

21 March 2023

The Attorney-General
The Hon. Mark Dreyfus KC, MP
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By Hand



Section 17 Submission regarding the United States of America v Daniel Edmund Duggan



COLLAERY
— LAW —

NSW Local Court Extradition Proceedings 2022/00314964

Introduction and Summary

1. We have recently taken over this matter and advise that we act for Daniel Duggan in the above proceedings. We make the following submission on his behalf and request that you exercise your general discretion under Section 17 (1) (b) (c), to direct the magistrate to release this Australian citizen and father of six and ultimately disallow his extradition, to the United States.
2. The next scheduled date in the proceedings is 4 April 2024 when our client will seek an adjournment of the proceedings while he awaits a decision by the NSW Legal Aid Office to grant him aid to allow his continued legal representation. This has been necessitated by the actions of the United States through the Australian Federal Police in obtaining a temporary restraining order from the Supreme Court of NSW over a property owned solely by Mr Duggan's wife she was selling to fund the case.
3. We also write to request that you direct your officers not to oppose a forthcoming bail application we propose to make on a date convenient to the Court on behalf of Mr Duggan, based on the significant special circumstances pursuant to Section 15 of the *Extradition Act 1988* (the "Extradition Act") outlined in this submission. We hope such application will not be necessary.
4. The power entrusted to the Attorney-General under Section 17 is a vitally important element of the Act. Section 17 enshrines the responsibility and authority of an elected official in our representative democracy to ensure the administration of justice, procedural and judicial fairness, as well as Australian sovereignty is upheld to the highest standards.

5. Section 17 assumes that the Attorney-General will scrutinise all elements of an extradition request by a foreign government to ensure it is not flawed or infects the subsequent technical legal advice of the Department. The current structure of the Extradition Act provides for only a perfunctory administrative review by a Magistrate. Proper review lies with the Attorney-General and in this submission, we expose flaws, discrepancies and omissions in the United States indictment and subsequent Extradition Request that are largely outside the Magistrate's s19 purview.

Background Summary

6. Mr Duggan is an Australian citizen with no adverse record whatsoever, arrested on 21 October 2022, and held in isolation at the maximum-security Lithgow Correctional Centre for most of the past 519 days, alongside convicted criminals serving life sentences. This breaches United Nations conventions to which Australia is a signatory. Mr Duggan faces Section 19 proceedings under the Extradition Act brought on behalf of the United States of America (the "United States") that are currently listed for hearing on 24 May 2024. Our client disputes all the allegations made against him.
7. We seek to advance the rights and interests of Mr Duggan and his large Australian family. We ask that you not allow his extradition to the United States for a range of well-founded legal reasons contained in this submission. Further, we ask that you permit him to be with his family while proceedings, likely to be protracted, at Magistrate Court, and if necessary, Federal Court level proceed. Our client is manifestly not a flight risk.
8. The family's situation became more dire in November 2023, when the United States seized Mr Duggan's wife's house. This was their only source of funds to adequately finance Mr Duggan's case and to provide an income for their children, as Mr Duggan was the primary breadwinner for the family.
9. Mr Duggan was a member of the United States Marines from 1990 to 2002 when he was honourably discharged and came to live in Australia. He is man of exemplary character, who is married to an Australian and lives in New South Wales with his six children.
10. Mr Duggan has been a permanent resident of Australia since 2002 and was approved for Australian Citizenship in 2011. He became an Australian citizen on 26 January 2012. He consciously relinquished his United States citizenship and has upheld his Oath to Australia. In return, the Australian government owes a duty of care and natural justice to Mr Duggan as a citizen. It also owes a duty of care to his six Australian children. We seek to demonstrate why ordinary Australians would expect issues of human rights and proper public policy affecting Mr Duggan and his family to

outweigh the reciprocity push emanating from the United States and pressed by your officials on behalf of the United States.

11. There are several basic errors in the way the United States ('the Applicant') puts its case. We submit that at least one of these errors goes to the heart of the matter and may not be rectified retrospectively. Fundamentally and critically the Applicant is incorrect concerning Mr Duggan's citizenship at the time of the alleged substantive offences and therefore bases its case on an incorrect factual foundation. At paragraph 74 of the Applicant's submission to the Local Court dated 17 March 2023 it is stated as follows: 'At the relevant period of alleged offending, the Respondent was a United States citizen.' This is not the case. The Kenerson Affidavit acknowledges that Mr Duggan acquired Australian citizenship on 26 January 2012 (Appendix 3) but does not address the loss of US citizenship consequent upon foreign naturalisation declared in the US *Immigration and Nationality Act* – section 349 which is codified in Title 8 USC 1481. We address this issue further in this submission.
12. Amongst other errors, some of which are detailed below, the Indictment claims that Mr Duggan was in the proximity of an aircraft carrier that was in fact more than 2000 km away from Guangdong Province where he was located.
13. None of the seven other co-conspirators listed in the Indictment have been charged with offences related to it, including an Australian citizen and a former US military pilot.
14. We submit, that this case fails to meet the criteria for extradition from Australia under the Extradition Act, in that there is no dual criminality, and that the offences are political in nature.
15. The case has also been the subject of an inquiry into the behaviour of ASIO by the Inspector General of Intelligence and Security (IGIS) who investigated and cleared ASIO of six out of nine of Mr Duggan's complaints, while also finding that one aspect of ASIO activity transcended "the bounds of propriety". We do not know the substance of this finding.

United States Allegations

16. The United States seeks the extradition from Australia of its former citizen Daniel Duggan alleging that,

'Beginning in or around November 2009, and continuing up to and including on or about November 27, 2012, Duggan and his co-conspirators conspired to export and exported defense services to the People's Republic of China ("PRC" or "China") in the form of aircraft carrier approach and landing training.

Duggan and others conspired to provide military training to PRC pilots relating to aircraft carrier approach and landing, and conspired to evade the prohibitions and

licensing requirements of the AECA and the ITAR. Duggan also provided military training to PRC pilots between March and April 2012 and in November 2012. In addition, Duggan and his coconspirators wired in United States (U.S.) dollars, which traveled through the United States, as payment for their exports of defense services.

17. There are two substantive allegations (counts 2 and 3) on which the entire matter rests, and two attached counts that may only stand if 2 and 3 are upheld. We submit that the two substantive allegations, while disputed on citizenship grounds, were not offences under Australian law at the time and fail, in any event, the dual criminality test.: The four counts in the Indictment are:

a. **Count 1**

Conspiracy to violate the Arms Export Control Act and to defraud the United States, in violation of Title 18, United States Code (U.S.C.), § 371, carrying a maximum penalty of 5 years' imprisonment;

b. **Counts 2 and 3**

Violations of the Arms Export Control Act, in violation of Title 22 U.S.C., § 2778, and Title 22, Code of Federal Regulations ("C.F.R.") §§ 126.1 & 127.1, each carrying a maximum penalty of 20 years' imprisonment for each count; and

c. **Count 4**

Conspiracy to commit money laundering, in violation of Title 18 U.S.C., § 1956(h), carrying a maximum penalty of 20 years' imprisonment.

Selective Prosecution

18. We say that geopolitical events in the US-China relationship led the Trump Administration to select Mr Duggan for a salutary political prosecution. Elements of the Coalition aligned national security bureaucracy in Canberra worked closely with US agencies in support of the US prosecution. This activity was, in certain respects, improper and disproportionate to the nature of the alleged offences said to have occurred between 12 to 15 years ago. Nothing in the US Indictment establishes any intent by Mr Duggan to commit any offence. Counts 2, 3 and 4 cannot constitute an offence in US law as our client was neither a US person nor US citizen at relevant times.
19. Count 1 is an alleged conspiracy between 2009 and 2012 that we say has been manufactured by United States authorities based on a loose association between eight actors, namely alleged co-conspirators **A,B,C,D,E,F,G** and **H**, some of whom were highly regarded professional and internationally recognised test pilots, trainers and engineers at the top of their fields, who were, in the mind of any reasonable person, unlikely to deliberately break the law, or be involved with any alleged conspiracy. Some are clearly not in any legal sense of the word co-conspirators. Data search by US authorities revealed them to be occasional correspondents, basically unconnected to any *modus operandi*.

