

Treaties and Australian Law — Administrative Discretions, Statutes and the Common Law

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1. Introduction

It has been generally accepted that treaties are not *directly* incorporated into Australian law by the act of ratification or accession. A treaty per se does not form part of domestic law unless implemented by legislation and, in the absence of such legislation, it cannot create rights in or impose obligations on Australian citizens and residents. However, this does not mean that treaties have no influence at all on Australian law prior to incorporation. In its decision in *Minister for Immigration and Ethnic Affairs v Teoh*,¹ the High Court held that treaties may have some *indirect* influence on Australian domestic law prior to their implementation through legislation. This is a troublesome issue which is likely to attract greater attention in the future largely in response to the inevitable pressures of internationalisation. Closely related to that issue is the extent to which a court should, in the event of a conflict, apply the statutory and common law rules which make up Australian domestic law.

In this article, I propose to examine three ways in which treaties have influenced Australian law: as an influence on the development of the common law, as a trigger for administrative law remedies and as an aid to statutory interpretation. The primary focus is on decisions of the High Court, as the highest court in the land, although that is not to suggest that treaties are not also influential in other courts. First, however, I will briefly outline the historical common law position, the impact that the Commonwealth Constitution has on this position, and the underlying rationale of the law as it currently exists.

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¹ (1995) 183 CLR 273.

2. The Traditional Rule

The English common law position relating to the use which courts may make of international treaties has been established for over 100 years. Although the Crown has the power to enter into treaties on behalf of the United Kingdom, treaties are only part of English law if an enabling Act of Parliament has been passed.² This gives effect to a basic principle of the separation of powers in British constitutional law which was finally established by the end of the eighteenth century.³ The rationale behind the rule is that, if a transformation doctrine were not applied, then the Crown would be effectively legislating or changing the law without parliamentary authorisation.⁴

Probably a less well known and narrower basis which is sometimes used to justify the need for legislation relates to the fact that treaties are normally seen as engagements between states or governments and municipal courts do not usually deal with disputes between such parties. The provisions of an international treaty, unless given effect in domestic law by legislation, are “res inter alios acta from which [individuals] cannot derive rights and by which they cannot be deprived of rights or subjected to obligations”.⁵

The case often cited as giving the clearest formulation of the common law rule regarding the operation of treaties in national law is *Attorney-General for Canada v Attorney-General for Ontario*.⁶ In this case Lord Atkin, delivering the judgment of the Privy Council, stated that:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.⁷

The accepted approach to the relationship of treaties to the Australian domestic legal system is the same as that in the United Kingdom.⁸

² *The Parlement Belge* (1879) 4 PD 179; *Walker v Baird* [1892] AC 491 at 497; *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326; *Blackburn v Attorney-General* [1971] 1 WLR 1037; *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523. See also I Brownlie, *Principles of Public International Law*, 4th edn Clarendon Press Oxford 1990 at 48; I Shearer, *Starke’s International Law*, 11th edn Butterworths London 1994 at 71-2.

³ For the historical background to the development of this rule, see W Holdsworth, ‘The Treaty-Making Power of the Crown’ (1942) 58 *LQR* 175.

⁴ See Brownlie *supra* n 2 at 47-8.

⁵ *Maclaine Watson & Co Ltd v Department of Trade and Industry supra* n 2 at 545 per Lord Oliver.

⁶ [1937] AC 326.

⁷ *Ibid* at 347.

⁸ *Brown v Lizars* (1905) 2 CLR 837 at 851 per Griffith CJ; *Roche v Kronheimer* (1921) 29 CLR 329; *Chow Hung Ching* (1948) 77 CLR 449 at 478 per Dixon J; *Bradley v Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J, 593 per Stephen J; *Simsek v Macphee* (1982) 148 CLR 636 per Stephen J; *Tasmanian Wilderness Society v Fraser* (1982) 152 CLR 270; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 193 per Gibbs CJ, 212 per Stephen J, 224 per

While the principle is settled, it has been stated in a number of ways. It has been couched in very broad terms: that a treaty is “not part of” or has “no effect” in domestic law.⁹ It has also been stated in more confined terms: that a treaty cannot affect “private rights” or “individual rights and duties” without legislation.¹⁰ The latter, perhaps, leaves open the possibility that a treaty might, except where rights and duties are involved, nonetheless have effect in municipal law. Ultimately, this distinction has been of little practical significance, and I will not examine it in any detail here. In addition, there are a number of suggested exceptions to the general transformation principle. These exceptions include treaties of peace and treaties affecting belligerent rights.¹¹ However, these exceptions are only of marginal practical relevance today.¹²

The transformation principle can then be seen to be one based on the notion of separation of executive and legislative powers which is, at least to some extent, found in the Australian constitutional structure.¹³ If the executive were able to alter the law of the land merely by entering into a treaty with another country, it would usurp the authority of the legislature, which is vested with the responsibility for making laws for the “peace, order and good government of the Commonwealth”.¹⁴ In addition, there are certainly implications for democracy in permitting a treaty ratified only by the executive to become directly applicable in Australian law without legislation.

Indeed, it should be noted that the framers of the Constitution removed a reference in what was then covering clause 7 (now covering clause 5) which would have introduced the United States model, which provides for the direct application of treaties. Early drafts of covering clause 7 of the Constitution Bill provided:

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, *and all treaties made by the Commonwealth*, shall, according to their tenor, be binding on the courts, judges, and people of

Mason J; *Kioa v West* (1985) 159 CLR 550 at 570 per Gibbs CJ; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 55 per Brennan J (Mason CJ and McHugh J concurring), 79 per Deane and Gaudron JJ; *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1 at 74 per McHugh J; *Dietrich v R* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J, 359-60 per Toohey J; *Coe v Commonwealth* (1993) 118 ALR 193 at 200-1 per Mason CJ; *Minister for Immigration and Ethnic Affairs v Teoh* *supra* n 1 at 287 per Mason CJ and Deane J (Gaudron J concurring), 370 per Toohey J, 384 per McHugh J; *Kruger v Commonwealth* (1997) 146 ALR 126 at 161 per Dawson J. See, eg, *Bradley v Commonwealth* *supra* n 8 at 582 per Barwick CJ and Gibbs J; *Simsek v Macphee* *supra* n 8 at 642 per Stephen J; *Kioa v West* *supra* n 8 at 570 per Gibbs CJ.

⁹ See, eg, *Chow Hung Ching* *supra* n 8 at 478 per Dixon J; *Simsek v Macphee* *supra* n 8 at 641 per Stephen J; *Koowarta v Bjelke-Petersen* *supra* n 8 at 193 per Gibbs CJ, 224 per Mason J; *Mabo v Queensland (No 2)* *supra* n 8 at 55 per Brennan J (Mason CJ and McHugh J concurring), 79 per Deane and Gaudron JJ; *Coe v Commonwealth* *supra* n 8 at 200-1 per Mason CJ.

¹⁰ The exceptions stated in the text are sufficiently explained with sufficient supporting judicial authority in J Crawford and W Edeson, ‘International Law and Australian Law’ in K Ryan (ed), *International Law in Australia*, 2nd edn Law Book Company Sydney 1984 at 94-7; J Starke, ‘The High Court of Australia and the rule in *Walker v Baird* [1892] AC 491’ (1974) 48 *ALJ* 368.

¹¹ F Mann, *Foreign Affairs in English Courts*, Clarendon Press Oxford 1986 at 87.

