

TREATIES, HUMAN RIGHTS and STATUTORY INTERPRETATION

Hon. Justice Peter Vickery

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INTRODUCTION

Expressing scepticism about the influence of international law on the development of domestic law in the United States, Justice Antonin Scalia of the US Supreme Court declared in a 2004 address to the American Society of International Law: ¹

“We have no authority to look around and say ‘Wow, things have changed.’”

This unaccommodating statement however, is far from representing a universal view amongst the United States judiciary. Only a few months before Justice Scalia’s pronouncement, Justice Sandra Day O’Connor, also then a member of the US Supreme Court, observed:

"[w]ith time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues" ²

In the same speech, Justice O’Connor acknowledged:

“[t]here has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes.”

In Australia, by comparison, the acceptance of international law as an influence on domestic law is a flourishing legal development, given particular impetus by the landmark decision of *Mabo v Queensland [No 2]* (“*Mabo*”) ³. International law now has an entrenched influence, spanning many areas of modern legal practice.

In *Mabo* Brennan J (with whom Chief Justice Mason and Justice McHugh agreed) recognized that it was inevitable, following Australia's ratification of the *International Covenant on Civil and Political Rights* (ICCPR), and specifically of the First Optional Protocol to that Covenant, that the powerful force of human rights law, endorsed by a ratified international treaty, would bring its influence to bear on judicial exposition of Australian law. His Honour said: ⁴

“The opening up of international remedies to individuals pursuant to Australia’s accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the covenant and the international standards it imports. The common law does not

¹ "Scalia skeptical about foreign law in US", Anne Gearan, ‘Scalia Skeptical about Foreign Law in US’, *Associated Press Newsfeed*, 2 April 2004.

² Justice Sandra Day O'Connor, Speech given to *Southern Center for International Studies* (Atlanta, Georgia, 28 October 2003).

³ (1992) 175 CLR 1 .

⁴ *Ibid* at 42.

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.”

A year after *Mabo* was decided, the Chief justice of the Family Court of Australia, Nicholson CJ, delivered a joint judgment with Fogarty J which provided further authoritative recognition of the use of international law in a domestic legal context. In *Murray v Director, Family Services ACT*⁵ an issue arose as to whether a decision by the primary judge for the return of the children to New Zealand following an alleged abduction, failed to properly take into account the effect of the *United Nations Convention on the Rights of the Child* (UNCROC). Specifically, it was argued that the provisions of the *Family Law (Child Abduction Convention) Regulations*, which had partly incorporated the *Hague Convention on the Civil Aspects of International Child Abduction* 1980 into Australian municipal law, was to be construed in a manner consistent with UNCROC.

In their joint judgment, Nicholson CJ and Fogarty J recognised the traditional approach that international law, unless incorporated, was not as such part of Australian domestic law. However, their Honours indicated that the Court was prepared to go further, by referring to the decision of the Full Court of the Federal Court of Australia in *Minister For Foreign Affairs v Magno* (1992) 112 ALR 529 at 534. The *Magno* case involved consideration of a regulation made pursuant to the *Diplomatic Privileges and Immunities Act* 1967. The majority of the Full Court (Gummow and French JJ, Einfeld J dissenting) held that the regulation in question was valid. In the course of his judgment, Gummow J expressed what might be regarded as a conservative view as to the effect of international conventions and treaties on Australian domestic law. The views of Gummow J, which appear at pp 534-535 and warrant particular attention, were summarised by Nicholson CJ and Fogarty J in *Murray* as follows.

Firstly, that if an international obligation involves enforcement in the courts which is not already authorised by municipal law, legislation is needed to make the necessary changes in the law or to equip the Executive with the necessary means to execute the obligation.

Secondly not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the Commonwealth or creates justiciable rights for individuals.

Thirdly, in cases where a convention has been ratified by Australia, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation.

Fourthly, where a statute has adopted the nomenclature of a convention in anticipation of subsequent Australian ratification, it is possible to refer to the convention to assist resolution of an ambiguity, but not to displace the plain words of the statute.

Fifthly, in the exercise of a discretion and where the domestic law upon its proper construction permits it, regard may be had to an international obligation or agreement which has been ratified by Australia, but not otherwise incorporated into domestic law and where the domestic law is not ambiguous. In this regard, his Honour pointed to the still unresolved difficulty, if it is suggested

⁵ (1993) FLC 92-416; 16 Fam LR 982; (1994) 116 FLR 321 before Nicholson CJ, Fogarty and Finn JJ

that the obligation or agreement has been misconstrued by the decision maker, as to whether this amounts to an error of fact or law for the purpose of review or appeal.