They were:

- A. [REDACTED], CEO of Test Flying Academy of South Africa (TFASA) (Co-conspirator H)
- B. Su Bin a Chinese national and CEO and owner of Co-Conspirator F, who was a business agent for many westerners, specialising in aviation amongst other general business. He was arrested in September 2012, prosecuted for defence hacking totally unrelated our client, jailed for several years following a plea deal and now back in China.
- C. a South African lawyer who had no contact with our Client.
- D. [REDACTED] a former RAF officer and test pilot, now a UK and Australian citizen. [REDACTED]
- E. [REDACTED] a former US pilot.
- F. a company owned by Su Bin, co-conspirator B.
- G. [REDACTED] Licenced Aircraft Maintenance Engineer. [REDACTED]
- H. a test flight academy based in South Africa, Test Flying Academy of South Africa (TFASA).

20. Only Su Bin has been prosecuted by the United States for entirely unrelated offences and not for the alleged conspiracy. The United States now seeks, belatedly, to make out a conspiracy by our client that allegedly commenced 15 years ago when Su Bin sounded out Mr Duggan and other pilots to provide aviation services which were at all relevant times lawful. Manifestly, US authorities cannot make out a conspiracy.

Oppressive US conduct

21. We submit that the pursuit of our client by the United States is political and oppressive. As just one example of the disingenuous nature of the claims made in the extradition request by the United States, the Affidavit by Mr Erik M. Kenerson (the "Kenerson Affidavit") supporting the extradition request deposes numerous irrelevant statements such as,

According to email metadata, Duggan traveled from Melbourne, Australia to Beijing, China in May 2012 and returned to Australia no later than May 20, 2012. Coconspirator F records obtained from Coconspirator B's electronic devices state that Coconspirator F paid for Duggan's travel.

22. Mr Kenerson implies throughout his affidavit that investigative data research revealed evidence of a covert conspiracy. This suggestion is disingenuous and not matched to any evidence of unlawful intent by our client. While B may have had improper connection to PRC agents, this was unknown to our client and others. The US indictment presents no evidence to the contrary. Ostensibly, B was an employment broker for AVIC, founded in 1951 and currently having over 500,000 employees worldwide, AVIC has strong links with the United States through, amongst other things, its purchase of American aircraft engineering companies and manufacturers such as Continental Motors Inc in 2010, and the American aircraft manufacturer Cirrus in 2011 and exchange of personnel.
23. Further to the flawed links suggested in the indictment our client's activity in China was monitored by ASIO and United States security services. Significantly, no part of the indictment relies on person to person exchanges with our client. We are instructed that at relevant times ASIO and United States officials were discussing issues with our client, in anticipation that he would either assist them with intelligence acquisition involving China and otherwise passively enable them to monitor our client's engagement in China which they openly encouraged.
24. While a lack of candour in the Kenerson Affidavit may depend upon what the deponent was told, the overall impression is of compromising activity by ASIO in collaboration with a foreign intelligence service. This activity was inimitable to the safety of our client and his family. Against the background of contact between Australian and US intelligence officials and our client, we also question the propriety of the assertion in the Indictment that,
- "Neither DUGGAN nor any of his co-conspirators applied for a license from the United States government to provide defense services to any foreign nationals."*
25. Having tacitly oversighted our client's engagement, the United States initiated salutary prosecution action against him despite agents of the United States being complicit in the conduct complained of.

Salutary Prosecution

26. The United States sealed an indictment in 2017 at the height of the Trump Administration stand-off with China. The Indictment sets the tone of the US attempt. It commences in theatrical terms citing the alleged 'alias' used by Daniel Duggan viz.,

*DANIEL EDMUND DUGGAN also known as DING SAN XING,
DING SAN QING, DSQ, IVAN,*

27. Our instructions are that the various names reflect a recognised cultural practice in China of Chinese in conversation (in our client's case intercepted communications) referring to a Westerner by a nickname often by physical attribute. These names are usually given to someone by third parties. They are not aliases adopted by Daniel Duggan in the sense used in criminal court proceedings. They are, to the limited extent they might be references to our client, merely adopted in cultural usage in China. They have no sinister connotation. The AGD has adopted the same theatrical descriptor.
28. The prejudicial descriptor of our client in the pleadings sets the tone to the affidavit by Mr Kenerson upon which the extradition request is based. In an extraordinary paragraph that admits the Chinese origin of the alias *Dan San Xing*, Mr Kenerson asserts use of alleged alias' by our client but concludes that our client received mail to the same address by his full European name and signed off as 'Dan'. He fails to explain where the alleged sobriquet 'Ivan' comes from. Perhaps a reference to a Russian as well as Chinese names may have assisted the Grand Jury in issuing the Indictment. It is difficult to know what to make of the US lack of cultural awareness, but the claimed aliases have been freely used by AGD representing the United States. Australian enforcement authorities would not, in our experience, introduce a Statement of Facts in the following language,

In the course of his involvement in the charged conduct described herein, Duggan used the alias "Ding San Xing" and the Google email address dingsanxing@gmail.com."

The Alleged Conspiracy

29. Paragraph after paragraph of the Kenerson Affidavit has little probative value and will not assist a committal court. It falls short in many respects of the standard of evidence adopted in Australian committal proceedings. The Kenerson Affidavit contains vague non-particularised assertions unsupported by connective evidence. This is not a matter that may be dismissed by your Department on the 'no evidence' basis.
30. The Kenerson Affidavit refers to alleged co-conspirators by alphabetic letters A, B, C, D, E, F, G and H and wanders from one non-sequitur to another concerning them. The affidavit neither identifies the alleged actors nor their precise role. The affidavit is silent with regard to any prosecution action against the other alleged co-conspirators. The principal alleged co-conspirator does not appear to have been prosecuted for his alleged role. We draw your attention to just a few matters,
- a. Mr Kenerson alleges that alleged conspirator C purchased an aircraft in the United States that was unlawfully exported to South Africa and used to train pilots. There is no evidence that in the years this alleged subterfuge was underway our client had any knowledge, participation or even peripheral involvement in the transaction. He denies any such involvement.

- b. Mr Kenerson alleges that on occasions our client purchased aircraft parts from China. On one occasion he asked alleged co-conspirator B, (Su Bin), a Chinese national for assistance in securing the part. These purchases were for an ex-Chinese aircraft our client used in his aircraft joy flight business established in 2004 in Tasmania, which operated legally under Australia law. Similar Chinese aircraft have been imported to Australia. There are numerous similar such aircraft operating throughout Australia including one parked at Canberra Airport. Mr Kenerson's claims can have no relevance whatsoever to the alleged conspiracy.
- c. Another misapprehension in the Kenerson Affidavit is where it is alleged that Mr Duggan was informed by the United States that he would need a licence to train foreign military personnel. This related to an entirely separate proposed engagement with the Malaysian Airforce that our client did not proceed with for the very reason that he did not intend to train military pilots. We submit that rather than providing evidence of Mr Duggan's involvement in the alleged conspiracy, it is further evidence of Mr Duggan's good character and intent to comply with the law. It should be highlighted here that the Kenerson affidavit disingenuously compares a military air force in Malaysia, with a privately owned, civilian flying school in South Africa that uses publicly available, open-source information (as referenced later in this submission).
- d. It was also suggested incorrectly that there should have been a Technical Assistance Agreement for the civilian pilot training our client was giving in Tasmania. This is a misapprehension by the US that persists despite these activities being legal in Australia under Australia's Civil Aviation Safety Regulations 1998 (CASR) as discussed below.
- e. What this commentary does establish is our client's prudent awareness of the rules that he says he abided by. Mr Kenerson is unable throughout to evidence any intent or attempt by our client to breach US laws.
- f. Mr Kenerson states ambiguously at para 87. 'Duggan demonstrated an awareness that exporting defense services to PRC pilots was risky.' This is another non-sequitur. We say that this bald claim by Mr Kenerson cannot be portrayed as consciousness of guilt for unspecified conduct. That public source carrier landing documentation was located on electronic devices seized from Co-Conspirator B probably in 2012 when he was arrested. That is of no evidential value in accusing our client of law breaking. We are advised Mr Duggan's use of the word "risk" was taken out of context and disingenuously associated with a defence service which it was not. We are instructed that he

was referencing future business risks associated with leaving his businesses in Australia, for new businesses in China.