¹² *Victorian Stevedoring and Construction Co Ltd and Meakes v Dignan* (1931) 46 CLR 73.

¹³ Australian Constitution, ss 51-2.

every state, and of every part of the Commonwealth, anything in the laws of any state to the contrary notwithstanding.¹⁵

It has been said that the reason for the removal of the phrase was to make it clear that there was no suggestion that the Act would confer power on Australia to enter into treaties in its own right.¹⁶ There was little recognition in the debate that the change had another important effect, of removing the direct application of treaties in Australian law. La Nauze, however, noted that the Colonial Office in England was prepared to insist that references to “treaties made by the Commonwealth” be deleted¹⁷ at least in part because it was thought to be inappropriate for treaties to be part of the law of the land in a system based on the Westminster model. Mr Reid stated that the provision

would be more in place in the United States Constitution, where treaties are dealt with by the President and the Senate, than in the constitution of a colony within the empire. The treaties made by her Majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but the treaties themselves are not laws.¹⁸

In fact, the original of the covering clause had been adapted from the Constitution of the United States¹⁹ and it seems unlikely that this departure from British practice was intended in the first place.

Given the basic need for legislation explained above it has always been difficult to explain the conferment of jurisdiction contained in s 75(i) of the Constitution, although perhaps the growing list of qualifications to the rule may help give that grant of jurisdiction a content which it would not otherwise have enjoyed.

3. Treaties and the Development of the Common Law

The qualifications which have been recognised so far include the relatively recent acknowledgment that international conventions to which Australia is a party, especially those which declare universal fundamental rights, may be used by domestic courts in Australia as a guide in the development of the common law.

Early recognition within the High Court of Australia of the potential role of international instruments to influence Australian law may be found in the judgments of Murphy J. Examples of Murphy J’s resort to international human rights law as an influence on the

¹⁵ *Official Record of the Debates of the Australasian Federal Convention*, Sydney 1891 Appendix (emphasis added).

¹⁶ See G McGinley, ‘The Status of Treaties in Australian Municipal Law: The Principle of Walker v Baird Reconsidered’ (1990) 12 *Adelaide LR* 367 at 368-9.

¹⁷ J La Nauze, *The Making of the Australian Constitution*, Melbourne University Press Melbourne 1972 at 184.

¹⁸ *Official Records of the Debates of the Australasian Federal Convention*, Sydney 1897 at 240. For an explanation of why Mr Reid used this argument see B de Garis, ‘The Colonial Office and the Commonwealth Bill’ in Martin (ed), *Essays in Australian Federation*, Melbourne University Press Melbourne 1969 at 110.

¹⁹ J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson Sydney 1901 at 353.

common law include *Dugan v Mirror Newspapers Ltd*,²⁰ *McInnis v R*²¹ and *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*.²² In these three examples, Murphy J used an international convention as an influence on the common law in areas where his approach involved a departure from recognised common law doctrine and from the approach taken by the majority.

However, in recent years, the acceptance of international law and international instruments in performing the judicial function has steadily grown. Brief mention may be made of a number of cases where judges referred to international conventions in their discussions of the common law, but the role played by the conventions was minimal.²³ Kirby J has been an active campaigner for more domestic recognition of international human rights.²⁴ However, it is only since *Mabo* that the proposition that treaties are a “legitimate and important influence” on the development of the common law has been truly accepted by the Australian High Court.

In *Mabo v Queensland (No 2)*,²⁵ the High Court held that Australian common law recognised native title of the Australian Aborigines. Where such title had not been extinguished, the indigenous inhabitants were entitled to their traditional lands, according to their laws and customs. The decision thus overturned the common law doctrine of *terra nullius*, which treated Australian territory as being without legal owners and capable of acquisition through occupation at the time of European settlement.

Brennan J appealed to international standards of civil and political rights as one reason for reconsidering the historical refusal of the common law to recognise the rights and interests in land of indigenous inhabitants of settled colonies. Brennan J, with whom Mason CJ and McHugh J agreed, said:

The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but *international law is a legitimate and important influence on the development of the common law*, especially when international law declares the existence of universal human rights.²⁶

Brennan J said that common law recognition of the rights in land of the indigenous inhabitants of Australia would be precluded if recognition would “fracture a skeletal

²⁰ (1979) 142 CLR 583.

²¹ (1979) 143 CLR 575.

²² (1985) 156 CLR 385.

²³ See, eg, *Hazlett v Presnell* (1982) 149 CLR 107; *J v Lieschke* (1987) 162 CLR 447 at 463 per Deane J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510 per Brennan J; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 266 per Brennan J.

²⁴ M Kirby, ‘The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View From the Antipodes’ (1993) 16 *UNSWLR* 363.

²⁵ *Supra* n 8.

²⁶ *Ibid* at 42 (emphasis added).

principle of our legal system”.²⁷ However, he considered this would not be the case. In contrast to Brennan J, Deane and Gaudron JJ indicated that that they were re-examining and rejecting “fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years”.²⁸

In one sense, Brennan J was not resolving ambiguity in the common law in his judgment in *Mabo* - he was entering an area where the common law was thought to be settled, albeit not by direct decision of the High Court or Privy Council. International treaties were used in what Brennan J termed the “development” of the common law; that is, as a basis for taking the common law in a direction it had never taken before.²⁹ Brennan J’s judgment in *Mabo*, while only briefly referring to the legitimacy of international law influencing domestic adjudication, has and promises even more so to become a touchstone for a globally aware common law.

The opportunity to reapply the approach adopted in *Mabo* occurred in *Dietrich v R*.³⁰ The applicant sought special leave to appeal against conviction on one count of importation of heroin contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth). His ground was that his trial in the County Court at Melbourne had miscarried by virtue of the fact that he was unrepresented by counsel. The applicant’s primary argument was that an accused faced with a serious criminal offence who desired but could not afford legal representation had a right to be provided with representation at public expense. If representation were not made available, the accused was entitled to a stay of the trial; if the accused were convicted in the absence of representation, the conviction should be quashed on the ground that the trial was unfair. The argument was based, in part, on article 14(3) of the International Covenant on Civil and Political Rights (ICCPR), which provided:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Counsel for the applicant acknowledged that the ICCPR was not part of Australian law, but argued that the common law should be developed in such a way as to allow the enforceability of rights under conventions to which Australia is a party.

A majority of the court held that the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense, but that the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial. The majority concluded that as a general proposition and in the absence of special circumstances, a trial of an indigent person accused of a serious crime will be unfair if,

²⁷ *Ibid* at 43.

²⁸ *Ibid* at 109.

²⁹ K Walker, ‘Treaties and the Internationalisation of Australian Law’ in C Saunders (ed), *Courts of Final Jurisdiction*, Federation Press Sydney 1996 at 213.

³⁰ *Supra* n 8.

by reason of a lack of means and the unavailability of other assistance, he or she is denied legal representation.³¹ Accordingly, the appeal was allowed. In dissenting judgments, Brennan and Dawson JJ considered that no entitlement to be provided counsel at public expense presently existed under common law, and the fact that an accused is unrepresented in such circumstances cannot of itself amount to a miscarriage of justice.

