



**Griffith Journal**  
of Law & Human Dignity

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# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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## BLOOD ON ITS HANDS

ROBERT MYERS\*

*The actions of the Australian Federal Police, in providing to the Indonesian National Police the identity of eight Australian citizens, comprising eight of the Bali Nine, and the details of their intended crime, exposing them to the death penalty, can never be justified. This paper will argue that inferences and implications arising from Australian legislation and guidelines impose restrictions on cooperation with foreign nations, where such cooperation could lead to the death of an Australia citizen. Furthermore, it will be argued that the Australian Federal Police possessed more than sufficient evidence to justify the apprehension of those eight Australian citizens. The Australian Federal Police continue to contend that they would act, in similar circumstances, in the same way. Therefore, immediate steps must be taken to ensure that no Australian citizen is ever again exposed to the risk of the death penalty in similar circumstances.*

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## I INTRODUCTION

The actions of the Australian Federal Police ('AFP'), in providing to the Indonesian National Police ('INP') the identity of eight Australian citizens, comprising eight of the so-called "Bali Nine", and the details of their intended crime, within Indonesia, exposing them to the inevitable consequence of death by firing squad, can never be justified.

## II WERE THE ACTIONS OF THE AFP LEGAL?

It is the contention of the AFP that it acted legally in providing, to the Indonesian authorities, the identities of eight of the Bali Nine, their intended movements from and to Australia, and details of their intended illegal importation of heroin into this country. The AFP places reliance on the decision of Finn J, in the Federal Court of Australia at Darwin, in *Rush v Commissioner of Police* (2006) 150 FCR 165 ('*Rush's Case*') in support of its contention. Although Finn J found no illegality in the actions of the AFP, it is a distortion of his judgment to say that he determined that the AFP acted legally.

*Rush's Case* comprised an interlocutory application on behalf of the applicants for preliminary discovery of the records relating to the Bali Nine operation. It was a condition precedent to the entitlement to disclosure that the applicants were able to identify a possible cause of action, based upon a legal wrong, that had been done to the applicants.

It was the applicants' assertion that the activities of the AFP, in providing information to the INP of the intention to illegally export heroin from Indonesia into Australia, exposing the eight identified Australian citizens to the death

penalty, constituted a breach of the *Death Penalty Abolition Act 1973* (Cth); the *Australian Federal Police Act 1979* (Cth); the *Mutual Assistance in Criminal Matters Act 1987* (Cth); and the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth).

There was clearly nothing in the *Death Penalty Abolition Act 1973* (Cth) preventing the disclosure of information which might result in the imposition of a death penalty. Similarly, there was no prohibition on the provision of like intelligence contained within the *Australian Federal Police Act 1979* (Cth). The latter Act did, nevertheless, define the functions and powers of the AFP being, 'the provision of police services in relation to laws of the Commonwealth ... [and] the safeguarding of Commonwealth interests'<sup>1</sup> and 'to do anything incidental or conducive to the performance of ... [those] functions.'<sup>2</sup>

Similarly, there was no prohibition in either the *Mutual Assistance in Criminal Matters Act 1987* (Cth) or the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth) that prohibited the provision of information of the kind that was conveyed to the INP on 8 and 12 April 2005. The aim of the legislation as particularised in the outline to the Explanatory Memorandum to the 1996 Bill was to, inter alia:

- clarify the areas in which mutual assistance in criminal matters may only be sought by the Attorney-General and the areas in which assistance may be sought using other channels
- enable the Attorney-General to grant or request assistance without the Act having to be applied by regulation to a particular country
- give the Attorney-General *a discretion to refuse assistance where the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty could be imposed or carried out*
- enable the Attorney-General to refuse assistance where he considers it appropriate in the circumstances of a particular request ...<sup>3</sup>

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<sup>1</sup> *Australian Federal Police Act 1979* (Cth) s 8(1)(b).

<sup>2</sup> *Ibid* s 8(1)(c).

<sup>3</sup> Explanatory Memorandum, *Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996* (Cth), 1 (emphasis added).