- g. Another bold and completely inaccurate factual claim also marks the Kenerson affidavit. Kenerson claims that the alleged aircraft carrier training our client gave in March 2011 (that our client says never occurred) likely occurred in Guangdong Province, because *'the Chinese aircraft carrier Liaoning (CV 16) was based' there*.¹ In fact the *Liaoning* was neither operational nor located in Guangdong Province at that time. Publicly available material reveals the *Liaoning* was under construction between 2002 to at least 8 June 2011 in a naval shipyard more than 2000kms away in Dalian as shown in **Figure 1**, and did not complete sea trials until 10 August 2011, where it continued to dock in Dalian.² The aircraft carrier did not enter the service of the People's Liberation Army navy until 23 September 2012,³ 18 months after the alleged training took place. The Kenerson allegation is false.

Figure 1

Dalian to
Guangzhou is
more than
2260km

Guangzhou is
on a river, not
an ocean port



- h. Another bold assertion is that Mr Duggan was presenting a slide deck presentation entitled **"The Fighter Pilot's Guide to Mission Success"** to Chinese businesses in 2010 and 2011. This presentation was a corporate training / team building course, that was given numerous times both in

¹ Kenerson Affidavit, [79(b)].

² Tania Branigan and Jason Burke, 'China's first aircraft carrier launches with pride amid regional tensions', The Guardian (10 August 2011), <<https://www.theguardian.com/world/2011/aug/10/china-aircraft-carrier-launch>>; Chris Buckley, 'China launches first aircraft carrier on maiden sea trial' Reuters (10 August 2011), <<https://www.reuters.com/article/us-china-military-carrier/china-launches-first-aircraft-carrier-on-maiden-sea-trial-idUSTRE77900D20110810>>; Hindustan Times, 'China's second aircraft carrier's sea trial likely in February' (09 January 2018), <<https://www.hindustantimes.com/world-news/china-s-second-aircraft-carrier-s-sea-trial-likely-in-february-report/story-kTWQ4DQWCU4KbHZ2lpLbBO.html>>; BBC News, 'China's first aircraft carrier enters service' (25 September 2012) <<https://www.bbc.com/news/world-asia-china-19710040>>.

³ The Guardian, 'China's first aircraft carrier completes sea trials' (02 January 2014), <<https://www.theguardian.com/world/2014/jan/02/china-aircraft-carrier-completes-sea-trials>>.

Australia and in China to companies such as Hewlett Packard. This is another example of the United States combining completely unrelated activities into an alleged conspiracy. Raising this issue is a blatant prejudicial claim. It has nothing to do with the alleged offences relating to South Africa in the indictment. It uses fighter pilot training and preparation as a metaphor for corporate success. A video of one such corporate training day can be provided.

- i. In another factually wrong claim, the Applicant makes some moment of the fact that for the perfectly legitimate slide deck presentation to Chinese businesses in 2010 and 2011, Mr Duggan was paid \$9,500. This remuneration is rolled up into an alleged overall figure of approximately \$182,000 that Mr Duggan earned between 2009 and 2012, but only \$33,000 related to the alleged offences in South Africa.
31. We doubt that an Australian court hearing an extradition request at the accepted standard for ordinary committal hearings may dispose of the United States' request based on Mr Kenerson's deposition. In our respectful view the AGD officers should have queried the United States documentation. A solution is that the United States should be separately represented before the Court and be required to provide adequate particularisation to satisfy the due process treaty accord the United States has with Australia. We need not emphasise that pursuant to s55Z of the Judiciary Act 1903 AGD officers should properly assist the Court.

Conflict of Interest within AGD

32. The apparent unquestioned acceptance by AGD of vague and convoluted claims against our client appears to pose the potential conflict of interest that the late Justice Paul Finn had in mind when he observed in Pasini,

...the Attorney-General's Department officials acting in the extradition process perform two distinct functions - one in aid of Mexico in relation at least to the s 12 and s 19 proceedings; the other in aid of the Attorney-General in relation to the Minister's s 16 and, let it be said, s 22 functions. In acting in the performance of each of these functions, the officers concerned are acting in furtherance of an interest that is in each case separate and distinct from the other. In the solicitor-client relationship the officers concerned are acting in the interests of, and owe duties to, the Mexican officials. In the officer-Minister relationship, the officers concerned are acting in aid of the Minister to further the relevant public interest and public purposes served by the statutory power conferred on the Attorney. The respective interests so served I re-emphasise are separate, not common, interests.

*I mention the above matter for the purpose of calling into question the appropriateness of the practice apparently adopted by the Attorney-General's Department in this case of having the same officers serving both the Minister and the Mexican officials (hence Mexico). There well may be good reason for not translating in an unmodified form to the public sector the common law's objection to a person serving "two masters" in the same or related matters - an objection affecting lawyers in the private sector with increasing stringency: see eg *Wan v McDonald* (1992) 33 FCR 491; *Dal Pont, Lawyers' Professional Responsibility*, Chs 8, 9. Nonetheless the public still is entitled to appropriate reassurance that the integrity of the advisory function in the public sector does not appear to be compromised through an adviser in a given instance being in a position of conflicting responsibilities.⁴*

33. Despite amendments to the Judiciary Act 1903⁵ consequent upon Finn J's expression of concern in *Pasini* the concern for this administrative enquiry pursuant to the *Extradition Act 1988* is not, in our respectful view, alleviated by a statutory authorisation for the Attorney's officers to serve conflicting interests.
34. Your Departmental officers act for the United States yet they are bound in their conduct by regulations made pursuant to the *Judiciary Act 1903*, in particular s55Z. Your officers are not in our view protected from ordinary judicial criticism by s55R of the Judiciary Act 1903. Section 55R says,
- AGS may act for more than one party**
- The AGS may act in a matter for 2 or more parties who have conflicting interests in the matter if to do so has been approved by the Attorney-General.
- (a) by way of approval in relation to the particular matter; or
- (b) by way of written arrangements covering the circumstances in which the AGS may so act.
35. It was well within the widely respected usual good-practice standard of the Australian Government Solicitor's Office to ensure that the evidence to be presented on behalf of the United States meets evidential requirements for committal to the treaty agreed due process standard, yet this has not been done by the AGD. We refer not only to the vague assertions throughout the Kenerson Affidavit but to crucial information known to the AGD that may cast doubt on the validity of three of the four counts in the Indictment against our client.
36. Particularisation of our client's alleged conspiratorial conduct in the period an alleged co-conspirator "B" was plea bargaining with authorities in an unrelated prosecution is vital to establish whether any element of our client's conduct in responding to "B" who cast himself as an employment broker could constitute an offence. We say this for two

⁴ *Pasini v Vanstone* [1999] FCA 1271 [49]-[50].

⁵ By Act No. 7 of 1999 s55R among other amendments was inserted in the *Judiciary Act 1988*.

reasons. Firstly, was "B" an agent provocateur. Secondly, our client could not be an accessory or co-conspirator to certain of the alleged offences if at relevant times he was not a US citizen.

Duggan was not a US Citizen

37. In natural justice terms it was surely incumbent upon the AGD to determine when the alleged elements in the alleged conspiracy occurred and whether our client was an Australian citizen at relevant times. The Kenerson Affidavit asserts that our client's offences occurred, '...beginning in or around November 2009, and continuing up to and including on or about November 27, 2012.' At the time of the claimed offences in Counts 2 and 3 our client was neither a US person or a US citizen. Those counts cannot stand and this infects the remaining counts. We believe you should have been advised of this.

38. Our client became an Australian citizen on 26 January 2012. Contrary to the suggestion in the Kenerson affidavit (para129) our client did not renounce his US citizenship from 2016. Section 349 of the *US Immigration and Nationality Act* is codified in Title 8 USC 1481 viz.,

1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions

(a) a person who is a national of the United States, whether by birth or naturalisation, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality –

(1) obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years;

. . .