Members of the court made use of the international standards in different ways. Brennan J, in dissent, briefly considered article 14(3)(d) of the ICCPR. He used it as “a concrete indication of contemporary values”, and stated that:

Although [article 14(3)(d)] of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law. Indeed, it is incongruous that Australia should adhere to the Covenant containing the provision unless Australian Courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the Courts cannot, independently of the Legislature and the Executive, legitimately declare an entitlement to legal aid.³²

Unlike his decision in *Mabo*, Brennan J found it impossible to alter the common law in this case, because the courts cannot compel the provision of legal representation and the “remedy” of adjournment is not open to the courts because it would constitute a breach of the constitutional duty to exercise jurisdiction and an impediment to the administration of justice.³³

The other dissident, Dawson J, acknowledged authority for the use of treaties in the interpretation of statutes,³⁴ but found that the use of treaties in the resolution of uncertainty in the common law was “not so clearly established”, and that the clear state of the common law on this issue precluded reliance on the ICCPR because it would not merely resolve an ambiguity but require “a fundamental change”.³⁵

Within the majority, Mason CJ and McHugh J responded to counsel’s argument that our common law should be consistent with our international obligations by saying:

Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.³⁶

Mason CJ and McHugh J clarified this statement by acknowledging that English courts may have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law. They said that “[a]ssuming, without deciding, that Australian courts should adopt a similar, common-sense approach”, this nevertheless

³¹ See especially *ibid* at 311-2 per Mason CJ and McHugh J, 337 per Deane J, 361-2 per Toohey J.

³² *Ibid* at 321.

³³ *Ibid* at 323-4.

³⁴ *Ibid* at 348-9. This is discussed in greater detail in Part 5 of this article, below.

³⁵ *Ibid* at 349.

³⁶ *Ibid* at 305.

did not assist the applicant because in this case the court was “being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognised should now be taken to exist”.³⁷

Mason CJ and McHugh J observed that under article 14(3)(d) of the ICCPR there is no absolute right of an indigent accused to be provided with counsel at public expense, but that a right to funded counsel will arise in cases where representation of the accused is essential to a fair trial. They considered that this approach is similar to the approach now taken by the Australian common law.³⁸ In coming to this formulation or explication of the right to a fair trial, there is little doubt that Mason CJ and McHugh J were mindful, if not substantially influenced by, the ICCPR (and the similarly worded European Convention on Human Rights (ECHR)).³⁹

Toohey J, in a similar fashion to Mason CJ and McHugh J, suggested that where the common law was unclear, “an international instrument may be used by a court as a guide to that law”. He also considered that it may be possible to use international instruments where there is a *lacuna* in domestic law.⁴⁰ Even if treaties could be used to fill gaps, Toohey J pointed to the fact that article 14(3)(d) of the ICCPR did not support an absolute right to counsel, only a right where “the interests of justice so require”.⁴¹

Deane J appeared to adopt the view that the ICCPR was influential in determining that the common law principle of a right to a fair trial had been breached. He referred to other domestic factors along with the ICCPR as support for his conclusion that, as a general proposition, the trial of an indigent accused would be unfair if because of lack of means, he or she is unable to be legally represented.⁴² This conclusion represents a development of the common law. It is impossible to say what weighting Deane J would have given the Covenant if it were the only justification for claiming the accused’s right to a fair trial had been denied.

Gaudron J’s approach to the use of international conventions in domestic law was quite different from that of the rest of the court. She appeared to use Australia’s obligations under the ICCPR as one of a number of justifications (or sub-justifications) for overruling the earlier High Court decision of *McInnis v R*⁴³ (which had denied the existence of any right to counsel at public expense) and as an indicator of what the new principle should be. Thus Gaudron J used international instruments in her development of the common law, but in a less direct way.

Dietrich, then, consolidates the court’s acceptance of the relevance of international conventions to the development of the common law, albeit in a less than robust fashion. There have been other recent pronouncements which also give an indication of how the High Court perceives the influence of treaties.

³⁷ *Ibid* at 306.

³⁸ *Ibid* at 307.

³⁹ *Ibid* at 300, 307.

⁴⁰ *Ibid* at 360.

⁴¹ *Ibid* at 360-1.

⁴² *Ibid* at 337.

⁴³ *Supra* n 21.

In 1993, in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁴⁴ a majority of the High Court found that the privilege against self-incrimination did not extend to corporations. Members of the court made reference to the right not to be compelled to testify against oneself or to confess guilt embodied in article 14(3)(g) of the ICCPR in support of their conclusion. Mason CJ and Toohey J in their joint judgment said that:

The language of that Covenant makes it clear that the purpose of its provisions is to protect individual human beings. As this court has recognised, international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights ...

Neither the fact that the privilege had its origin in the necessity of protecting human beings from compulsion to testify on pain of excommunication or physical punishment nor the modern justification of discouraging ill-treatment of individuals and dubious confessions requires that the privilege be available to corporations ... Likewise, the modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege.⁴⁵

Brennan J referred to the judgment of Murphy J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*, who had referred article 14(3)(g) of the ICCPR and concluded that the privilege was “peculiarly a human right” and thus not available to be exercised by non-human entities.⁴⁶

It appears that the privilege is available to corporations in England and New Zealand, and that in Canada it was available to corporations under the common law, but not under the Canadian Charter of Rights and Freedoms.⁴⁷ In *EPA v Caltex*, Mason CJ and Toohey J commented at the end of their judgment that:

[I]f it ever was the common law in Australia that corporations could claim the privilege against self-incrimination in relation to the production of documents, it is no longer the common law.⁴⁸

This acknowledgment of the possibility of explicit alteration of the common law, for which an international convention was used as a justification, albeit in a fairly minor way, sits comfortably with what Brennan J, Mason CJ and McHugh J did in *Mabo*.

In a joint dissenting judgment, Deane, Dawson and Gaudron JJ said with reference to article 14(3)(g) of the ICCPR that although the privilege against self-incrimination may be classified as a “human right”, it did not rest exclusively upon notions of personal freedom and human dignity. They could find no sufficient reason in principle for saying

⁴⁴ (1993) 178 CLR 477.

⁴⁵ *Ibid* at 499-500.

⁴⁶ *Supra* n 22 at 395.

⁴⁷ See *supra* n 44 at 489-97 per Mason CJ and Toohey J, 539-42 per McHugh J.

⁴⁸ *Ibid* at 508.

that the doctrine, as it has developed in Australian common law, has no application to corporations.⁴⁹

Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Western Australia v Commonwealth*⁵⁰ made a passing comment in relation to the use of international law in the development of the common law. In the context of a Commonwealth argument that that s 12 of the *Native Title Act 1993* (Cth), which gave the common law of native title “the force of a law of the Commonwealth” could be sustained under s 51(xxix), the majority stated that:

The common law may, it is true, find in international law concepts or values which may advantageously be used in the development of the common law, but the common law of native title is not developed in order to satisfy the obligations of a treaty.⁵¹

In *Minister for Immigration and Ethnic Affairs v Teoh*,⁵² Mason CJ, Deane, Gaudron and McHugh JJ all accepted that there is a role for international conventions in the common law area. Mason CJ and Deane J (with whom Gaudron J agreed on this issue⁵³) acknowledged that international conventions to which Australia is a party are a “legitimate guide” in judicial development of the common law.⁵⁴ However, they cautioned that “the courts should act in this fashion with due circumspection” where Parliament has not taken the step of enacting treaty obligations into domestic law, lest development of the common law be seen as a “backdoor means” of incorporating conventions into Australian law.⁵⁵ They offered some, albeit rather vague, guidance as to when an international convention may be used in the development of the common law:

Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.⁵⁶

McHugh J also accepted that treaties may be used to develop the common law.⁵⁷

While acknowledging a role for international conventions in the development of the common law, the court is not yet quite sure of exactly what that role is. Mason CJ and Deane J on the one hand embrace an approach which was not fully accepted as recently as 1992 (in *Dietrich*) and on the other hand draw back from the approach by advocating caution in the courts’ use of international instruments. Further, they seem to indicate that courts should confine themselves to treaties which Australia has ratified, despite

⁴⁹ *Ibid* at 532, 534.