Sixthly, in circumstances where Parliament has expressly given the same meaning to a law as the meaning it bears in a particular agreement or convention, it may attract the provisions of s15AB of the Acts Interpretation Act 1901, where the agreement or convention is "referred to" within the meaning of s15AB(2)(d). In such circumstances consideration may be given to it not merely to construe provisions which are ambiguous or obscure but for the wider purposes set out in s15AB(1).

However, Nicholson CJ and Fogarty J took the view that Gummow J's may have been may have been overly restrictive in holding that the terms of the Convention may only be resorted to for the purpose of resolving ambiguity in domestic primary or subordinate legislation. As their Honours said in *Murray*:

"We think that such conventions may also be resorted to in order to fill lacunae in such legislation, having regard to the views of the High Court expressed in Dietrich's case and those expressed by Kirby P in *Jago v District Court of NSW* [1989] HCA 46; (1988) 12 NSWLR 558."

Nicholson CJ and Fogarty said further:

"We think that the [Convention] falls clearly within the third category of conventions described by Gummow J in Magno's case, in that it has been ratified by Australia but has not been given specific statutory recognition. It can thus be used to resolve ambiguities in domestic primary and subordinate legislation. If we are correct it can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children."

Thus, the Full Court of the Family Court recognised that international law could be used in a number of ways: (1) to help resolve ambiguities in the interpretation of domestic primary or subordinate legislation; (2) to fill gaps in such legislation; and (3) to elucidate and develop the common law.

Building upon these early pronouncements, the President of the Court of Appeal in Victoria, Maxwell P was definitive in his appreciation of the force of international law when he said in *Royal Women's Hospital v Medical Practitioners Board of Victoria*:⁶

1. The Court will encourage practitioners to develop human rights -based arguments where relevant to a question in the proceeding.
2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.

That there is a proper place for human rights -based arguments in Australian law cannot be doubted. As the Hospital's well-researched submission pointed out, over the past two decades Australian courts have been prepared to consider the use of international human rights conventions in:

⁶ (2006) 15 VR 22 at 38-39.

- (a) exercising a sentencing discretion;
- (b) considering whether special circumstances existed which justified the grant of bail;
- (c) considering whether a restraint of trade was reasonable; and
- (d) exercising a discretion to exclude confessional evidence.

In *John Fairfax Publications Pty Ltd v Doe*, Gleeson CJ (as Chief Justice of New South Wales), in considering whether the means of protecting privacy of communication under Part VII of the *Telecommunications (Interceptions) Act 1979* (Cth) lacked proportionality, referred to the international recognition of the need for stringent controls in the interests of privacy.

There are three important ways in which such instruments, and the associated learning, can influence the resolution of disputes under domestic law. This is so notwithstanding that, unless an international convention has been incorporated into Australian municipal law by statute (as has occurred with the Commonwealth's *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*), the convention cannot operate as a direct source of individual rights and obligations under Australian municipal law.

First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.

Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.

Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.”

In practice, the use of treaties and case law founded on international treaties, as recent experience has shown, will have their greatest impact on Australian human rights law. This body of law, in turn is beginning to have a significant impact upon our legislation as a whole. Given the recent observation of Gleeson CJ ⁷ that “...applying legislation is now the largest part of the work of modern judges”, the implications for the development of our law are plain.

In this way, the seemingly divergent themes of this paper are uniquely linked in Australia's contemporary jurisprudence.

TREATIES AS A SOURCE OF RIGHTS IN FOSTERING LEGISLATIVE CHANGE

The general and well accepted principle was noted by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* ⁸:

⁷ Gleeson CJ, “The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights” Victoria Law Foundation Oration, Melbourne, 31 July 2008 at 3.

⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J.)

“[A] treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.”⁹

The theme was developed further by Gummow J in *Magno* as follows:¹⁰

“...not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the commonwealth, or creates justiciable rights for individuals. An example is s 3 Charter of the United Nations Act 1945 (Cth). This simply states that the Charter is “approved”, something insufficient to render the Charter binding on individuals in Australia”

However, treaties may provide an instrument to foster legislative change, which in turn can give rise to locally enforceable rights.

An example is provided by the operation of the First Optional Protocol to the ICCPR. This entitles individuals to complain about their treatment in Australia directly to the UN Human Rights Committee, having first exhausted reasonably available domestic remedies. The First Optional Protocol was adopted by Australia in 1991. Since then, Australian citizens have been entitled to approach the United Nations Human Rights Committee in Geneva for a declaration as to the compatibility of Australian law with Australia’s obligations as a State party to the Covenant. This is not a formal judicial process but the findings of the Committee can result in political pressure for change.