Finn J found that the *Mutual Assistance in Criminal Matters Act 1987* (Cth) had no application to the provision of the information in this case. It is clear that that was so. However, his Honour did record, in the course of his judgment, that the following paragraphs were inserted into s 8 of the principal Act, by the 1996 amending Act:

(1A) A *request* by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

(1B) A *request* by a foreign country for assistance under this Act may be refused if the Attorney-General:

- (a) believes that the provisions of the assistance may result in the death penalty being imposed on a person; and
- (b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the *request* should not be granted.<sup>4</sup>

The ultimate failure of the application for disclosure and the implicit support of the actions of the AFP resulted from the fact that no *request* had been made by the INP in this instance. Rather, the unilateral actions of the AFP in providing the information that had not been requested by the Indonesian authorities was not caught by the legislation and hence the AFP, in providing that information, did not act illegally.

It has always been the contention of the AFP that the provision of information to the INP, in this instance, was done pursuant to a Memorandum of Understanding between Australia and Indonesia entitled Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation. Certainly, amongst the criminal matters in relation to which the *Treaty Between*

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<sup>4</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8, quoted in *Rush's Case* (2006) 150 FCR 165, 177-8 [40] (emphasis added).

*Australian and the Republic of Indonesia on Mutual Assistance in Criminal Matters* ('*Mutual Assistance Treaty*') envisaged that assistance could be granted was 'an offence against the law relating to dangerous drugs or narcotics'.<sup>5</sup>

Notwithstanding this contention the *Mutual Assistance Treaty*, effected pursuant to the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth), contemplated, in art 4(2)(d), that assistance under the Treaty might be refused if the *request* related to 'the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out.'<sup>6</sup>

Further, reference should be made to the AFP official guideline, the AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations ('*Death Penalty Charge Guide*'), which provides:

The Attorney-General in consultation with the Minister for Justice has determined that in future Australia will exercise a discretion when considering foreign *requests* for mutual assistance in criminal matters where the *request* relates to a charge attracting the death penalty under the law of the *requesting* country. In exercise of that discretion, assistance may be refused in the absence of an assurance from the *requesting* country that the death penalty would not be imposed or carried out. The Attorney-General has decided that this policy will also apply to police *requests*.

Consistent with the Attorney-General's decision, in future the following will apply in relation to AFP cooperation with overseas law enforcement agencies:

- police to police cooperation may continue on the present basis, i.e. the AFP may provide such assistance as *requested*, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.
- where the assistance of the AFP is *sought* by the police or another law enforcement agency of a foreign country in relation to a matter in which a charge has been laid under the law of that foreign country, for a crime attracting the death penalty, no action is to be taken, nor should any

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<sup>5</sup> *Treaty Between Australian and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, signed 27 October 1995, [1999] ATS 10 (entered into force 17 July 1999) annex.

<sup>6</sup> *Ibid* art 4(2)(d).



indication be given as to the decision likely to be made in respect of the *request*. All such *requests* are to be notified to the Director International Operations as soon as possible after receipt. Following consultation with the Attorney-General's Department, the General Manager National Operations will provide the Commissioner and Deputy with such advice as considered necessary in order that advice may be provided to the Minister for Justice and the Attorney-General ...<sup>7</sup>

Again, it was recognised that the Death Penalty Charge Guide had no application in this instance. Of course the Death Penalty Charge Guide relates only to requests for assistance. The AFP circumvented the application of any of the prohibitions relating to the supply to a foreign police force of information or intelligence that might lead to the imposition of the death penalty on an Australian citizen by deliberately, and quite callously, providing the information in this instance, without any request, recognising that there was no specific prohibition upon it so doing.

In the light of the restrictions imposed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth), the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth), the *Mutual Assistance Treaty* and the Death Penalty Charge Guide it is naive, in the extreme, for the AFP to contend that it was acting with propriety and in accordance with the laws of Australia in providing the information to the INP, which it did on 8 and 12 April 2005.

It is significant that Finn J in, effectively, refusing to find any illegality on the part of the AFP said of his judgment that:

*Whatever the moral wrong to a caring parent that may have been involved in so doing [knowingly misleading Lee Rush for the purposes of securing the Bali investigation from potential compromise] it [the actions of the AFP] could not have authored a duty of care such as has been proposed in this application.*<sup>8</sup>

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<sup>7</sup> Australian Federal Police, 'AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations', quoted in *Rush's Case* (2006) 150 FCR 165, 179 [50] (emphasis added).