⁵⁰ (1995) 183 CLR 373.

⁵¹ *Ibid* at 486.

⁵² *Supra* n 1. The case is discussed in greater detail in Part 4 of this article, below.

⁵³ *Ibid* at 304.

⁵⁴ *Ibid* at 288.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* at 288.

⁵⁷ *Ibid* at 315.

references in earlier cases to the ECHR by several judges, including Mason CJ in *Dietrich*.

Parallel to these developments in the High Court, similar points have been argued before the Federal Court,⁵⁸ the Family Court⁵⁹ and in the New South Wales Court of Appeal.⁶⁰

Conclusion as to the development of the common law

The use of international conventions in the development of the common law is now reasonably well-accepted by a majority of the court, although the precise circumstances in which a treaty will be used in this way are not clear. In particular, it remains unclear whether an international instrument can justify a change in the common law, as opposed to justifying the resolution of ambiguity and uncertainty. At this stage, all that can be suggested with confidence is that treaties are likely to be used by the High Court as a factor in deciding when and how to *replace* common law.⁶¹ The filling of gaps in the common law⁶² and the creating of new (as opposed to replacement) common law are issues of the moment but ones on which the court is yet to show its hand. Much depends on whether the judges see the notion of ‘development of the common law’ including the importation of international norms into the domestic system to create entirely new obligations.

Given the settled principle that the executive, by entering into a treaty with a foreign state, cannot alter the law of this country, the question arises on what basis the court can take any notice at all of unincorporated human rights treaties. It is possible that international human rights instruments are referred to as merely persuasive authority, and that they have the same status as, for example, decisions of courts of other countries, which are frequently taken into account by Australian courts in deciding questions in all areas of the law. Support for this explanation of the status of human rights treaties in common law can be found in an extrajudicial statement by Sir John Laws, a justice of the Queen’s Bench Division. He asked:

Why may courts not have regard to the ECHR jurisprudence in precisely the same way as they look to the decisions of foreign courts in other fields? No one suggests that when the House of Lords reforms the common law by reference to a decision of the Supreme Court in a Commonwealth jurisdiction, it incorporates an alien text: nothing could be more jejune ... And indeed, where the court cites an academic work with approval, no one

⁵⁸ See, eg, *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298; *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 at 443 per Black CJ.

⁵⁹ See, eg, *Re Marion* (1990) 14 Fam LR 427; cf *Re Jane* (1988) 12 Fam LR 662.

⁶⁰ See, eg, *Daemar v Industrial Commission of New South Wales* (1998) 12 NSWLR 45; *S & M Motors Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1998) 12 NSWLR 358; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558.

⁶¹ This seems to be the way in which international law was used in *Mabo* and *EPA v Caltex* and also to accord with the rejection of the ICCPR as justification for a fundamental change in the common law in *Dietrich*, while permitting its use in the less radical development of the common law notion of ‘fair trial’.

⁶² On this notion, see *Dietrich supra* n 8 at 360-1 per Toohey J.

complains that some illegitimate exercise is afoot: nor could they. Why is the ECHR different?⁶³

In this sense, international human rights are seen as a ‘modernising agent’ of the existing common law and not as the creator of new domestic common law - that is, international human rights are not capable of enlarging the floating mass that is the common law and are only capable of reforming the internal structure of that mass.

4. Treaties and Administrative Law

A further and more recent exception appears to have been recognised in the *Teoh* case where a majority of the High Court accepted that ratification of an unincorporated treaty could, in the absence of legislative or executive indications to the contrary, generate a legitimate expectation that decision-makers will not act inconsistently with the obligations contained in a treaty which has only been ratified by the Australian government without affording those affected an opportunity to make representations on their own behalf.⁶⁴

The first case to raise the use of an international convention as a limit on executive power was *Simsek v Macphee*.⁶⁵ In issue was, *inter alia*, the question whether Australia’s ratification of two international conventions, the Geneva Convention Relating to the Status of Refugees and the Protocol thereto, gave rise to a legitimate expectation on the applicant’s behalf that he would not be denied refugee status or deported before being given a hearing in conformity with the requirements of natural justice. Stephen J rejected this argument on the basis that the Convention and Protocol were not part of municipal law. He concluded that the applicant’s legitimate expectation argument failed because it involved “critical reliance upon the Convention and Protocol”.⁶⁶ Stephen J’s decision was affirmed by Gibbs CJ in *Kioa v West*⁶⁷ without qualification. This case and *Simsek*, however, need to be reconsidered in the light of *Teoh*.

Teoh’s case

Mr Teoh, a Malaysian citizen and the respondent in the case, first arrived in Australia in May 1988 on a temporary visa. In July 1988, he married an Australian citizen who had four children, three of whom had been fathered by his deceased brother in a de facto relationship. In 1989, he applied for a grant of permanent resident status. That application was pending when he was convicted in 1990 of six counts of importing heroin and three counts of being in possession of heroin. In July 1991, the Department of Immigration and Ethnic Affairs turned down Mr Teoh’s application for permanent resident status on the grounds that he did not meet the good character requirements

⁶³ Sir John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ [1993] *Public Law* 59 at 63.

⁶⁴ *Minister for Immigration and Ethnic Affairs v Teoh* *supra* n 1 per Mason CJ, Deane, Toohey, and Gaudron JJ; McHugh J dissenting.

⁶⁵ *Supra* n 8.

⁶⁶ *Ibid* at 643.

⁶⁷ *Supra* n 8.

because of his criminal record. Since Mr Teoh had overstayed his temporary visa, he was further informed that he was to be deported.

In pursuance of migration procedures, Mr Teoh appealed the decision of the Department of Immigration to the Migration Review Panel. In the intervening years, two children had been born to the Teohs and a third was born in 1992, shortly after the making of the deportation order. Mr Teoh's deportation to Malaysia would result in the breaking up of the family, which included seven children aged between 20 months and 10 years. The wife was unable to care for the children without him and it was clear they would be taken into care if the deportation order was implemented. The Panel stated:

It is realised that Ms Teoh and family are facing a very bleak future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.

However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record.⁶⁸

Mr Teoh applied to the Federal Court to have the decision reviewed and was successful on appeal to the Full Court.⁶⁹ In the Federal Court, Lee and Carr JJ held that Australia's ratification of the Convention on the Rights of the Child created a "legitimate expectation" in parents and children that any action or decision by the Commonwealth would be conducted in accordance with the principles of the Convention.⁷⁰ This principle was upheld and explained by a majority of the High Court.

There were four separate judgments in the High Court decision: Mason CJ and Deane J joined in the leading judgment; Toohey J wrote a judgment in substantial agreement with Mason CJ and Deane J; Gaudron J, the final member of the majority, took a different approach; and McHugh J dissented.

Mason CJ and Deane J found that ratification of the Convention by Australia was a significant event:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, *ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.* That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers

⁶⁸ *Supra* n 1 at 281.