A prominent illustration of the use of the First Optional Protocol is the case of *Toonen v Australia*¹¹ decided by the Human Rights Committee on 4 April 1994. This was the first complaint made by an Australian citizen. The question was whether the Tasmanian Criminal Code, which criminalized male homosexual conduct violated the right of privacy guaranteed by Article 17 of the International Covenant on Civil and Political Rights (“the ICCPR”) in the following terms:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The United Nations Human Rights Committee found that provisions of the Tasmanian Criminal Code which criminalised all sexual conduct between consenting male adults in private were in breach of Australia's obligations under art. 17 of the ICCPR in that they constituted an arbitrary interference with Mr Toonen's privacy.

The Australian Attorney-General of the day, Michael Lavarch, stated that, while the Committee's views do not have the force of law in Australia, "the government takes seriously its obligations under the Covenant", and that "all Australian governments ...

⁹Ibid.

¹⁰ *Minister For Foreign Affairs v Magno* (1992) 112 ALR 529 at 533 – 534.

¹¹ (1994) 1 PLPR 50.

have a corporate responsibility to ensure Australia's record on human rights is not tarnished internationally as a result of a particular law within a jurisdiction". He called on the Tasmanian government to amend the laws in question, and warned that, if necessary, the Commonwealth government would exercise the foreign affairs power to override the Tasmanian government. The Committee's view would form part of the government's argument (in the inevitable High Court challenge by Tasmania) that this was "a proper exercise of the foreign affairs power."

Following a failure on the part of the government of Tasmania to repeal the offending provision from its criminal code, the Australian Government introduced the *Human Rights (Sexual Conduct) Bill 1994* into Federal Parliament on 21 September 1994 which was passed in the last session of Parliament in 1994 with bi-partisan support. The legislation came into effect on the 19 December 1994. The Commonwealth in effect sought to override the offending State law by the use of s 109 of the Constitution. The new Act relevantly provided, by its only substantive provision s. 4, that:

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

Note: Article 17 of the International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986*.

(2) For the purposes of this section, an adult is a person who is 18 years old or more.

However, the law undoubtedly recognizes that even a treaty such as the First Optional Protocol is not a source of direct rights which may be claimed by Australian citizens. As we are reminded by Mason CJ and McHugh J who comprised part of the majority in *Dietrich v R* ("*Dietrich*") in relation to the effect of the ICCPR and its First Optional Protocol on rights claimed under Australian law:¹²

"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 (Bradley v. The Commonwealth [1973] HCA 34; (1973) 128 CLR 557, at p 582; Simsek v. MacPhee [1982] HCA 7; (1982) 148 CLR 636, at pp 641-644; Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, at pp 570-571.). No such legislation has been passed. This position is not altered by Australia's accession to the First Optional Protocol to the ICCPR, effective as of 25 December 1991, by which Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible."

INFLUENCE ON THE COMMON LAW

¹² (1992) 177 CLR 292 at 305.

The most dramatic example of Australian common law developing under the influence of international law is the seminal case of *Mabo*.¹³ Brennan J in a leading judgment said:¹⁴

“If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.”

Through the *Mabo* case, the role of international law in the development of the common law in Australia was given momentum. As Brennan J, said further: ¹⁵

“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.”

The *Mabo* approach was canvassed further in *Dietrich v The Queen* (1992) 177 CLR 292. In that case Mr Dietrich appealed against a conviction on one count of importation of heroin contrary to s 233B(1)(b) of the Customs Act 1901 (Cth). His central ground was that his trial in the County Court at Melbourne had miscarried because he was unrepresented by counsel. The argument was based, in part, on article 14(3)(d) of the 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.

It was acknowledged that the ICCPR was not part of Australian law, however it was 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 signatory.

A majority of the Court held that the domestic common law of Australia did not recognise the right of an accused to be provided with counsel at public expense, but emphasised that the courts did have the power to stay criminal proceedings which would result in an unfair trial.

Members of the Court displayed different approaches to the application of international standards.

Brennan J, in dissent, found that he could not change the common law, even by reference to article 14(3)(d) of the ICCPR:¹⁶

¹³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J, with whom Mason CJ and McHugh J agreed.

¹⁵ *Ibid.*

¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 321

“Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law (See *Mabo v. Queensland* (1992) 66 ALJR, at p 422; 107 ALR, at p 29.). Indeed, it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian Courts recognize 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.”

Dawson J, also dissenting, was more cautious when he said: ¹⁷

“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 (See *Reg. v. Home Secretary; Ex parte Brind* [1991] UKHL 4; (1991) 1 AC 696, esp. at pp 747-748.). Whether that approach may be extended beyond statutory interpretation to the resolution of uncertainty in the common law is not so clearly established (Cf. *Attorney-General v. Guardian Newspapers (No.2)* [1988] UKHL 6; (1990) 1 AC 109, at p 283; *Derbyshire County Council v. Times Newspapers Ltd.* (1992) 3 WLR 28.). It is unnecessary to consider the question in this case because to extend to the common law the principle which underlies Art.14(3)(d) - the principle that there are cases in which the absence of representation of itself results in an unfair trial - would not be to resolve ambiguity or uncertainty but to effect a fundamental change.”