<sup>8</sup> *Rush's Case* (2006) 150 FCR 165, 197 [118] (emphasis added).

It is of significance that it is not contended by the AFP that it acted in ignorance of the relevant principles. The argument seems to be one relating to what the AFP perceived to be the “greater good”; that is to say that one or more of the Bali Nine be executed rather than innocent Australians be exposed to the scourge of illegally imported heroin and the concomitant risks associated therewith. As it was put by Commissioner Andrew Colvin, on the occasion of the AFP press conference on 4 May 2015 ‘so my first point to that is which Australian citizens do you want us to protect? Those that are impacted by narcotics each and every day – I know that’s not your question, but that needs to be put into context.’<sup>9</sup>

Deputy Commissioner Phelan, in the course of the press conference said:

I’ve seen the misery that drugs cause to tens of thousands of families in this country. We are charged with executing the laws of this country to the best of our ability. That’s the sort of thing that weighed on my mind at the moment. Yes, I knew full well that by handing over the information and requesting surveillance and requesting the evidence gathered [sic] if they found them in possession of drugs they would take action and expose them to the death penalty. I knew that.

I went in with an open mind but I weighed up a number of things in my mind as to what I thought was appropriate and I’ve agonised over it for ten years now and every time I look back, I still think it’s a difficult decision, but given what I knew at that particular time and what our officers knew, I would take a lot of convincing to make a different decision. It was not easy.<sup>10</sup>

The “greater good” argument has no place in the law, or, for that matter, in society. It is an issue, as was foreshadowed by Finn J, of “morality”. The 19<sup>th</sup> century British individualist, Auberon Herbert, addressed the issue of the “good of the greater number”. He wrote in the July 1898 edition of *The Free Life*:

There never was invented a more specious and misleading phrase. The Devil was in his most subtle and ingenious mood when he slipped this phrase into the brains of men. I hold it to be utterly false in essentials. It assumes that there are two opposed ‘goods’, and that the one good is to be sacrificed to the other good – but

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<sup>9</sup> Australian Federal Police, ‘Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine’ (Transcript of Media Release, 4 May 2015), 16 <<http://www.afp.gov.au/media-centre/news/afp/2015/may/transcript-bali-nine>>.

<sup>10</sup> *Ibid* 24.

in the first place this is not true, for liberty is the one good, open to all, and requiring no sacrifice of others; and secondly this false opposition (where no real opposition exists) of two different goods means perpetual war between men – the larger number being forever incited to trample upon the smaller number. I can only ask: why are two men to be sacrificed to three men? We all agree that the three men are not to be sacrificed to the two men; but why – as a matter of moral right – are we to do what is almost as bad and immoral and short-sighted – sacrifice the two men to the three men? Why sacrifice any one set of men to another set, when liberty does away with all necessity of sacrifice?<sup>11</sup>

The AFP recognised that it was doing the work of the “Devil” when it communicated details of the Bali Nine conspiracy to the INP. The AFP contends that it was confronted with a dilemma. There was no dilemma. The answer was clear. It was morally wrong to take the decision that exposed these young Australian citizens to the death penalty. As the AFP acknowledged in the course of its press conference, one of its number was clearly concerned about the moral implications of the Bali Nine operation and refused to take part in the “AFP conspiracy”.

The obligations of the AFP were not only to uphold the law of Australia, including obligations to be implied and inferred from not only Australia’s objection to the death penalty but also the clear inferences and implications arising from both legislation and guidelines imposing restrictions on cooperation with foreign nations, upon request by the latter, when the provision of cooperation could lead to the death of an Australian citizen; there was also an obligation to prevent the commission of a crime.

### III THE AFP HAD THE EVIDENCE

The AFP, over the course of the past decade and in the course of its recent press conference, suggested that it had insufficient evidence to prevent the departure, from Australian shores, of the eight identified members of the Bali Nine.

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<sup>11</sup> Auberon Herbert, *The Free Life* (United Kingdom), July 1898.

Obviously, it is a matter of judgment for prosecutors whether there is sufficient evidence to prosecute any given charge.