39. The operation of s349 has been considered by a US Court of Appeal,

*In establishing loss of citizenship, the Government must prove an intent to surrender United States citizenship, not just the voluntary commission of an expatriating act such as swearing allegiance to a foreign nation. Congress does not have any general power to take away an American citizen's citizenship without his "assent," which means an intent to relinquish citizenship, whether the intent is expressed in *253 words or is found as a fair inference from his conduct. The expatriating acts specified in § 349(a) cannot be treated as conclusive evidence of the indispensable voluntary assent of the citizen. The trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also*

*intended to relinquish his citizenship. Cf. Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757. Pp. 544-547.*⁶

40. The AGD knows that Daniel Duggan swore an oath of allegiance to Australia at Hobart on Australia Day 2012 and had been a permanent resident since 2002. His Australian wife was present. He had long made his life away from the United States. The Oath he swore to Australia in 2012 included: "from this time forward under God I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey". By doing so, he relinquished his United States citizenship and has upheld his Oath to Australia ever since and has not violated Australian law. He had long ceased taxation returns in the United States. He is an Australian taxpayer.
41. On 26 January 2012 our client ceased by oath of allegiance to Australia and conduct to be a United States Citizen. For protective reasons in 2016, following overt intelligence contact by US authorities that may have compromised his family safety, he put the matter beyond doubt by going to the US Embassy in Beijing and formally recording the renunciation of his US Citizenship from 26 January 2012 forward. The last paragraph of Mr Duggan's Statement of Relinquishment that was accepted unchallenged by the US authority bears reading. It says that his renunciation was effective from 26 January 2012(Appendix 3).
42. For this reason, Count 2 of the Indictment cannot stand. It states,

Between on or about March 5, 2012, and April 15, 2012, DUGGAN a United States citizen, and others known and unknown to the Grand Jury, did wilfully violate and attempt to violate the Arms Export Control Act and International Traffic in Arms Regulations, by exporting, attempting to export, and proposing to export, defense services to the People's Republic of China without a license or authorization obtained from the United States Department of State.
43. Counts 3 and 4 of the Indictment by the dates cited are similarly infected by a misapprehension by the United States that our client was a United States Citizen at the relevant times of the alleged offences.
44. Plainly, three of the four counts in the Indictment proceed upon an erroneous basis and cannot stand in US law. United States law has no reach into Australia in relation to the alleged offences no matter how closely ASIO and US intelligence agencies have collaborated in bringing about counts two, three and four against, as ASIO head Mr Burgess has alleged publicly, 'top gun' Mr Duggan.

⁶ Vance v. Terrazas, 444 U.S. 252 (1980)

45. This leaves the United States with a single count of 'conspiracy', a charge occasionally referred to as the 'prosecutor's refuge'. The pleading recites events that are sought to be drawn together into a compendious course of conduct by our client. No reference is made to wider issues we are instructed to address further in this submission.
46. We express concern that you have not apparently been briefed in relation to the citizenship matter and how the United States is seeking to delve back in time to validate a count of conspiracy. Our client who has an unblemished record has been 519 days in solitary confinement in Australia as an 'NSI' classified detainee based on a fundamentally defective 'show trial' sought by the United States.
47. At relevant times Mr Duggan was an Australian citizen deserving of the protection of his country and not entrapment. We respectfully ask that you seek your own expert Counsel on the matters we address. It is incumbent upon Australia to ensure that the offences in the 17 September 2017 indictment presented by the United States are particularised accurately.
48. The *Extradition United States of America Regulations* made pursuant to the *Extradition Act 1988* Article 2 (4) says,
- If the offence has been committed outside the territory of the requesting State, extradition shall be granted if the laws in the requested State provide for the punishment of an offence committed outside of its territory in similar circumstances. If the laws in the requested State do not so provide, the executive authority of the requested State may, in its discretion, grant extradition.*⁷
49. An extradition hearing pursuant to Australia's treaty with the United States may not be conducted in accordance with the unfair and controversial 'no evidence' standard Australia has, most regrettably, established by treaty with many other countries. As Gleeson CJ observed in *Vasiljkovic*,
- [15] Many lawyers would find it surprising that, in responding to a request from Croatia for the surrender to its criminal justice system of an Australian citizen, Australia's requirements for supporting information are less than its requirements in responding to a similar request from the United States of America. The question of supporting information is a matter that affects human rights, and involves an important issue of public policy.*⁸

⁷ <https://www.legislation.gov.au/F1996B01257/asmade/text>

⁸ *Vasiljkovic v Commonwealth* [2006] HCA 40 per Gleeson CJ at [15]

Double Standards

50. Before the United States will agree to the extradition of one of its own citizens from the United States the First and Fourth Amendments to the US Constitution effectively mandate 'due process'. Those hearings are forensically challenging. The reciprocal nature of Australia's extradition treaty with the United States requires that not just a *prima facie* case be established but that the evidentiary process is fair and just. The United States can have no complaint about a due process requirement negotiated as a reciprocal element in the treaty with Australia. A probable cause process founded in the United States on the First and Fourth Amendments was a treaty guarantee. Gleeson CJ referred to this in clear terms in *Vasilikovic*,

[10] The practice of the United States has been, and remains, to include in extradition treaties to which it is a party a requirement that before any fugitive in the United States is surrendered it must be shown that there is probable cause to surrender that person to the criminal process of the foreign State and, because of the reciprocity inherent in extradition arrangements, a similar requirement applies when the United States seeks extradition of a fugitive from, say, Australia.⁹

51. Your departmental officials who act for the United States, appear not to have raised concerns as to the propriety of the US extradition request. We submit that there are fundamental issues of fact and jurisdiction associated with the United States extradition request yet to be attended to before a Section 19 hearing may usefully proceed. We believe that in the circumstances of this case it would be improper for the Australian Government to hide behind a s19 hearing. In the circumstances that would be a travesty of justice.

Suspension of statute of limitation by a 'Tolling Tactic'.

52. Another issue of concern is the 'tolling' tactic used to extend the five-year limitation period set by Section 3282 of the US Code (See Exhibits 4 & 5 to the Kenerson Affidavit). Our client's alleged offence in Count 2 would be well out of time for prosecution in the United States but for an extension period approved under a tolling regime peculiar to United States law, viz.,

⁹ *Vasiljkovic v Commonwealth* [2006] HCA 40 per Gleeson CJ at [15]

Exhibit 5:

Title 18, United States Code, Section 3292

Suspension of limitations to permit United States to obtain foreign evidence

(a)

(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

53. Mr Kenerson states (paras 121-125) that the US submitted a request to Australia on 23 June 2016 and a response was not received until 14 March 2018. The five year limitation period expired on or about 15 April 2017 however, while the US awaited a response from Australia, a Judge agreed to 'toll' the limitation period for 629 days.
54. Applying Section 3292(a)(2), the court shall rule upon the toll application no later than within 30 days. According to the Kenerson affidavit application was made on 23 June 2016 and ruled on 8 August 2016, which equates to 45 days. If these dates referred to in the affidavit are correct, this is a further ground upon which to assert that Count 2 is invalid. Another discrepancy associated with use of this tolling tactic is that the requested information that is assumed integral to the indictment to justify the suspension was not received until 14 March 2018, 6 months after the indictment was filed. It appears that the requested information was not required for the indictment and the request for more time was, to borrow a US term, 'nefarious'. The misuse of prolonged tolling tactics merely to extend limitation periods has been exposed frequently before courts in the United States.
55. Evidence of ongoing joint investigative intelligence activity by US and Australian officials across the limitation period sits uneasily with the claimed delay in the receipt of information by the US. Mr Kenerson's Affidavit reveals that the evidence asserted against our client was secured electronically either by seizure of electronic device data from Co-Conspirator B, Su Bin in 2012, or by reference to US and Australian border

control data searches. The electronic seizures involving Su Bin commenced around September 2012.¹⁰ The indictment was not returned by a Grand Jury until 12 September 2017. One Count in the indictment relates to April 2012. Tolling is relied upon to extend the five-year limitation period. The law requires evidence of a request for assistance to a foreign State. The Kenerson Affidavit does not particularise the substance of such request(s). This should be investigated now in Australia as our client's immunity by limitation period apart from citizenship is fundamental to his eligibility for extradition.