⁶⁹ *Teoh v Minister for Immigration, Local Government and Ethnic Affairs supra* n 58.

⁷⁰ *Ibid* at 450 per Lee J, 446 per Carr J.

will act in conformity with the Convention, and treat the best interests of the children as ‘a primary consideration’.⁷¹

Toohy J made similar comment, observing that the submission that decision-makers need pay no regard to a treaty which has only been ratified by the Australian government was “unattractive”.⁷²

Three judges went on to observe that personal knowledge of the Convention and its terms by the individual concerned was not necessary; rather, the concept was based on an “objective” standard - it was enough that the expectation be a reasonable one, in the sense that there be materials to support it.⁷³ Thus, in this case, there was a legitimate expectation, founded on the Convention, that the decision-maker would treat the best interests of the children as “a primary consideration”.

The principle of legitimate expectations, not being a binding rule of law, does not require a decision-maker to act in a particular way. Instead, it falls within the ambit of the rules of procedural fairness in the sense that a decision contrary to a legitimate expectation should not be made without first giving those affected adequate opportunity of putting their case.⁷⁴ On the facts of *Teoh* the immigration department had denied such procedural fairness as there was no evidence that, in making their decisions, the relevant provisions of the Convention had either been considered or applied. The interests of the applicant’s children had not been treated as a primary consideration as required by the Convention without giving the applicant adequate opportunity to argue against the course.

Bayne considered that the practical effect of *Teoh* is to oblige the decision-maker to consider the treaty and give reasons for departing from its requirements, thereby effectively imposing an obligation on the decision-maker to comply with the treaty unless an adequate reason can be found not to do so. He stated:

[I]n practical effect, the court was coming very close to saying that decision-makers must have regard to the terms of a convention when they exercise an administrative power. If there is no act of the legislature or the executive or if there is no action of the executive which displaces the convention, then as a matter of practical effect decision-makers will have to have regard to the terms of the convention in order to determine whether they should give a hearing to a person in respect of whom they propose not to apply the convention ...

⁷¹ *Supra* n 1 at 291 (emphasis added). Australian courts are not alone in placing such weight on the consequences of ratification of treaties. The New Zealand Court of Appeal in *Tavita v Minister for Immigration* (1994) 2 NZLR 257 at 266 described the government’s argument that it is entitled to ignore treaties to which New Zealand is a party, as “an unattractive argument” which implies that New Zealand’s adherence to international instruments “has been partly window dressing”.

⁷² *Ibid* at 301.

⁷³ *Ibid* at 291 per Mason CJ and Deane J, 301 per Toohy J.

⁷⁴ *Ibid* at 291-2 per Mason CJ and Deane J.

That comes very close to a rejection of the basic legal principle that conventions do not have the force of law in Australia unless adopted by relevant local legislation.⁷⁵

Gaudron J took a different approach, according significance to the ratification of a treaty to the extent that it gives expression to a fundamental human right which is accepted in Australian society. She considered that ratification of the Convention confirmed the significance of the right within Australian society, and concluded:

Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.⁷⁶

It is submitted that the questions begged by any such approach would make it less than satisfactory. Who would be the arbiter of harmonious compliance with community values? Presumably the judges. And how difficult might be the task of a decision-maker having to second guess the likely judicial view on the matter?⁷⁷

McHugh J's initial criticism of the majority arose out of a historical examination of the concept of "legitimate expectations". Having stated that his preferred approach was to look not at whether there is an obligation of procedural fairness but at the content of that obligation, he accepted that the argument was based on the former question and undertook to deal with it.⁷⁸ He then cited the following passage:

Our analysis of the cases suggests that there are four principal sources which the courts recognise as capable of rendering expectations legitimate or reasonable: (1) a regular course of conduct which has not been altered by the adoption of a new policy; (2) express or implied assurances made clearly on behalf of the decision-making authority within the limits of the power exercised; (3) the possible consequences or effects of the expectation being defeated especially where these consequences include economic loss and damage to reputation, providing that the severity of the consequences are a function of justified reliance generated from substantial continuity in the possession of a benefit or a failure to be told that renewal cannot be expected; and (4) the satisfaction of statutory criteria.⁷⁹

In McHugh J's view, none of the previously recognised sources of a legitimate expectation were present in this case. Thus, for Mr Teoh to succeed, the doctrine of legitimate expectation would have to be extended. In any event, he noted, a legitimate

⁷⁵ Commonwealth, *Hansard*, Senate Legal and Constitutional References Committee 1 May 1995, 110 (Mr P Bayne).

⁷⁶ *Supra* n 1 at 305.

⁷⁷ J Kidd, 'Can International Law Protect Our Civil Rights? The Australian and British Experience Compared' (1995) 18 *UQLJ* 305 at 309.

⁷⁸ *Supra* n 1 at 311-2.

⁷⁹ *Ibid* at 312, citing P Tate, 'The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice' (1988) 14 *Monash LR* 15 at 48-9.

expectation would not oblige the decision-maker to apply the Convention.⁸⁰ In McHugh J's view, the rules of procedural fairness would not have required the decision-maker to inform Mr Teoh that she was not going to apply article 3 of the Convention because she had done nothing to lead Mr Teoh to believe that it would be applied.⁸¹

In order to determine whether *Teoh* is such a radical departure from precedent, it is necessary to consider some earlier cases on "legitimate expectation". A "legitimate expectation" is a doctrine of administrative law, intended to provide procedural fairness in administrative decision-making. The concept of "legitimate expectation" was "created"⁸² by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*.⁸³ The doctrine will operate when the government publishes a policy, or makes a representation about how it will proceed in making certain types of administrative decisions. If the decision-maker decides to act in a manner which is contrary to the policy or other representation, the affected person must be given the opportunity of a hearing. In 1985 the Privy Council applied the concept of "legitimate expectation" in *Attorney-General of Hong Kong v Ng Yuen Shiu*.⁸⁴ The Privy Council held that a legitimate expectation arose because there was a publicly announced policy that illegal immigrants applying for residency would have their applications processed in a certain manner. Thus, if the government intended to depart from that policy, then the applicant was entitled to a hearing on the issue before that departure. The concept was reconsidered by the High Court in *Haoucher v Minister for Immigration and Ethnic Affairs*,⁸⁵ where it held that a "published, considered statement of government policy" that a decision of the Administrative Appeals Tribunal will only be overturned on a deportation issue in "exceptional circumstances", gave rise to a legitimate expectation that the person subject to deportation be given a hearing on the point before the Minister makes his or her decision. It is my view that the decision of the majority of the High Court in *Teoh*, in holding that a legitimate expectation arose from the act of ratification of a treaty without the necessary intervention of a considered statement of policy, represents a significant extension of the legitimate expectation doctrine.⁸⁶

McHugh J also disagreed with the conclusion of the majority that an individual can get the benefit of this legitimate expectation even if they did not in fact have it, or indeed, even if they were totally unaware of the existence of the treaty. He considered that for there to be a 'legitimate expectation', the person affected must have that expectation, or otherwise no disappointment or injustice is suffered by that person if that expectation is not fulfilled. His Honour concluded:

⁸⁰ *Ibid* at 313.

⁸¹ *Ibid*.

⁸² M Allars, *Introduction to Australian Administrative Law*, Butterworths Sydney 1990 at 238.

⁸³ [1969] 2 Ch 149.

⁸⁴ [1983] 2 AC 629.

⁸⁵ (1990) 169 CLR 648.