Finn J, in the course of his judgment in *Rush's Case*, referred to the 'precise details provided to that police [the INP] by members of the AFP,'<sup>12</sup> resulting in the arrests of the Bali Nine, and the fact that 'the AFP was already possessed of a considerable body of information relating to past and likely prospective moves of (inter alia) the applicants.'<sup>13</sup>

The letter from Paul Hunniford, the AFP Senior Liaison Officer in Bali, of 8 April 2005, was headed 'Heroin couriers from Bali to Australia – Currently in Bali'.<sup>14</sup>

It went on to say:

Dengan hormat,

The AFP in Australia have [sic] received information that a group of persons are allegedly importing a narcotic substance (believed to be Heroin) from Bali to Australia using 8 individual people carrying body packs strapped to their legs and back. More specifically the information received that:

The group planned to conduct an importation in December 2004. The group travelled to Bali in December 2004 but the importation was cancelled because there was not enough money to buy 'the stuff' and that they would be travelling again in 3-6 months. The group returned to Australia.

The couriers were given instructions not to smoke cigarettes for two weeks prior to travel as they would not be allowed to smoke on the return flight as they may appear nervous. They were to carry body packs (containing white powder) back to Australia by using packs on both legs and the back supports. The packs were to be tightly taped to the person's body. Members of the group were given expense money and told to change the money into local currency to allow them to buy oversized clothes and thongs. The clothes and thongs were not to have any metal on them to avoid the metal detectors at the airports. The couriers received pre-

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<sup>12</sup> *Rush's Case* (2006) 150 FCR 165, 168 [2].

<sup>13</sup> *Ibid* 195 [107].

<sup>14</sup> Letter from Paul Hunniford to INP, 8 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 172 [22].

paid mobile telephones. On return through Customs they were told to be carried [sic] a wooden carving for declaration to Quarantine to by-pass Customs.

Couriers –

YANG, Alice dob 9 Dec 1985

NGUYEN, Thanh Nhan dob 30 Nov 1986

LEE, Francis dob 14 March 1983

CAO, Shaode dob 26 Sep 1986

HUANG, Danny dob 7 Dec 1986

LAU, Ina Yuk Teng 3 Feb 1986

LAWRENCE, Renae dob 11 Oct 1977

NORMAN, Matthew 17 Sept 1986

Enquiries reveal that Andrew CHAN bn: 12/0111984 [sic] (21)...Sydney (NSW D/L) organised travel for some of the December 2004 couriers. Travel movements show that CHAN has travelled previously to Bali in August 2004 (11 days) and October 2004 (7 days).

On Sunday 3 April 2004 CHAN departed Sydney for Denpasar, Bali. His travel itinerary indicates that he is booked to stay at the Hard Rock Café Kuta and is due to return on Friday 15 April 2005.

On Wednesday 6 April 2005 four suspected couriers departed Sydney for Denpasar on A07829:

Renae LAWRENCE bn: 11/10/1977

Matthew NORMAN bn: 17/09/1986

Martin STEPHENS bn: 13/04/1976

Si Yi CHEN bn: 19/03/1985

They are due to return to Australia on Friday 15 April 2005, the day after CHAN returns. At this stage it is unknown who is the source of the narcotics in Bali. If identified by INP it is strongly requested that no action is taken until interdiction

commences in Australia as early interdiction will hamper the identification of the organiser/recipients in Australia. Also until the possible narcotics are located on the couriers it is possible that the syndicate is still in the organisational phase.

About 0900 hrs this date Friday 8 April the AFP have [sic] received information that a further 3 suspect couriers departing on Australian Airlines flight no AO7829 to Denpasar. Return date not confirmed at this stage.

Tan Duc Thanh NGUYEN bn: 30/10/1982

Michael William CZUGAJ bn: 21/06/1985 (Russian)

...

Scott Anthony RUSH bn: 03/12/1985

...

Request

The AFP would like to identify the source of the drugs and the organisers (other than CHAN) in Australia. We would also like to gain evidence of association between CHAN and the suspected couriers. To do this it [sic] I ask that

1. That the suspected couriers due to arrive this date be oversighted to identify their intended address in Australia.
2. INP obtain as much evidence/intelligence as possible to assist AFP identify the organisers in Australia and source of narcotics in Indonesia.
3. We request surveillance to be carried out on CHAN and the couriers until departure.
4. should they suspect that CHAN and/or the couriers are in possession of drug at the time of their departure that they take what action they deem appropriate.
5. Could INP make inquiries to establish if CHAN is staying at the Hard Rock Hotel and to identify any associates, especially meetings with the above mentioned or the identity of other possible couriers.
6. Could copies of all passenger arrival cards be obtained.