Role of the Attorney-General

56. Earlier in this submission we raised the question whether you have, pursuant to s55R of the *Judiciary Act 1903*, approved the AGS to act for the United States, and if so whether, in light of these submissions, it is appropriate for such approval to continue. We now respectfully ask you to consider whether there is conflict within your role as Attorney-General, as distinct from the conflict within your Department.
57. In *Vasilikovic* Gleeson CJ summed up the background to how you might exercise your ultimate discretion.
- [4] Treaties, and other international arrangements, on extradition have reflected certain concerns. Reciprocity is one. Another is the identification of the kinds of offence for which extradition may be sought. Political offences are commonly excluded. Extradition offences are usually limited to serious crimes. According to the principle of double criminality, the conduct constituting such an offence must also constitute a criminal offence according to the law of the surrendering State. Questions of possible penalty (particularly the death penalty) may call for attention. Assurances limiting the offences for which a surrendered person may be prosecuted are common[3]. Whatever is agreed about such matters will be reflected in the necessary legislation. Typically, however, because of the nature of the concerns addressed by extradition arrangements, and the relationship between such concerns and a nation's foreign relations, the legislation will give the executive authority an ultimate discretion to refuse a request for surrender even if all necessary conditions are fulfilled[4].*¹¹
58. The High Court's decision in *Vasilikovic v Commonwealth* has importance in a constitutional Chapter III sense and for the strength of Kirby J's dissent. Gleeson CJ's introductory remarks made clear that while the Court's focus in *Vasilikovic* was on the exercise of legislative power there are acknowledged issues of human rights and

¹⁰ <https://www.wired.com/story/us-china-cybertheft-su-bin/>

¹¹ *Vasiljkovic v Commonwealth* [2006] HCA 40 per Gleeson CJ at [4]

public policy involved in extradition arrangements. Justice Kirby's focus was wider and whether a more interventionist court may revisit *Vasilikovic* is a separate issue.

59. With regard to the exercise of legislative power, we note the dual role not just of AGD officials referred to by Finn J. in *Pasini*, but of your role as Minister and First Law Officer of the Commonwealth.

60. We observe with the greatest respect that Section 42 of the *Constitution Act 1901* requires the affirmation made by the Attorney-General to include the following,

*I do swear that I will well and truly serve **the people of Australia** in the office of Attorney General* (emphasis added).

61. This Ministerial affirmation stands together with the affirmation you first made as a Member of Parliament, namely,

I affirm my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, And whose laws I uphold and obey.

62. Our client is a citizen and member of the Australian community. The form of your affirmation to serve the interests of the people of Australia sits uncomfortably in the circumstances of this case with your officials subject to direction from yourself acting for the United States in these extradition proceedings. This might be ameliorated by circumstances where there is agreement on the facts and concord on social values and law. The circumstances of this indictment sealed by the Trump Administration are controversial and defects such as the necessity for our client to have been a US citizen at relevant times appear not to have been brought to your attention by your officers. While barbarous conditions in US jails is but one matter we are enjoining you to consider those conditions highlight the judicious role you have as Attorney-General in protecting Australian citizens.

63. The hearing on the substantive matter under Section 19 of the Act is due to take place on 24 May 2024 before Magistrate Reiss at the NSW Local Court in Sydney. Lacking proper particulars, and agreement on our client's citizenship status at relevant times, we have been unable to settle Mr Duggan's case both in fact and law. We are retained *pro tem* to seek an adjournment of the s19 extradition proceedings. At this stage, Mr Duggan is unable to meet our fees or the anticipated fees of Senior and Junior Counsel or their instructors.

64. Mr Bret Walker SC holds the brief to appear. We are anxious to have Mr Walker settle the case for Mr Duggan and to represent him. On a previous occasion Mr Walker informed the Court that, '...this matter falls well within the orbit of material which may give a political character to the alleged offences in question'. We also observe that in context Mr Duggan's decision to relinquish his United States citizenship means

that he 'may be prejudiced' at trial within the meaning of Section 7 (c) of the Extradition Act, at a time when that nation is in an election cycle of political polarisation and significant anti-China sentiment.

65. In this context the circumstances by which the United States used civil forfeiture proceedings to limit our client's capacity to fight the extradition request bears examination. In a mutual recognition process akin to proceeds of crime freezing orders, the United States recently secured an interim civil order from the NSW Supreme Court to freeze the sale by our client's wife of a home she owns in NSW. The United States claims that consulting fees of \$182,570.67 paid and openly banked in Australia by our client constituted money laundering and should be forfeited. Our client's then lawyers explained that the house sale was the only source of funds for our client's legal fees. The United States rejected, unreasonably, Mr Duggan's offer to hold the sum in trust or pay the alleged forfeiture sum into court if the sale was allowed to proceed. If we are right regarding our client's citizenship the money laundering count is defeated.

ASIO Activities

66. This oppressive conduct by the United States has other manifestations. On 11 November 2022 Mr Duggan submitted complaints to the Inspector-General of Intelligence and Security ("IGIS"), and oral testimony to the IGIS investigative team on 15 December 2022. Those complaints could have been better expressed by our client's then lawyers and were made before our client had received the indictment or had any detailed knowledge of the allegations within. This has enabled ASIO to avoid a full review. One example is the IGIS finding that ASIO did not 'lure' our client back to Australia. Mr Burgess made public show of this finding. Our client's complaint is that in the context of his contact with ASIO and the apparent satisfactory processing by ASIO of his Australian Civil Aviation approval to conduct flight training at Nowra NSW (for which employment he was returning to Australia) he had no notice that ASIO was working behind the scenes with the Trump Administration to have him extradited. 'Lure' may have been an inaccurate word, but the substance of his complaint stands in our view and will be pressed at any hearing.
67. Nevertheless, the IGIS has determined that certain conduct by the Australian Security Intelligence Organisation ("ASIO") "transcended the bounds of propriety" in dealings with Mr Duggan. Precise details of how the IGIS believes this to have occurred are held in a confidential report that has not been provided to Mr Duggan's lawyers. Mr Duggan received notice of the findings by letter dated 16 August 2023 (the "IGIS Letter" attached) but our client was not given a copy of this correspondence and the original complaint of 11 November 2022 until 29 January 2024. As such, our client disputes some of the findings in the report and we are instructed to seek the Court's leave to subpoena the IGIS Report in the interests of procedural fairness, the rules of

natural justice and to avoid the matter being infected by actual or perceived bias. We attach a copy of our letter dated 18 March 2024 to the IGIS

68. Mr Duggan has been involved in civilian training and flying ex-military aircraft since 2002; an activity that is legal in South Africa and regulated in Australia under the Civil Aviation Safety Regulations 1998 (CASR). Over the years he has had interactions with ASIO, not least because background checks are conducted persons who hold an Aviation Security Identification Card (ASIC) and applicants for citizenship.
69. One such interaction took place in December 2012. This was only three weeks after the end date of the Indictment after which there are no further allegations made against Mr Duggan.
70. Mr Duggan was contacted by telephone by an ASIO agent, supposedly in relation to his ASIC. During the call a meeting was arranged on or about 20 December 2012 at The Grand Chancellor Hotel in Hobart. When Mr Duggan arrived, he was surprised to be met by not only the agent who called but also by another ASIO agent, together with an officer who identified herself as being with the United States Naval Criminal Investigative Service ("NCIS").
71. During the conversation, it was made clear that ASIO understood that Mr Duggan had been conducting civilian training of student test pilots in China and South Africa. Mr Duggan asked whether there was a problem with him carrying out this work and the ASIO representative made clear that ASIO did not "want to interfere" with Mr Duggan's business. However, an ASIO officer suggested that while carrying on his legitimate business operations in China, Mr Duggan may be able to gather sensitive information which could be provided to ASIO in future. A document was produced for Mr Duggan to sign "in case you meet any Chinese generals" and therefore "we could do business" as it was put. Mr Duggan indicated that he would like to speak to a lawyer before signing, at which point the document was withdrawn. It was further suggested that before Mr Duggan next travelled to China, he should get back in touch with ASIO, which Mr Duggan duly did in early 2013.
72. Once again, a meeting was arranged at a hotel in Hobart in or about February 2013. On this occasion Mr Duggan was met in a hotel room by the original ASIO agent and the same United States NCIS officer. They spoke to him separately and the information flow generally covered the training he was carrying out in China. Once again there was no suggestion that this work was in any way outside either the law or the expectations of ASIO or the United States. At one point Mr Duggan asked if the document for his signature was available and he was told that it was not necessary. Towards the end of the meeting the ASIO agent warned him to take care in China and to remove the ASIO agent's details from his devices.