⁸⁶ See also Senate Legal and Constitutional Legislation Committee, *Administrative Decisions (Effect of International Instruments) Bill 1995*, Senate Canberra 1995 at 3-6.

A person cannot lose an expectation that he or she does not hold. Fairness does not require that a person be informed about something to which the person has no right or about which that person has no expectation.⁸⁷

Thus, McHugh J concluded that Mr Teoh could not succeed in this case. However, he also went on to consider the effect of the Convention in the event that an extension of the doctrine of legitimate expectation was accepted. McHugh J considered that the ratification of treaties is an act directed at the international community, and should not have internal consequences:

The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive Government does not give undertakings to its citizens or residents. The undertakings in the Convention are given to the other parties to the Convention. How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament.⁸⁸

Towards the end of his judgment, McHugh J made an argument that, were the majority approach to be correct, the consequences for administrative decision-making would be enormous, given that Australia is party to about 900 treaties.⁸⁹ The difficulty of deciding whether a particular convention is relevant to a decision will frequently be compounded by the ambiguous language in which some conventions are expressed.⁹⁰ In *Teoh*, for example, the issue arising was whether deportation of Mr Teoh fitted the description of article 3 of the Convention on the Rights of the Child, that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” (emphasis added). A skilled lawyer could be excused for having decided that deportation of Mr Teoh was not an action concerning his children.⁹¹

McHugh J found that, even if a treaty could be regarded as raising a legitimate expectation of compliance with its terms, the express terms of the policy of the Department of Immigration and Ethnic Affairs displaced any such expectation, notwithstanding that the terms of the policy were not in fact applicable to Mr Teoh’s case;⁹² that article 3 of the Convention did not apply in this situation where the decision was directed at the parent of a child rather than the child;⁹³ and that, in any event, on the

⁸⁷ *Supra* n 1 at 314. See also G Evans, ‘The Impact of Internationalisation on Australian Law: A Commentary’ in Saunders *supra* n 29 at 239, noting that the expectation has to have a “whiff of objective reality about it”.

⁸⁸ *Ibid* at 316. See also Evans *supra* n 87 at 238: “[R]atification is a statement to the *international* community to observe the treaty measures in question; it is not a statement to the *national* community - that is the job of the Legislature, not the Executive.”

⁸⁹ *Ibid*.

⁹⁰ See *R v Chief Immigration Officer; ex parte Bibi* [1976] 1 WLR 979 at 984-5 per Lord Denning MR.

⁹¹ J McMillan, ‘*Teoh*, and Invalidity in Administrative Law’ (1995) 5 *AIAL Forum* 10 at 14.

⁹² *Supra* n 1 at 318-9.

⁹³ *Ibid* at 319.

facts of the case, the decision-maker had made the children's interests a primary consideration.⁹⁴

Teoh's biggest impact has been on decisions to deport a parent with children who will remain behind in Australia. In a number of subsequent cases, the Federal Court has declared that deportation decisions affirmed by the Administrative Appeals Tribunal were invalid because the interests of a child had not been considered in the manner envisaged by *Teoh* and the Convention on the Rights of the Child.⁹⁵

The Governmental Response

In *Teoh*, the majority stated that the legitimate expectations created by treaty ratification would only come about in the absence of "statutory or executive indications to the contrary".⁹⁶ "[T]here can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation."⁹⁷

In May 1995, soon after the High Court handed down its decision, the then Minister for Foreign Affairs, Senator Evans, and the Attorney-General, Mr Lavarch, issued a 'Joint Executive Statement' which was intended to "clarify" the position of the government with respect to the *Teoh* decision.⁹⁸ The statement reviewed the decision in *Teoh* and what the High Court said regarding the impact of treaties upon Australian law. It was noted that:

It may be only a small number of the approximately 920 treaties to which Australia is currently a party could provide a source for an expectation of the kind found by the High Court to arise in *Teoh*. But that can only be established as individual cases are litigated. In the meantime, the High Court decision gives little if any guidance on how decision-makers are to determine which of those treaty provisions will be relevant and to what decisions the provisions might be relevant, and because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced into government activity.⁹⁹

The statement then purported to nullify the effect of unincorporated treaties in the manner envisaged by the High Court by providing as follows:

⁹⁴ *Ibid* at 320. See also J McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *FL Rev* 347 at 371.

⁹⁵ See, eg, *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (FFC); *Lam v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Sackville J, 4 March 1998); *Hui v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Carr J, 21 July 1999).

⁹⁶ *Supra* n 1 at 291 per Mason CJ and Deane J.

⁹⁷ *Ibid* at 302 per Toohey J.

⁹⁸ Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995. An executive statement in almost identical terms was issued by the South Australian Attorney-General on 8 June 1995. The Western Australian Attorney-General made a statement in Parliament on 24 August 1995 in similar terms.

⁹⁹ *Ibid* at 2.

We state on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. This is so both for existing treaties and for future treaties that Australia may join.¹⁰⁰

This 1995 statement has since been replaced by a statement of 25 February 1997 by the present Minister for Foreign Affairs, Mr Downer, and the Attorney-General, Mr Williams.¹⁰¹ The 1997 statement again restated the consequences of the decision in *Teoh's* case and made express reference to the role of the Australian Parliament in changing Australian law to implement treaty obligations. The statement went on to provide:

Therefore, we indicate on behalf of the Government that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the *Teoh* Case ...

[T]he executive indication in this Joint Statement applies to both Commonwealth and State and Territory administrative decisions and to the entry into any treaty by Australia in the future as well as to treaties to which Australia already is a party. In relation to administrative decisions made in the period between 10 May 1995 and today reliance will continue to be placed on the Joint Statement made by the then Minister for Foreign Affairs and the then Attorney-General on 10 May 1995.¹⁰²

Allars has questioned whether the Joint Executive Statements are sufficient to overturn other considered statements of government policy.¹⁰³ These policy statements include the Guidelines on Official Conduct of Commonwealth Public Servants, which states that a key human rights treaty, the ICCPR, is “in line with community expectations of fair treatment from the public service”.¹⁰⁴ They also include international human rights instruments declared under s 47 of the *Human Rights and Equal Opportunities Commission Act* 1986 (Cth).¹⁰⁵ The declaration of an instrument under that Act makes

¹⁰⁰ *Ibid.* It should be noted that the statement will not operate retrospectively to defeat claims arising on the basis of a legitimate expectation generated before the statement was made: see *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583 at 604 per Carr J.

¹⁰¹ Joint Statement by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams, *The Effect of Treaties in Administrative Decision Making*, 25 February 1997.

¹⁰² *Ibid.*

¹⁰³ M Allars, ‘International Law and Administrative Discretion’ in B Opeskin & D Rothwell (eds), *International Law and Australian Federalism*, Melbourne University Press Melbourne 1997 at 266-8.

¹⁰⁴ *Ibid* at 267.

¹⁰⁵ *Ibid* at 267-8.

it a statement of human rights which must be taken into account by HREOC. Declared instruments are scheduled to the Act itself.