7. Request photos be taken of any meetings for possible use in proceedings here.
8. If possible obtain phone records of any numbers being called in Australia by either CHAN or the couriers. This may assist AFP identify the organisers in Australia and possible telephone interception.<sup>15</sup>

On 12 April 2005, Officer Hunninford sent another letter to the INP. It stated:

Subject:

Suspected heroin couriers from Bali to Australia – Additional intelligence

Dengan hormat

Enquiries reveal that:

Andrew CHAN bn: 12/011984 [sic]

Renae LAWRENCE bn: 11/10/1977

Matthew NORMAN bn: 17/09/1986

Martin STEPHENS bn: 13/04/1976

Csiyi CHEN bn: 19/03/1985

are due to return to Australia on Thursday 14 April 2005, on the Australian airlines flight A07830 scheduled to depart at 22.40 hrs. Intelligence suggests that CHAN may not be in possession of narcotics but will possibly act as oversight on the flight. It is also suspected that Chan would take possession of the narcotics after they arrived in Australia.

Enquiries reveal that:

Tan Duc Thahn NGUYEN bn: 30/10/1982

Michael William CZUGAJ bn: 21/06/1985 (Russian)

....

Scott Anthony Rush bn: 03/12/1985

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<sup>15</sup> Ibid 172–174 [22].

...

are due to return to Australia on Saturday 16<sup>th</sup> April 2005, on Australian Airlines flight AO7830 scheduled to depart at 22.40 hrs. Intelligence suggests that NGUYEN may also not have narcotics in his possession and may only oversight/organise the couriers.

#### Request

If arrests are made on 14 April it is likely that NYUYEN [sic], CZUGAJ and RUSH will become suspicious of the arrest and decide not to attempt to board the Saturday flight with narcotics. I therefor [sic] request that you consider searching NYUYEN [sic], CZUGAJ and RUSH soon after the first group are intercepted.<sup>16</sup>

As noted by Finn J, the intelligence provided to the INP contained 'precise details' of the activities of the Bali Nine.<sup>17</sup> His Honour also noted that 'the AFP [by 8 October 2004] was already possessed of a considerable body of information'.<sup>18</sup> The AFP had clearly received substantial information from informants within Australia. The AFP investigation had been ongoing since February 2005. The last three of the Bali Nine departed Australia on 8 April 2005. Scott Rush was one of those three. On the occasion of the press conference Deputy Commissioner Phelan said of that departure:

The important point to note here is that Scott Rush was linked to three airport alerts, not one, but three. First, the alert that was placed on as a result of the conversations with his father; the second, an alert was placed because proximate to the same time an anonymous information came in to Crime Stoppers into New South Wales, and a pass alert or an alert was put on at the same time. The third one was another alert that had been previously put on in relation to one of the subsequent people arrested in Bali. He was directly linked through travel bookings with that individual. So on three separate occasions, Scott Rush was linked to this syndicate.<sup>19</sup>

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<sup>16</sup> Letter from Paul Hunniford to INP, 12 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 174 [23].

<sup>17</sup> *Rush's Case* (2006) 150 FCR 165, 168 [2].

<sup>18</sup> *Ibid* 195 [107].

<sup>19</sup> Australian Federal Police, 'Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine', above n 8, 9.



It goes without saying that the AFP was possessed of sufficient intelligence at that time to link Scott Rush with the ongoing investigation. It is also idle to suggest, as the AFP now does, that there was never an agreement to, at the very least, speak to Scott Rush as he departed from Australia. As Deputy Commissioner Phelan conceded, one of the three alerts was placed there at the request of Scott Rush's father. There was no point in establishing that alert unless it was intended for a purpose. I will return to consider the cavalier way in which the activation of, at the very least, the alert initiated at the request of Lee Rush was treated.