73. In May 2013, Mr Duggan and his family relocated to China joining the Australian business community where Mrs Duggan commenced her business and Mr Duggan consulted to AVIC. The suggestion and encouragement given by ASIO for Mr Duggan to gather sensitive aviation information whilst running his consultancy business in China compromised his safety and that of his family. Our client believes that compromise of US and/or Australian intelligence activity led to him being arbitrarily detained in China during the period from 2014 to 2022. The PRC refused to grant Mr Duggan an exit permit. The reason may lie with the US prosecution of Su Bin not that our client was aware or warned by ASIO. Mr Duggan had further contact with ASIO whilst in China, the detail of which is sensitive. It is extraordinary that ASIO continued this contact despite the risk to the Duggan family.
74. Mr Duggan is relieved to now know that the IGIS may support his view that certain conduct by ASIO was improper and placed he and his family at risk. He adopts the view that sensitive matters should be treated as such, despite his grievances. Accordingly, he has maintained a dignified silence and restraint throughout his incarceration. Should the matter go forward to hearing he will be put in the position of having to defend himself vigorously and transparently in the public domain.
75. It is a fundamental part of Mr Duggan's case that the offence is political in nature, as set out in the submissions prepared by Mr Walker SC and filed with the Court ahead of the hearing on 27 July 2023. Without proper access to the IGIS Report Mr Duggan will not be able to prepare his case. He may be obliged to file evidence that covers the entirety of his interactions with ASIO. In effect, his s19 submission is far from ready to be advanced prior to discovery. He is reluctant to provide further detail in public.

Dual Criminality Counts 2 and 3 Alleged Violation of the Arms Export Control Act and the International Traffic in Arms Regulations (ITAR)

76. There is a convincing argument as to why the United States has not proved dual criminality. To analyse dual criminality, one must first review the ITAR. Based on the Kenerson Affidavit (paragraph 99) the ITAR only attaches to "US persons, including US citizens". Daniel Duggan was, at relevant times neither. A US Appeals Court has upheld this view, and approved a lower court decision to dismiss a similar erroneous indictment,

District court could determine prior to trial, on defendant's motion to dismiss the indictment, whether defendant was a "U.S. Person" for purposes of the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR), where United States failed to object. Arms Export Control Act, § 38, 22 U.S.C.A. § 2778; Fed.Rules Cr.Proc.Rule 12, 18 U.S.C.A.; 22 C.F.R. § 129.2(a, b).

Although it is an unusual circumstance for the district court to resolve the sufficiency of the evidence before trial because the government is usually entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal, district court's pretrial dismissal of the indictment based on a question of law will be upheld where the government has not made a timely objection. Fed.Rules Cr.Proc.Rules 12(b), 29, 18 U.S.C.A. ¹²

77. Therefore Counts 2 and 3 could not have been committed by Mr Duggan and there is no corresponding offence under Australian law. Mr Duggan should not be extradited merely to allow proceeding for the dismissal of a defective indictment.
78. The crux of the complaint by the United States is that Mr Duggan in March, April, and November 2012 provided flight training to Chinese pilots. The error is that at those times he was neither a 'US person nor a US citizen'. Further, there is no allegation in the Indictment or evidence in the Kenerson Affidavit to indicate that the pilots were anything other than student civilian test pilots, or that Mr Duggan was aware of them being anything other than civilian test pilots. At para 6 of the Indictment there is a bald claim of 'PRC Pilots' and para 28 'Chinese test pilots' and para 25 (jj) of the Indictment 'Chinese pilots' and (qq) 'Chinese test pilots in South Africa'. This is a salient point in relation to whether there is even a *prima facie* case against Mr Duggan.

Good Faith by Australia

79. The training of Chinese civilian test pilots remains to this day, legal in Australia where training schools cater for Chinese civilian pilots. The ITAR legislation does not apply in Australia or to Australians wherever they might be. Furthermore, Australian legislation provides for such training. We understand legislation has been introduced to require permission from the Federal Government for the training by ex-defence personnel of foreign **military** pilots and that in future, this might change the legal position in Australia.
80. How 'military' pilots might be identified is yet to be resolved and exemplifies the evidential challenges of intention and proof not addressed in the Kenerson Affidavit. Use of the sobriquet 'PRC' in the Kenerson Affidavit skips over the evidentiary issue. The Kenerson Affidavit provides no evidence of any intent by our client to breach the ITAR and is silent on exculpatory evidence that must also have been intercepted.
81. On occasion our client enquired of the law and sought assurances. As our AGD colleagues are aware failure by the United States to provide exculpatory evidence, that we say on our instructions exists, strikes at the very basis of ethical prosecution practice. Under US practice the obligation to disclose exculpatory evidence is not enlivened at Grand Jury indictment stage. The Grand Jury hears only of the prosecution allegation. There is no right of appearance, no prior right to discovery or obligation of disclosure.

¹² U.S. v. Yakou, 428 F.3d 241 (2005)

This is a defect in the treaty arrangement with the United States when extradition is sought solely on a Grand Jury indictment. At Grand Jury Indictment stage the United States prosecution has not passed any due process threshold. This is profoundly different from ethical prosecution practice in Australia. Full disclosure and particulars are provided usually before indictment.

82. Also relevant to the issue of good faith by Australia in supporting the prosecution is that Mr Duggan's syllabus for carrying out such training work was lodged with and approved by the Civil Aviation Safety Authority ("CASA") in Australia.

China Australia Free Trade Agreement (CHAFTA).

83. The *China Australia Free Trade Agreement (CHAFTA)* negotiated while our client was employed in China and operative from 20 December 2015 facilitated the export via Article 8 of 'Services' including flight training and speciality training including firefighting and parachute operations. It is hypocritical for the Australian Government to have encouraged the export of such services, and to subsequently support the United States in accusing our client of impropriety.
84. The more so because our client was an active member of the Australian Chamber of Commerce in Beijing during the discursive stages of the proposed trade agreement, when speciality flight training was included in Australia's export proposals. The Kenerson Affidavit casts our client as a covert operative for China. The AGD has gone along with this theatrical depiction. The former President of the Australian Chamber of Commerce, Beijing may attest to our client's active support for this aspect of the free trade treaty.
85. We remain confident that those advising you, have not drawn to your attention our client's informed role with the Australian Chamber of Commerce at Beijing in promoting the export of air-training services. China has one of the fastest growing commercial and civil aviation sectors in the world. Properly trained Chinese aircrew is in the public interest. Thousands of Australian fly daily on Chinese air routes. No exception or protocol was devised to allow training schools outside China any means of differentiating students by their intended career paths.
86. Your government understands the United States expressed misgivings, almost to the point of antagonism, towards the 2015 trade agreement between China and Australia. Our client has become a pawn in the way the United States, having for years willingly shared its much-vaunted aircraft carrier landing training material, has now changed its mind. The US and its supporters in Australia including Mr Burgess now wish to bait China and serve selective salutary notice not just on our client, but upon Australia for doing business with the PRC. The Duggan family has become swept up in geopolitics as equally inhumane as the much-criticised authoritarian government in Beijing.

87. If one looks for guidance to the *Treaty on Extradition Between Australia and The United States of America* (1976) (the "Treaty") Article II requires that where an offence has been "committed outside the territory of the requesting State" and Australia does not recognise such an offence extraterritorially, the Australian Executive has discretion to grant the extradition (but is not so required). This Article II discretion is tied to your general discretion under the Extradition Act, to bring extradition proceedings to an end.
88. In this case, apart from Count 1, the conspiracy, the two substantive alleged offences are supposed to have taken place in March, April and November 2012, in a foreign jurisdiction, namely South Africa. The Attorney-General is required to separately consider whether to exercise his discretion to grant extradition under the amended Article II of the Treaty.
89. Article II discretion should not be exercised lightly. This caution is essential given that granting extraditions where Article II is enlivened amounts to extending the dual criminality concept beyond its traditional remit and recognising parallels in the criminal jurisdiction where Australia does not deem such conduct to be illegal.
90. Lastly, in regards to dual criminality, there is an integral link between the Attorney-General's Section 17 discretion and Article V(1)&(2) of the US-Australia treaty provisions, viz.,
- (1) *Neither of the Contracting Parties shall be bound to deliver up its own nationals under this Treaty but the executive authority of each Contracting Party shall have the power to deliver them up if, in its discretion, it considers that it is proper to do so.*
- (2) *If the requested state refuses to extradite a national of that state on the basis of nationality it shall, if the requesting state so requests, and the laws of the requesting state allow, submit the case to the competent authorities in order that proceedings for the prosecution of the person may be undertaken in the respect of all offences for which the extradition has been requested.*
91. Clearly, the US-Australia Treaty anticipates circumstances where for reasons of State you may as Attorney General exercise your discretion not to approve an extradition request. That said, we observe that Article 5 exposes a flaw in the Duggan case regarding dual criminality. If the United States requests Australia to prosecute under Article 5(2) the law associated with the alleged substantive offences did not exist in Australia at the time and the alleged offences in their current state are not retrospective.

