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Chinese law is Australia's business

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The plight of the Australian businessman Matthew Ng detained by Chinese police on 16 November bears striking similarities to the recent Stern Hu case.

Both involve Chinese born business executives who relocated to Australia and gained Australian citizenship before returning to China and developing a high business profile before running afoul of local authorities, and being caught up in the Chinese legal system. Stern Hu was working for Rio Tinto as a leading Chinese-based executive engaged in sensitive negotiations over the sale price of Australian iron ore to Chinese steel manufacturers. His situation began to unravel in mid-2009 when he was arrested and charged with stealing government secrets. Ng is currently being detained without charge, but it appears that he is the subject of police enquires as a result of business dealings between his Chinese-based travel company, Et-China, and local competitors.

While the Stern Hu case eventually engaged the Australian government at the very highest levels, Matthew Ng's situation has yet to have reached those heights though Australian officials in China are monitoring his case.

How is it that ethnic Chinese carrying Australian passports have become the subject of such recent attention by the Chinese authorities? At one level it would seem purely by chance that these two similar cases have arisen over the course of 2009-2010.

In the 1990s the Chinese-born Australian businessman James Peng was the first high profile case involving a Chinese Australian who had encounters with the Chinese legal system. Peng was sentenced in 1995 to sixteen years imprisonment for embezzlement and misappropriation of company funds, and released in 1999 as part of a 'good-will' gesture by China. There was a ten

year gap between Peng's release and Stern Hu's arrest suggesting that Australian citizens of Chinese origin are not being targeted by the Chinese authorities.

Nevertheless, the Hu and Ng cases do suggest that Chinese who have become naturalised citizens of countries other than China, and who return to live, work and do business in China may be particularly at risk of having their legal and human rights threatened by a legal system that does not readily make allowances for the rights of foreign citizens.

When Australians travel, or live and work overseas, they do of course become subject to the local laws of the country they are visiting. As successive Australian Foreign Ministers have been at pains to emphasise in the past decade, Australian law and legal standards do not follow Australians wherever they may be as is self evident from the plight of David Hicks at Guantanamo Bay and now Jock Palfreeman in Bulgaria. Nevertheless, Australians do enjoy fundamental human rights when abroad, and if these rights as recognised under international human rights law are not being respected the Australian government has a right to intervene to ensure their protection.

In the case of Australians in China, those rights have been amplified by a 1999 Agreement on Consular Relations. This Agreement supplements the 1963 Vienna Convention on Consular Relations to which both Australia and China are parties, but in the words of the Department of Foreign Affairs and Trade not only "confirms and amplifies" the Convention but also "expands its provisions in some respects". This is critical because the Vienna Convention represents the international standard for the level of consular assistance that countries can provide their nationals when they are detained in foreign goals. The 1999 Australia-China Agreement goes beyond that standard and gives to Australian citizens greater rights in China than is the case for other foreign nationals.

Consistent with the Agreement, Australian consular officials were advised of Stern Hu's arrest in July 2009 were given access to him. No irregularities arose in the interpretation of the Agreement until March 2010 when Australian officials were denied access to part of his trial. Notwithstanding Australian protests part of Hu's trial was conducted in secret without Australian officials present. At the time, a Chinese Ministry of Foreign Affairs spokesperson noted that the Chinese position was that "We should not confound the consular agreement with sovereignty, especially judicial sovereignty… The decision of a closed-door trial was made based on Chinese law."

This statement highlights China's particular position on the interpretation of international law. China has in recent years been promoting a fierce sovereignty-orientated interpretation of international law, whether it be China's rights to exercise sovereignty over it peoples notwithstanding human rights violations, it assertion of significant maritime claims throughout parts of the South China Sea, or the capacity of the Chinese courts to trump bilateral Consular Agreements with countries such as Australia.

The Matthew Ng case is still in its very early days. It may well be that Ng is released without charges and that the commercial dispute which appears to be at the centre of this particular matter is resolved through other means. Nevertheless, the Hu case has highlighted that Australia

will need to be vigilant in all instances when Australians are detained in China and seek to hold China accountable to its international legal obligations.

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