James Watson, an AFP member and legal adviser to the Commissioner and to AFP members, said in the course of his evidence on the occasion of the hearing before Finn J that:

It was the triggering of this alert [one of the three passenger analysis clearance and evaluation system ('PACE') alerts that had been activated by Scott Rush on the occasion of his departure] which connected Mr Rush with eight other persons of interest. It was information obtained in the course of this extant AFP investigation (including as a result of the activation of the PACE alert handled by Federal Agent Hingst) which caused Mr Rush's details to be included in the AFP letters of 8 and 12 April.<sup>20</sup>

Although, as I say, it is a matter for judgment, it would be my view that prior to the departure of the known eight of the Bali Nine (excluding Myuran Sukumaran), the AFP possessed more than sufficient evidence to justify the apprehension of those eight Australian citizens, with the inevitable consequence that they would have been subjected to Australian law, charged, tried, and, in all likelihood convicted and sentenced in relation to the crimes that they intended to commit against Australia and its citizens.

There is obviously, in every proposed prosecution, some uncertainty whether a conviction would necessarily result. It is not to the point that one or more of these eight young Australians citizens may have been acquitted. What is to the point is that the timely arrests prior to the departure of eight of the Bali Nine would have

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<sup>20</sup> *Rush's Case* (2006) 150 FCR 165, 174-5 [24].

ensured that none of the nine were ever exposed to the death penalty and that Myuran Sukumaran and Andrew Chan would not now be dead.

It was the obligation of the AFP to prevent the commission of the crime in this instance. It would have accomplished that obligation had it apprehended the identified eight within Australia. The result of the apprehension of the known eight may well have meant that Sukumaran might never have been identified and might never have been brought to justice as a co-conspirator. The fact is that in delegating its obligations to investigate and prosecute any crimes associated with the Bali Nine to its Indonesian counterparts, the AFP put it beyond its control to 'identify the organisers in Australia' and to identify 'source of narcotics in Indonesia'<sup>21</sup> — the AFP's stated purpose in communicating with the INP, at first instance, on 8 April 2005.

Further, misleading information, purportedly supporting the decision to delegate responsibility for this operation to the INP, was offered by the AFP on the occasion of the recent press conference. It was said, in the course of that conference, that it was not for Australia to impose its will or direction in relation to the investigation and prosecution of charges on a foreign shore to a foreign police force.

The AFP letter to the INP of 8 April gives the lie to that assertion. The letter seeks cooperation. The AFP would hardly suggest that in 'strongly request[ing] [of the INP] that no action is taken until interdiction commences in Australia as early interdiction will hamper the identification of the organiser/recipients in Australia' it was making an idle request.<sup>22</sup> Further, there can be no doubt that the request made in the paragraph numbered 4 that 'should they suspect that CHAN and/or the couriers are in possession of drug at the time of their departure that they take what action they deem appropriate'<sup>23</sup> and the 'request that you consider searching NYUYEN [sic], CZUGAJ and RUSH soon after the first group are intercepted' were consistent with the initial request for cooperation.<sup>24</sup>

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<sup>21</sup> Letter from Paul Hunniford to INP, 8 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 173 [22].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Letter from Paul Hunniford to INP, 12 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 174 [23].

There can be no doubt that the Indonesian authorities would have cooperated, in the way that was first envisaged, had they been requested to do so. Having said that, the ultimate invitation to arrest was not only callous, but as is now conceded, deliberate. Finally, there can be no doubt that the AFP knew that one or more of the Bali Nine would likely be executed in consequence of the “intelligence” provided to the INP by the AFP. Deputy Commissioner Phelan, in the course of the recent press conference, said:

We understood – and I’ll be clear, and I’ve been saying this now for the best part of ten years – that decision was made in the full knowledge that we may very well be exposing those individuals to the death penalty. I’ve said that before and it’s not a position that the AFP has stepped away from. We knew what may occur as a result of that.<sup>25</sup>

The resignation of one of the case officers from the investigation is overwhelming evidence of the AFP’s expectation of the inevitability of the imposition of the death penalty. It is, of course, to the credit of that police officer that he or she distanced himself or herself from participation in the AFP conspiracy. It is of concern that the officers charged with the obligation of ‘safeguarding ... Commonwealth interests’ and ‘do[ing] anything incidental or conducive to the performance of such function would act as the AFP did in this instance.’<sup>26</sup>