The Public Domain Test

92. The ITAR has specific and broad exceptions for material that is in the public domain. We submit that all the training provided by Mr Duggan was in the public domain in that it was available in open-source online repositories, by ordinary research. Even if you were to accept the version of events laid out in the indictment, aircraft carrier landing sequences had been released for public access by the US Defense Department.
93. The unfairness of those, including ASIO Director General Michael Burgess in promoting by public statements ill-will against our client as a 'top-gun' knowingly training Chinese military personnel is manifest from the information in **Appendix 2** which lays out information freely available on taking off and landing on aircraft carriers but not considered in contravention of ITAR. Apart from the fact that he gave no such training it appears that on publicly available material the offence could not be committed in Australia even if there were a statutory equivalent because the public domain test is met.
94. The company that Mr Duggan worked for in South Africa in 2012, TFASA maintained in public statements and on its website that: "none of its trainers are in possession of legally or operationally sensitive information relating to the national security interests of any country, whether those from where its employees are drawn or in which it provides training".

Conspiracy and Money Laundering

95. In our submission these offences stand or fall on Counts 2 and 3 being criminal offences in Australia which they are not. In Australia it is not possible to conspire to commit an offence that is either not an offence or does not take place.¹³ Nothing in the Indictment or the Kenerson Affidavit contradicts Mr Duggan's contention that he was a contractor carrying out permitted services.
96. None of the emails adverted to in the Kenerson Affidavit evidence a knowing involvement of our client in any law-breaking. Indeed, no evidence advanced points to our client believing that the activities were in any way illegal. One may wonder why Mr Keith Dennison, an ex-RAF senior officer, ex Chief Test Pilot at British Aerospace and frequent email correspondent is absent from the so called co-conspirator group.¹⁴ Mr Dennison ran the training program at TFASA at all material times and Mr Duggan reported directly to him. Indeed, we anticipate that the United States is fully aware from its much-vaunted meta-data acquisition that Mr Dennison consistently assured Mr Duggan that the training was not in breach of ITAR.

¹³ <https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-24-extensions-criminal-liability/division-11/115-conspiracy>

¹⁴ <https://www.linkedin.com/in/keithdennison1/>

97. Furthermore, in Australia money laundering may only take place in circumstances where the funds are the proceeds of an illegal enterprise or may be used to carry out an illegal enterprise. Once dual criminality is found not to exist, count 4 of money laundering becomes otiose.¹⁵

Conclusion

98. We invite you to consider our client's immediate release on remand while you seek an independent assessment of the concerns we have raised. In this respectful submission the form and structure of a s19 hearing is neither conducive to a proper examination of all the matters that may engage your discretion nor to the dispassionate exposure of our client's legitimate national security concerns over US and Australian intelligence activity in China.
99. We were dismayed by Director-General Michael Burgess' further public statements two weeks ago on the eve of our client's application for an adjournment so that legal aid may be secured to keep Senior and Junior Counsel briefed in this matter.¹⁶ That hearing has now been adjourned to 4 April 2024. Our client appreciates the legitimate national security concerns about former members of Allied defence services assisting any authoritarian regime but says selecting him to convey a salutary message that has now gone far and wide and perhaps achieved its purpose was grossly unfair.
100. It is our submission that you are not receiving fully informed advice concerning our client. On humanitarian grounds alone (Appendix 1), we implore you to deliver the Duggan family from this nightmare. We ask that you not allow Daniel Duggan's extradition to the United States for a range of well-founded legal reasons contained in this submission and at the very least permit him to be with his family while proceedings, likely to be protracted, at Magistrate Court, and if necessary, Federal Court level proceed. The United States cannot seriously suggest that our client is a flight risk.

Yours sincerely,


Bernard Collaery

¹⁵ <https://www.aic.gov.au/sites/default/files/2020-05/tcb004.pdf>

Appendix 1

Humanitarian Arguments

NOTE: All documents referred to are available on request of this office.

Destruction of a family

The impact of Mr Duggan's separation from his six children and incarceration are clearly articulated by number of experts, whose opinions are attached to this submission. Extradition will undoubtedly compound this tragedy.

1. Medical experts

- a. Mr Duggan's lengthy time in isolation, with very limited access to the children, is contrary to Articles 3 and 9 of the [UN Convention on the Rights of the Child](#). This states that "a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child". The distress felt by Daniel's children about his incarceration, in isolation at Lithgow Correctional Centre, is already marked, as stated in advice from Dr Paul Anthony Bauert OAM, FAMA, a practising Paediatrician with over 40 years' experience. He is also a lifetime Fellow of the Royal Australasian College of Physicians. This distress would become more severe if Daniel is extradited the United States and has far less contact with the children, if he is allowed any at all.
- b. Dr Bauert states he has: "very serious concerns for Dan Duggan's children's physical and mental health. Each of the six children is exhibiting unmistakable signs of stress and severe anxiety and is vulnerable to compounding ill-health." The stress and trauma suffered by the children, including recurring nightmares, is also detailed in commentary by Mr Duggan's wife Saffrine.

2. Education and counselling experts

- a. The Principal of Lyndhurst Public School Mrs Christine Kovac *B. Teach (EC)* *M. Teach (Special Ed)* states: "These six children are all suffering immense grief, deep sadness and loss at the incarceration of their father, Daniel Duggan. It is clear that these children are suffering confusion and developing a mistrust of authority in the community". Accredited Counsellor, Ms Alison Nancye *BCouns, DipCoun*, a member of the Australian Counselling Association, states that she has, "...grave concerns for the immediate and long-term detrimental impact on the well-being and mental health of the six Duggan children".

3. Academic reports

- a. The impact on children of separation from a male parent are well documented. Ms Nancye's submission quotes from several sources, including [Mental Health and](#)

Wellbeing Statistics on Children with Absent and/or Incarcerated Fathers, Children's Bureau (2023) that states: "Fatherless children are at greater risk of suffering physical, emotional, and sexual abuse ... Father involvement leads to better emotional, academic, social, and behavioural outcomes for children." An article in Psychology Today (2023) by Dr Edward Kruk states: "The results of father absence on children are nothing short of disastrous, along a number of dimensions."

- b. Evidence from highly credible sources explains the many challenges that the families of incarcerated parents face, as well as the lasting and deleterious impact. Children of incarcerated parents are more likely to experience emotional and behavioural problems, academic problems, economic problems, and social problems. The attachment features: a number of international legal cases where Rights of the Child are cited; university studies about the impact of separation by incarceration on children; recommendations from recent inquiries by both the NSW and Victorian governments into the impacts on children with parents in the prison system; United Nations recommendations on Children of Incarcerated Parents; and the key principles of the Nelson Mandela Rules, which include the importance of maintaining family ties.

4. *Spiritual counsellors*

- a. Anglican Chaplain Rev. Mark Muss and Catholic Chaplain Sr. Virginia McGrath, who have both visited Mr Duggan in prison at Lithgow, say they had observed the psychological, personal and financial impact of his incarceration on Mr Duggan and his family. They have stated that they are "increasingly concerned about state of his and his family's wellbeing".

5. *Media reporting*

- a. Numerous media reports misrepresent Mr Duggan's case, including claims that he was involved in espionage and was working directly for the People's Republic of China. These falsehoods have appeared in media articles in both the United States and Australia, many of which have a large readerships and influence. They are not only damaging to Mr Duggan's character and the public understanding of the case, but they have the power to influence a jury and to deprive Mr Duggan of any chance of a fair trial in the United States. These misrepresentations may also place Mr Duggan's life in danger, should he be imprisoned in the United States. In fact, following publication of some of these claims, death threats against Mr Duggan have been made on social media. We can provide several examples on hateful and threatening comments made against Mr Duggan on a single site, in a single day.