Allars has also expressed the view that the Joint Executive Statements may well not have the effect of negating future inconsistent statements of policy.¹⁰⁶ Such statements could include future ratifications of treaties. Support for a restrictive interpretation of the executive's power to negate the domestic effect of treaties is to be found in *Department of Immigration and Ethnic Affairs v Ram*,¹⁰⁷ in which Hill J, discussing the reference by Mason CJ and Deane J to executive indications to the contrary, suggested "it may well be that their Honours intended to refer to statements made at the time the treaty was entered into, rather than to statements made years after the treaty came into force".¹⁰⁸

While the majority certainly gives a clear indication that executive statements may displace the legitimate expectation, it is unlikely that they envisaged a blanket suffocation of all such expectations in relation to all treaties, past and future. What may have been envisaged was a statement as to particular treaties and particular kinds of decisions. So, for example, the Minister for Immigration and Ethnic Affairs could make a statement to the effect that migration decisions would not be made in accordance with Australia's obligations under the Convention on the Rights of the Child and this would preclude any legitimate expectation arising in any person affected by a migration decision.¹⁰⁹

There have also been legislative attempts to overcome the decision at the federal level. In 1995, the Keating Labor government introduced a Bill to this effect, which lapsed with the March 1998 federal election.¹¹⁰ The Howard Coalition government introduced its own Bill in 1997.¹¹¹ It encountered difficulties in the Senate¹¹² and eventually lapsed with the 1998 election. In October 1999, the government made a second attempt, introducing the Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth). Parliament has yet to pass the Bill. The Explanatory Memorandum which accompanied the Bill noted as follows:

Prior to the *Teoh* decision, the terms of treaties to which Australia was a party had not been considered to create rights or obligations in Australian law in the absence of legislation. The High Court confirmed this principle

¹⁰⁶ M Allars, 'One Small Step for Legal Doctrine, One Giant Step Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law' (1995) 17 *Syd LR* 204 at 221-6.

¹⁰⁷ (1996) 23 AAR 134.

¹⁰⁸ *Ibid* at 140. See also *Re Yad Ram and Department of Immigration and Ethnic Affairs* (1995) 22 AAR 372 (AAT); *Fang v Minister for Immigration and Ethnic Affairs* *supra* n 100; *Davey Browne v Minister for Immigration and Multicultural Affairs* (1998) 27 AAR 353; *Tien v Minister for Immigration and Multicultural Affairs* (1999) 159 ALR 405; *Baldini v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, Drummond J, 25 February 2000).

¹⁰⁹ *Baldini v Minister for Immigration and Multicultural Affairs* *supra* n 108 at para 30 illustrates that the obligation imposed by *Teoh* can be overridden by a ministerial policy or direction that establishes a detailed code to provide guidance to decision-makers.

¹¹⁰ Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth).

¹¹¹ Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth).

¹¹² See Senate Legal and Constitutional Legislation Committee, Administrative Decisions (Effect of International Instruments) Bill 1997, Senate Canberra 1997.

in the *Teoh* case. The court distinguished between a substantive rule of law and the doctrine of legitimate expectation on the basis that the doctrine only gave rise to a procedural right to have the treaty considered, not a legal right to enforce the terms of the treaty. Despite this distinction, however, the court's decision gave treaties an impact in Australian law which they did not previously have.

The government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations.

The Bill is a statutory indication to the contrary as discussed by the High Court in the *Teoh* case. The purpose of the Bill is to ensure that the Executive act of entering into a treaty does not give rise to legitimate expectations in administrative law.¹¹³

Allars has similar doubts as to whether the Commonwealth legislation will overturn the effects of the *Teoh* decision. Section 5 of the Bill states that:

The fact that:

- (a) Australia is bound by, or a party to, a particular international instrument; or
 - (b) an enactment reproduces or refers to a particular international instrument;
- does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative action.

But Allars points out that it is not the existence of an international obligation or the scheduling of an instrument, but the historical fact of the conduct of government in ratifying which generates a legitimate expectation.¹¹⁴

In addition, the South Australian Parliament has passed the *Administrative Decisions (Effect of International Instruments) Act 1996* (SA), which came into effect on 30 November 1996. The substantive provision of the South Australian legislation provides that:

- (1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.

¹¹³ House of Representatives, *Administrative Decisions (Effect of International Instruments) Bill 1999*, Explanatory Memorandum 1999 at 1.

¹¹⁴ M Allars, 'International Law and Administrative Discretion' *supra* n 103 at 268.

- (2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that -
- (a) administrative decisions will conform with the terms of the instrument; or
 - (b) an opportunity to present a case against a proposed administrative decision that is contrary to the terms of the instrument.¹¹⁵

It has been held that the Act removes any legitimate expectation arising under international instruments.¹¹⁶

Teoh's case, and the governmental response, demonstrated very clearly the impact that treaties had begun to have on Australian law throughout the 1990s.

Conclusion as to Administrative Law

The doctrinal and practical difficulties of using procedural fairness via legitimate expectation to achieve a greater status for unincorporated treaties in domestic law should be evident. The *Teoh* decision could be construed as a transfer by the judiciary of Parliament's legislative sovereignty to the executive. Some of the statements of the High Court, while expressly denying that an unincorporated treaty may have direct legal effect in Australia, go so far in acknowledging the impact of treaties, in the context of legitimate expectations, that they may be seen as being tantamount to a back door entry for unincorporated treaties into Australian law.¹¹⁷

It remains to be seen whether the use of unincorporated treaties will be confined to the generation of legitimate expectations for the purposes of procedural fairness and the interpretation of ambiguous legislation. In *Minister for Foreign Affairs and Trade v Magno*, Gummow J pointed to difficult questions of administrative law which arise where:

whilst the international obligation is not in terms imported into municipal law and the municipal law is not ambiguous, nevertheless, upon the proper construction of the municipal law, regard may be had by a decision maker exercising a discretion under that law to the international agreement or obligation. If that agreement or obligation is misconstrued by the decision maker, is there reviewable error of law? Or is the 'error' to be classified as factual in nature? If the latter is correct the scope of judicial review will be narrowed. The question is unresolved.¹¹⁸

¹¹⁵ Section 3.

¹¹⁶ *Collins v State of South Australia* (unreported, Supreme Court of South Australia, Millhouse J, 25 June 1999).

¹¹⁷ G Evans *supra* n 87 at 239, stated that if *Teoh* did not incorporate treaties through the back door, it had certainly brought them "through the back gate as far as the back garden". See also M Taggart, 'Legitimate Expectations and Treaties in the High Court of Australia' (1996) 112 *LQR* 50 at 53; R Piotrowicz, 'Unincorporated treaties in Australian law' [1996] *Public Law* 190 at 192-3.

¹¹⁸ *Supra* n 58 at 304.

The extension of the significance of unincorporated treaties in other areas of administrative law could become a back door means of importing an unincorporated treaty into Australian law so as to undermine the basic inability of the executive to make or alter domestic law. I believe that such an extension would not represent an acceptable balance that needs to be struck between the ever growing and inevitable demands of internationalisation, on the one hand, and the demands of localised democratic government, on the other.

Whatever the fate of the Administrative Decisions (Effect of International Instruments) Bill 1999, one consequence of the *Teoh* decision was readily foreseeable. That is that the Commonwealth government would be wise to adopt a more cautious, more consultative approach than it had hitherto when deciding whether to ratify treaties.¹¹⁹

5. Treaties and the Interpretation of Statutes

An interesting example of a modern qualification to the rule which establishes the need for legislation, relates to the use of treaties and agreements to interpret ambiguous legislation especially in the light of the presumption that Parliament normally intends to legislate consistently with Australia's international obligations.¹²⁰

In the earlier days of Mason CJ's period on the High Court, his Honour took a very narrow approach to the use of international conventions as an aid to statutory interpretation. In two cases, *D & R Henderson v Collector of Customs for NSW*¹²¹ and *Yager v R*,¹²² he required both ambiguity in the language of the statute in question and that the statute be intended to give effect to the convention which is to be called in aid of interpretation.