The cavalier approach of the AFP to the likely imposition of a death sentence on one or more of the Bali Nine was reflected in the evidence given by Federal Agent Collins in the hearing before Finn J in the Federal Court. Federal Agent Collins had been informed by a Queensland police officer on secondment to the AFP, Damon Patching, that Scott Rush’s father Lee ‘wanted Scott to be approached.’<sup>27</sup> Collins commented to Patching that ‘this was not usual practice.’<sup>28</sup> Collins, who was on duty at the AFP office at Sydney Airport on 8 April, having been informed of the activations of the alert on Scott Rush, swore:

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<sup>25</sup> Australian Federal Police, ‘Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine’, above n 9, 9.

<sup>26</sup> *Australian Federal Police Act 1979* (Cth) s 8(1)(b)(iii), 8(1)(c).

<sup>27</sup> *Rush’s Case* (2006) 150 FCR 165, 171 [17].

<sup>28</sup> *Ibid.*

My conclusion at this stage [passengers having commenced boarding the flight to Bali] was that there was no reason for Scott Rush to be detained and that he should be allowed to leave without being disturbed. My view was that despite the concerns of Lee Rush, Scott Rush was an adult and there was no basis for detaining Scott Rush. I recall running my decision past my supervisor after outlining the result of my investigations and that my supervisor agreed with my decision.<sup>29</sup>

The overall actions of the AFP demonstrate an administrative avoidance by it of government policy. Further, the contention that a decision to provide assistance to a foreign nation, in the circumstance of this case, is regarded as an “operational decision for the AFP not involving notification to either the Attorney-General or Minister for Justice and Customs” is unsupportable. The decision of the AFP to expose the identified members of the Bali Nine to the death penalty was a cold and callous decision. It exposed all of the eight identified Australian citizens to an almost inevitable execution by firing squad. Fortunately, the death sentences imposed on four of the six had been reduced to sentences of life imprisonment by the time of the conclusion of the appeal procedures in Bali.

The AFP continues to contend that it would act, in circumstances similar to those giving rise to the cooperation with the INP in the case of the Bali Nine, in the same way if presented with similar circumstances today; that is to say, notwithstanding the execution of both Chan and Sukumaran, the current AFP practice is to:

cooperate [with a foreign police force notwithstanding the availability of the death sentence as a punishment] up to the point a charge is laid irrespective of whether the dossier [being prepared in cooperation with the intelligence provided by the AFP] is being prepared for a likely charge which will eventuate in the death penalty.<sup>30</sup>

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<sup>29</sup> Ibid 172 [21].

<sup>30</sup> *Rush's Case* (2006) 150 FCR 165, 180 [53].

## IV LESSONS NOT LEARNT

That attitude on the part of the AFP is abhorrent. If the AFP cannot deduce from relevant legislation, treaties, and guidelines that they are not permitted to cooperate with a foreign police force, where the likely outcome of such cooperation will expose an Australian citizen to the death penalty, then clearly it is time for legislation, prohibiting cooperation in those circumstances, to be imposed on the AFP.

Alternatively, to adopt the suggestion of my colleague, Colin McDonald QC, of the Northern Territory Bar:

In order to avoid as much as is possible the exposure of Australian citizens to the death penalty, the first practical suggestion is for Australia to domestically legislate and incorporate into domestic law the *Second Optional Protocol to the International Covenant of Civil and Political Rights*.<sup>31</sup> This practical step would prevent any Government in Australia in the future, in the law and order auction world of Australian politics, from reintroducing the death penalty. It would also ensure the exposure of an Australian citizen to the death penalty was a relevant legal consideration in administrative decision making which might expose such a citizen to the death penalty.

The second practical step involves the writing of one letter by the Minister for Justice to the Commissioner of the Australian Federal Police, pursuant to section 37(2) of the *Australian Federal Police Act 1979*. That letter would be a direction to the Commissioner that AFP members are not to intentionally and predictably expose Australian citizens to the death penalty in AFP operations. By subsection 37(4) of the same Act the Federal Police Commissioner is obliged to comply with such a direction.<sup>32</sup>

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<sup>31</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

<sup>32</sup> Colin McDonald, 'Don't Bury us Before we're Dead' (Paper presented at the Criminal Lawyers Association of the Northern Territory 11<sup>th</sup> Biennial Conference, Remote Justice, Bali Hyatt Hotel, Sanur Beach, Bali, Indonesia, 5 July 2007) 10 <<http://clant.org.au/index.php/the-bali-conference/2007>>.