6. *US prison conditions*

- a. Mr Duggan and his legal team are deeply concerned about what treatment may be visited upon him in prison in the United States. We hold an affidavit from Mr John C. Kiriakou, former Central Intelligence Agency (CIA) counterterrorism officer turned war crimes whistleblower who was a 2016 nominee for the Nobel Peace Prize. Mr Kiriakou spent 23 months in Federal Correctional Institutions, including time in

solitary confinement. In his affidavit, he testifies about the horrendous conditions in United States Federal Prisons, focusing on solitary confinement where Mr Duggan is most likely to be imprisoned, if extradited. He states: "While in solitary confinement I was denied access to all medication, including insulin (I required three shots per day) and medication for high blood pressure, high cholesterol, and general anxiety disorder ... My experience is emblematic of the way solitary confinement is run in the United States ... There are scores of prisoners across the US who have been in solitary for years and, in some cases, for decades".

7. *The International Commission of Jurists opinion*

- a. A letter from the International Commission of Jurists Australian Section President Nicholas Cowdery AO KC states "The ICJ (AS) is concerned that an Australian citizen with wife and children in and ties to Australia, subject to an extradition request that does not involve allegations of any offences that would render him dangerous to the Australian community, should be awarded such a high security classification and treated in the way described."

8. *The United Nations Human Rights Committee*

- a. During 2023, the treatment Mr Duggan in the Australian prison system under the Act and Treaty has been the subject of a report submitted to the Joint Standing Committee on Treaties. As well, a complaint was filed with the United Nations Human Rights Committee. As a signatory to the Universal Declaration of Human Rights, the following United Nations standards have been breached in Mr Duggan's incarceration under the following Rules of the Act: Rule 43 – prohibits indefinite solitary confinement, and prolonged solitary confinement (in excess of 15 consecutive days), and yet Mr Duggan he has been placed into solitary confinement since his arrest; Rule 44 prohibits confinement of prisoners for 22 hours or more a day without meaningful human contact, and yet Mr Duggan has been in solitary confinement for 15 months and it took seven months before he was even allowed to go outside to exercise; Rule 11 prohibits untried prisoners being kept with convicted prisoners, and yet Mr Duggan is in a wing with convicted prisoners. He was also threatened with a transfer to the so-called 'boneyard' and general population if he didn't agree to solitary confinement and isolation.

Appendix 2

Open-source information on aircraft carrier landings

<https://simpleflying.com/how-fighter-jets-land-on-aircraft-carriers/> includes footage of someone landing on an aircraft carrier, from inside the cock pit. It also has a comment section where the audience is asked: Have you ever flown in a fighter jet? What are your thoughts on the way that they land on short runways? Let us know in the comment section below.

<https://science.howstuffworks.com/aircraft-carrier4.htm> Thorough description of how the process works on both the plane and the aircraft carrier. Includes photos provided by the US Department of Defense. Includes a diagram of the Long Range Line Up System and the coordinates, provided by the US Navy.

<https://www.youtube.com/watch?v=IM8GJaFeG0U> Smithsonian video using fighter pilot to explain landing and take-off.

<https://www.youtube.com/watch?v=AqYDFxT-8ug> Join us as we delve into the intense world of US Navy flight operations, from the various approaches pilots use to land on aircraft carriers depending on weather conditions, to the vital role of the Carrier Air Traffic Control Center in ensuring safe recovery of aircraft. Learn about the fast-paced, 90-minute flight operation cycles that involve launching and recovering multiple aircraft.

<https://www.military.com/video/military-aircraft-operations/carrier-landings> range of videos of different landings on aircraft carriers.

<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1615&context=nwc-review> Article from 2010 on possibility of Chinese aircraft carriers and them not being a concern to the US.

Flight Simulators

<https://orbxdirect.com/product/miltech-cvn-77>

<https://www.miltechsimulations.com/carriers>

<https://www.youtube.com/watch?v=uQOCMug8zm0>

<https://www.simvol.org/en/articles/tutorials/catapulting-f18-aircraft-carrier>

<https://apps.apple.com/us/app/f18-carrier-landing/id454802329>

<https://interestingengineering.com/video/exploring-the-most-realistic-aircraft-carrier-simulator>

High-fidelity flight simulator software ranges from the Lockheed Martin (market cap \$113B USD) Prepar3D (P3D) to 'Microsoft Flight Simulator' through to the open-source X-Plane

The Lockheed Martin P3D can be used to teach aircraft carrier take-off and landing in several ways. One way is to use the built-in training missions. These missions provide step-by-step instructions on how to take off and land on an aircraft carrier. Another way to use P3D for aircraft carrier take-off and landing training is to create custom missions. This can be done by using the simulator's built-in mission editor. Custom missions

can be tailored to the specific needs of the pilot, such as the type of aircraft they are training in or the specific carrier they will be operating from.

P3D also includes several features that can help pilots learn how to take off and land on aircraft carriers. These features include:

- A realistic physics engine that simulates the forces that act on an aircraft during take-off and landing.
- A detailed model of the aircraft carrier, including the flight deck, the arresting cables, and the catapults.
- A realistic weather system that can simulate the conditions that pilots would encounter on an aircraft carrier.
- A built-in debriefing system that can help pilots analyse their performance and identify areas for improvement.

Despite its level of detail and accessibility worldwide, this software does not contravene the ITAR International Traffic in Arms Regulations (ITAR).

Appendix 3



COMMONWEALTH OF AUSTRALIA

Australian Citizenship Act 2007

Australian Citizenship

DANIEL EDMUND DUGGAN

born on 29th July 1968

*I, the Minister administering the Australian Citizenship Act 2007,
give notice that the abovenamed is an Australian citizen and that
citizenship was acquired on 26th January 2012.*

Dated: 26th January 2012

Evidence No. 01860503936



MINISTER
FOR IMMIGRATION AND
CITIZENSHIP

DANIEL EDMUND DUGGAN

Apartment 1501, Building 4, Happy Gardens, Si Ji Xing He Street, Chaoyang District, Beijing China, 100123
Email: dduggan13@hotmail.com / Phone Contacts: China +86 138 1038 0134 / Australia: +61 4 1588 9048

To:
Bureau of Consular Affairs
U.S. Department of State
Care Of: Office of American Citizen Services
Embassy of the United States, Beijing China

STATEMENT OF VOLUNTARY RELINQUISHMENT OF NATIONALITY OF THE UNITED STATES

To Whom It May Concern:

I, Daniel Edmund Duggan, a former national of the United States by birth, solemnly swear and affirm that I was born in the Town of Milton, in the County of Norfolk of the Commonwealth of Massachusetts, United States of America on 29 July 1968.

My last official permanent residence within the United States was 521 Hawthorne Street, Monterey, California 93942 in which I resided there until 22 December 1999. I have not resided within the confines of the United States since February 2000.

Further to the above, in the year 2011 I solemnly declare that I voluntarily applied for citizenship to the Commonwealth of Australia and did so with the full intent to relinquish my citizenship and nationality of the United States of America.

As such, I was granted the great privilege to become an Australian citizen and on 26 January, 2012, in the City of Hobart, State of Tasmania of the Commonwealth of Australia, I made the following Australian Citizenship Pledge:

"From this time forward, under God, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey"

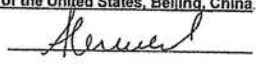
Therefore, from that date forward, and as per Sections 349(a)(1) and (2) of the United States Immigration and Nationality Act, (8 U.S.C. 1481(a) (1) and (2)), I hereby absolutely and entirely declare that I, of my own free will, voluntarily, knowingly, and free of any duress or undue influence obtained Australian citizenship by naturalization with the intent to relinquish my United States nationality together with all rights and privileges and all duties and allegiance and fidelity thereunto pertaining and understand that I did this for myself only and by doing so the act was effective from that date and irrevocable.

Signed as a statement of truth:


Daniel Edmund Duggan

Subscribed and sworn/affirmed to before me this 20th day of July, 2016 at the Embassy of the United States, Beijing, China.



Signature of Consular Officer: 

Printed Name of Officer: _____

Title of Officer: _____

Abigail Greenwald
Vice Consul