It was only in 1992, in *Dietrich*, that the court first acknowledged a role for treaties in the interpretation of legislation not intended to implement the treaty in question. This was the beginning of a broader approach to the use of treaties by the court, although the High Court's adoption of this approach in *Dietrich* was less than wholehearted. Mason CJ and McHugh J, in discussing the position in the United Kingdom, stated that:

[I]t is 'well settled' that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations.¹²³

However, it is unclear from the judgment whether Mason CJ and McHugh J consider this principle to be "well-settled" in Australian law. Clearly, though, the principle referred to is not confined to statutes which are directed at the implementation of an international convention, but is directed at all statutes, as a general cannon of statutory

¹¹⁹ See now Government Response to the Senate Legal and Constitutional References Report 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', tabled in the Senate on 2 May 1996.

¹²⁰ See, eg, *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1.

¹²¹ (1974) 48 ALJR 132 at 135.

¹²² (1977) 139 CLR 28 at 43-4.

¹²³ *Supra* n 8 at 306.

interpretation. Ambiguity, however, is still required. This is somewhat broader than the earlier, restricted view taken by Mason CJ.

Dawson J's judgment is not of much greater assistance. He stated that:

There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation.¹²⁴

Again, there is no real indication whether Dawson J considers that approach to be correct. And, again, ambiguity in the legislation is required before the presumption comes into play, although his Honour's view of ambiguity seems to be a reasonably wide one.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,¹²⁵ the plaintiffs were Cambodian nationals who had arrived by boat in Australia in 1989 and 1990 and who had been detained in custody since their arrival, pending determination of their applications for refugee status. In April 1992 the applications were rejected. In the Federal Court, the plaintiffs obtained an order setting aside this decision; they also sought an order that they be released from custody pending re-determination of their applications, but this aspect of the proceeding was adjourned. Prior to the return of their application for release, the Federal government passed the *Migration Amendment Act 1992 (Cth)* which, *inter alia*, purported to prohibit any court from ordering the release from custody of anyone of a defined class of persons which included the plaintiffs. The plaintiffs challenged the validity of the legislation. One of the bases of the challenge was the inconsistency of the amendments with international legal commitments undertaken by Australia, in particular the Convention relating to the Status of Refugees 1951 and its 1967 Protocol, and the ICCPR. Section 54T of the *Migration Act 1958 (Cth)* provided that the amendments were to apply despite inconsistency with any other Australian law other than the Constitution. Members of the High Court regarded s 54T as adequate to preclude recourse to international law:

[Section] 54T ... unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties.¹²⁶

One of the important *obiter dicta* which arose in the *Teoh* case concerned the extent to which treaties can affect the interpretation of statutes. Mason CJ and Deane J¹²⁷ took a broad approach to this issue, in contrast to the House of Lords, which has taken a narrower view of the extent to which treaties can effect the interpretation of

¹²⁴ *Ibid* at 348-9.

¹²⁵ (1992) 176 CLR 1.

¹²⁶ *Ibid* at 38 per Brennan, Deane and Dawson JJ.

¹²⁷ With whom Gaudron J agreed on this point.

legislation.¹²⁸ Their Honours noted that it is a principle of statutory interpretation that if a statute or legislative instrument is ambiguous, the courts should interpret it in a manner that is consistent with Australia's international obligations.¹²⁹ This rule, they noted, is based on the principle that "Parliament, prima facie, intends to give effect to Australia's obligations under international law". They went on to explain how this principle must lead to a broad reading of the concept of ambiguity, stating:

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph [that ambiguous statutes should be interpreted in accordance with Australia's international obligations] should be stated so as to require courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That is indeed how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.¹³⁰

In the case of *Kartinyeri v Commonwealth*,¹³¹ Gummow and Hayne JJ stated that it was an accepted principle

that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is not in conflict with the established rules of international law.¹³²

One final point to be made in relation to the use of treaties in statutory interpretation is the High Court's complete lack of reference to s 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth), which permits recourse to "any treaty or other international instrument that is referred to in the Act" as extrinsic material which may be used to confirm the ordinary meaning of the text (s 15AB(1)(a)) or where there is ambiguity or the ordinary meaning would lead to an absurd result (s 15AB(1)(b)). Clearly, this statutory discretion overrides the common law principles, at least in relation to statutes which make explicit reference to a treaty, yet it is never mentioned in decisions concerning such statutes. Thus, in relation to such statutes, ambiguity is not essential under s 15AB.

¹²⁸ See *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696 at 747-8 per Lord Bridge.

¹²⁹ *Supra* n 1 at 287, and see 315 per McHugh J.

¹³⁰ *Ibid* at 287-8.

¹³¹ (1998) 152 ALR 540.

¹³² *Ibid* at 599.

Conclusion as to the Interpretation of Statutes

Where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations. It may also be that in the case of an ambiguity in any legislation, even if not enacted for the purpose of implementing a treaty, the courts will favour a construction that is consistent with Australia's obligations under international human rights treaties. This may be an aspect of a more general principle of statutory interpretation that a court will interpret statutes in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms.¹³³ However, as Lauterpacht has commented:

[T]his has been a theoretical affirmation having the probably not unintended effect of stressing the duty of Judges to do their utmost to interpret statutes so as not to impute to the Legislature the intention of disregarding International Law. It is easier to interpret away a provision of an Act of Parliament on the face of it inconsistent with International Law if previously due obeisance has been made to the supremacy of the Legislature.¹³⁴

6. Conclusion

Although little use has been made of unincorporated treaties outside the field of human rights, within that field judicial interpretation is increasingly likely to narrow the gulf between international norms and Australia's domestic law. This is to be seen both in the interpretative rules and, more dramatically, in administrative law. The law regulating the relationship between treaties and domestic law is far from settled. Questions still abound as to the extent to which unincorporated treaties can affect the domestic law of Australia, whether by interpretation of statutes, development of the common law, or the creation of procedural rights of fairness. As Kirby J emphasised in *Newcrest Mining (WA) Ltd v Commonwealth*,¹³⁵ "the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution'".¹³⁶ In my view, the pressures of internationalisation or globalisation, as it is sometimes called, are bound to increase the qualifications which will be recognised to the rule which establishes the need for legislation.

The decision in *Teoh* does, I believe, strengthen the case for introduction of measures to give the Houses of the Commonwealth Parliament a capacity to control exercise by the executive branch of its power to enter into international agreements. If, by ratification of an international agreement, the Commonwealth executive can affect legal rights and obligations under Australian law, the principle of parliamentary supremacy in relation to law-making surely requires that the federal Parliament be accorded a facility to

¹³³ *Potter v Minahan* (1908) 7 CLR 277 at 304; *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 183 per Dawson J; *Nationwide News v Wills* (1992) 177 CLR 1 at 43 per Brennan J.

¹³⁴ H Lauterpacht, 'Is International Law a Part of the Law of England' (1939) 25 *Transcripts of the Grotius Society* 51 at 58.

¹³⁵ (1997) 147 ALR 42.

¹³⁶ *Ibid* at 147.

determine whether domestic law will or may be affected by exercise of the treaty-making power invested in the executive.¹³⁷

¹³⁷ See also Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Senate Canberra 1995 at 93-4.