Finally, in the context of the actions of the AFP, something should be said about the doctrine of substantive, legitimate expectations — the doctrine that was rejected by Finn J as not having any application in Australia.

The Hong Kong Court of Final Appeal summarised the doctrine in *Tung v Director of Immigration* [2002] 1 HKLRD 561:

The doctrine recognises that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which a person has a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority.<sup>33</sup>

In rejecting the application of the doctrine in *Rush's Case* Finn J relied, principally, upon the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 where, in a joint judgment, McHugh and Gummow JJ said:

The doctrine of “legitimate expectation” has been developed in England so as to extend to an expectation that the benefit in question will be provided or, if already conferred, will not be withdrawn or that a threatened disadvantage or disability will not be imposed. This gives the doctrine a substantive, as distinct from procedural, operation.

The earlier English decisions with respect to “legitimate expectations” were discussed by Mason CJ in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 and by McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In *Quin*, Mason CJ observed:

In the cases in this Court in which a legitimate expectation has been held entitled to protection, protection has taken the form of procedural protection, by insisting that the decision-maker apply the rules of natural justice. In none of the cases was the individual held to be entitled to substantive protection in the form of an order requiring the decision-maker to exercise his or her discretion in a particular way.

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<sup>33</sup> *Tung v Director of Immigration* [2002] 1 HKLRD 561, 600 [92].

The prevailing view in this Court has been, as Stephen J observed in *Salemi (v MacKellar (No 2))* (1977) 137 CLR 396, that: '(t)he rules of natural justice are "in a broad sense a procedural matter"',<sup>34</sup> echoing the words of Dixon CJ and Webb J in *Commissioner of Police v Tanos* [(1958) 98 CLR 383].<sup>35</sup>

That remains the decision in this Court and nothing in this judgment should be taken as encouragement to disturb it by adoption of recent developments in English law with respect to substantive benefits or outcomes.<sup>36</sup>

Colin McDonald QC in addressing the issue at the Criminal Lawyers Association of the Northern Territory 11<sup>th</sup> Biennial Conference Remote Justice in Bali on 5 July 2007 said:

it is difficult to think of a more basic and legitimate expectation of Australian citizens than that their Government and Commonwealth officers not intentionally and by deliberate act expose them predictably to the death penalty in accordance with often repeated Government policy on Australia's abhorrence of the death penalty.

...

Justice Felix Frankfurter observed in 1960 'in a democracy, in our society the most important office is the office of citizen'.<sup>37</sup> It is hard to argue with the proposition ... If [it is] ... correct, and given the abhorrence of the death penalty as a basic value of Australian Society is it not a *legitimate* expectation of Australian citizens that their own Commonwealth officers will not predictably expose them to the death penalty overseas by administrative decisions even where those decisions are made to combat crime?<sup>38</sup>

It is virtually impossible to resist the notion.

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<sup>34</sup> *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 442, quoted in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 22, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [67].

<sup>35</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 22, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [67].

<sup>36</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [66]–[67].

<sup>37</sup> McDonald, above n 32, 34, quoting Felix Frankfurter and Phillip B Kurland (ed), *Of Law and Life and Other Things That Matter: Papers and Addresses of Felix Frankfurter* (Harvard University Press, 1965).

<sup>38</sup> McDonald, above n 32, 33–5 (emphasis in original).

## V CONCLUSION

In summary, it is submitted that immediate steps must be taken to ensure that no Australian citizen is ever again exposed to the risk of the death penalty in circumstances similar to those that gave rise to the deaths of Andrew Chan and Myuran Sukumaran. Further, there should be an acknowledgement, on the part of the Australian Government, of the immoral behaviour of the AFP and a condemnation of its actions to both the Australian people and the Indonesian Government, with a request of the latter, as a close ally and friend, that the improper actions of the AFP be recognised by an order for deportation of the remaining seven of the Bali Nine to Australia, to be dealt with in accordance with Australian law.



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