it finds it with a well established tradition of free expression, including public comment on matters of domestic and international politics" the VCCR must be interpreted accordingly: *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 326 (French J) (applying the provisions of Article 22 and 29 concerning protection of dignity of the consulate). See also at 346 (Einfeld J, dissenting).

⁵² First Pavlou Affidavit, Annexure G.

...

- (2A) If the matter of a complaint under subsection (1) or (2) is substantiated to the justice's satisfaction, and the justice considers it is reasonable in the circumstances for the complainant to have the fear mentioned in the subsection, the justice may issue;
- (a) a summons directed to the defendant requiring the defendant to appear at a stated time and place before a court; or
 - (b) a warrant to apprehend the defendant and to cause the defendant to be brought before a court;

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

103. Section 6 of the PGB Act provides:

The justice of the peace, in the consideration of the substantiation of the matter of the complaint to the justice's satisfaction, may make or cause to be made such inquiries and receive such evidence as the justice thinks fit.

104. Section 7 of the PGB Act provides (relevantly):

- (1) The court before which the defendant appears in obedience to the summons or is brought pursuant to the warrant, as the case may be, shall hear and determine the matter of the complaint.
- ...
- (3) Upon a consideration of the evidence, the court may—
 - (a) dismiss the complaint; or
 - (b) make an order that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the court thinks fit.
 - (4) The order made by the court may contain such other stipulations or conditions as the court thinks fit.

105. Section 8(1) of the PGB Act provides:

- (1) If at the time and place appointed by summons for the hearing of the complaint the defendant does not appear when called and proof is made to the court of due service of the summons in accordance with section 56 of the Justices Act 1886, the court may --
 - (a) issue its warrant to apprehend the defendant and to bring the defendant before a court to answer the complaint and to be further dealt with according to law; or
 - (b) proceed in the absence of the defendant to hear and determine the matter of the complaint as fully and effectually to all intents and purposes as if the defendant has personally appeared before the court in obedience to the summons and may make an order referred to in section 7; or
 - (c) for any reason appearing to it to be a sufficient reason, adjourn the hearing to a time and place determined by it before a court.

106. A summons issued under s 5(2A) of the PGB Act was duly served on the respondent on 14 October 2019.⁵³ The respondent did not and has not appeared in response to the summons. It was therefore open to the Magistrates Court under s 8(1)(b) of the PGB Act to proceed to hear and determine the matter of the complaint and make an order under s 7.
107. The powers of the District Court on an appeal under s 222 of the Justices Act are set out in s 225 of the Justices Act, which states:
- (1) On the hearing of an appeal, the judge may confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just.
 - (2) If the judge sets aside an order, the judge may send the proceeding back to whoever made the order or to any Magistrates Court with directions of any kind for the further conduct of the proceedings including, for example, directions for rehearing or reconsideration.
 - (3) For subsection (1), the judge may exercise any power that could have been exercised by whoever made the order appealed against.
 - (4) An order made under subsection (1) has effect, and may be enforced in the same way, as if it had been made by whoever made the appealed order.
108. Under s 225(3), it would be open to this court to made an order under s 7 of the PGB Act since that power could have been exercised by the Magistrates Court.
109. A complaint under the PGB Act is not a criminal proceeding and the court need not be satisfied of the criteria referred to in section 5(1) beyond reasonable doubt.⁵⁴ However, “it is plain that the strength of the evidence necessary to establish the basis for an order...must take into account the seriousness of the allegation made against the person against whom the complaint is made”.⁵⁵
110. Before making an order under s 7(3), the court does not need to be satisfied that an offence has been committed, although the court does need to be satisfied of one or more of the matters set out in s 5(1)(a) to (d).⁵⁶ As McPherson J stated in *Laidlaw v Hulett* [1998] 2 Qd R 45 at 52:
- ...although some of the acts specified in paras (a) to (d) of [s 5] might also constitute offences under chap. 38 of the Criminal Code if accompanied by the requisite intent, [s 5] of the Act is concerned not with the criminality of the acts in question, but simply with their tendency to promote breaches of the peace.

⁵³ Second Tarrant Affidavit, para [4].

⁵⁴ *Laidlaw v Hulett* [1998] 2 Qd R 45 at 49 (Fitzgerald P); see also at 52 (McPherson J); at 55 (Shepherdson J). See also *Harvey v Walker* [2016] QDC 180 at [9] (Bowskill QC DCJ); *Sinclair v Lynch* [2021] QDC 190 at [14] (McGinness DCJ).

⁵⁵ *Laidlaw v Hulett* [1998] 2 Qd R 45 at 49 (Fitzgerald P); see also at 52 (McPherson J); at 55 (Shepherdson J).

⁵⁶ *Laidlaw v Hulett* [1998] 2 Qd R 45 at 52 (McPherson J); at 55 (Shepherdson J).

111. The issuing of an order under s 7 is “a precautionary measure to prevent a future crime, and is not by way of punishment for something past”.⁵⁷
112. For the reasons set out above, the Consul-General Statement constituted a threat to procure others to assault persons, including the appellant, who participate in demonstrations concerning China. The matter set out in s 5(1)(b) of the PGB Act is therefore substantiated.
113. Further, the appellant has deposed to his fear in consequence of the Consul-General Statement. That fear is reasonable in the circumstances.⁵⁸ The reasonable basis for the fear is continuing as evidenced by the assault against the appellant in north Sydney in April 2022.
114. Accordingly, the appellant requests the court to make an order under section 7 of the PGB Act, which under s 7(4) may include such stipulations or conditions as the court thinks fit. The terms of the order sought by the appellant are set out below.

VI. CONCLUSION

115. The appellant seeks the following order:
1. The appeal is allowed.
 2. The order of Deputy Chief Magistrate Brassington made on 10 August 2020 is set aside.
 3. Pursuant to s 7(3) of the *Peace and Good Behavior Act 1982* (Qld), Xu Jie shall keep the peace and be of good behaviour by:
 - (a) refraining from any act or statement within Australia that encourages the use of force, threats or intimidation against persons engaged in peaceful protest;
 - (b) refraining from any public statement within Australia in connection with Mr Drew Pavlou or any lawful activities undertaken by him within Australia or elsewhere.

AC Stumer
Counsel for the Appellant
8 August 2022

⁵⁷ *Laidlaw v Hulett* [1998] 2 Qd R 45 at 50 (McPherson J), quoting *Ex Parte Davis* (1871) 35 JP 551 (Blackburn J).

⁵⁸ Section 7(1) does not expressly require the court to be satisfied that it is reasonable in the circumstances for the complainant to be in fear of the person complained against. However, as Fitzgerald P stated in *Laidlaw v Hulett* [1998] 2 Qd R 45 at 47 “it would ordinarily be inappropriate to make an order against a person complained against unless the complainant had a reasonable fear of that person”.

Annexure A: List of Material Before Magistrates Court

1. Complaint dated 14 October 2019
2. Affidavit of Drew Pavlou sworn 14 October 2019
3. Video files of events on 24 July 2019
4. Affidavit of Clive Charles Hamilton sworn 21 November 2019
5. Expert Report of Geremie R Barne dated 16 December 2019
6. Expert Report of Donald R Rothwell dated 31 January 2020
7. Memorandum on behalf of the Chinese Embassy dated 16 July 2020.