Mason CJ and McHugh J (who comprised part of the majority) were also mindful of the limitations on the use of unincorporated international instruments in the creation of new common law rights (as opposed to resolving uncertainty or ambiguity in existing judge-made law). They said:

“However, it is "well settled" (*Reg. v. Home Secretary; Ex parte Brind* [1991] UKHL 4; (1991) 1 AC 696, per Lord Bridge of Harwich at pp 747-748) that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations. English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law (*Derbyshire County Council v. Times Newspapers Ltd.* (1992) 3 WLR 28, per Balcombe L.J. at p 44).

Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach, this nevertheless does not assist the applicant in this case where we are being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognized should now be taken to exist.”

Toohy J said: ¹⁸

“Where the common law is unclear, an international instrument may be used by a court as a guide to that law (*Jago v. District Court of New South Wales* (1988) 12 NSWLR 558, per Kirby P at p 569.).”

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. Gaudron J, however, although she was prepared to use the international instrument in development of the common law, was prepared to do so only by indirect reasoning.

¹⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 348-349

¹⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 360

Despite some of the more tentative observations of members of the High Court in *Dietrich*, the case nevertheless consolidated the acceptance of international conventions and their application to judge-made law.

Following *Dietrich* there have been further pronouncements indicating that the courts are prepared to accept the use of treaties in the development of the common law.

In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (“*Teoh*”) at 288 Mason CJ and Deane J said:

“The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.”¹⁹

More recently, in *R v Swaffield; Pavic v The Queen*, Justice Kirby stated:

“In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law ... It is also helpful, in considering fundamental rights, to take cognisance of international statements of such rights, appearing in instruments to which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint ... To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.”²⁰

The theme was further emphasized by Maxwell P in *Royal Women's Hospital v Medical Practitioners Board of Victoria* when he said:²¹

“[The] provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.”

His Honour Maxwell P was no doubt offering a word of caution derived from the following passage from the judgment of Mason CJ and Deane J in *Teoh*:²²

“But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law.”

¹⁹ See: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J, with whom Mason CJ and McHugh agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 231 (Brennan J); at 360 (Toohey J); *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 569 (Kirby P); *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770.

²⁰ *R v Swaffield; Pavic v The Queen* [1998] HCA 1.

²¹ (2006) 15 VR 22 at 39

²² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J (with whom Gaudron J agreed on this point at 304)

STATUTORY INTERPRETATION

General Principles

It is a long-established principle that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with established rules of international law, and which accords with Australia's treaty obligations. In an early statement of the principle in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363, O'Connor J. said:

“[It is a] general presumption [that] every Statute is to be interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law: *Maxwell on Statutes*, 3rd ed., p.200.”

Three members of the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ) said:

“We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.”

Is Application of the Principles Confined to Cases of a Strict Ambiguity ?

Ironically the word “*ambiguity*” is not capable of precise definition. Generally, “ambiguity” arises when a word or phrase has more than one meaning. But ambiguity may also arise where the meaning of a particular statutory provision, as expressed by its text, is in doubt.²³

In any event, recourse to international law in statutory interpretation is not confined to cases of ambiguity in the strict sense. A broader approach has been adopted. The High Court decided *Minister for Immigration and Ethnic Affairs v Teoh*²⁴ (“*Teoh*”) in 1995. Mason CJ and Deane J said:²⁵

“[T]he fact that the Convention²⁶ has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party²⁷, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is, because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.

²³ See: Bell and Engle, *Cross on Statutory Interpretation* 3rd ed (London, Butterworths, 1995) pp 83-84; *Bowtell v Goldborough Mort & Co* (1996) 3 CLR 444 at 456-457.

²⁴ (1995) 183 CLR 273.

²⁵ (1995) 183 CLR 273 at 287.

²⁶ The United Nations Convention on the Rights of the Child was ratified by the Commonwealth Executive in 1990 and entered into force for Australia on 16 January 1991.

²⁷ Citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

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.”²⁸

This statement may be regarded as an uncontroversial re-statement of the use of international treaties in statutory interpretation in Australia. However, a broader approach was introduced in the passage which followed:

“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 should be stated so as to require the 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 indeed is 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.”

This landmark decision gave international treaties a status in domestic law that had not been previously recognised.²⁹

In 1998 the High Court decided *Kartinyeri v Commonwealth*, in which Gummow and Hayne JJ, in following *Teoh*, re-stated the principle that legislation was 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’. However, if the language is clear, it follows that ‘the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law’.³⁰

The result is that, wherever the language of a statute is in doubt and is susceptible of a construction consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction ought to prevail.

Conformity of a Statutory Administrative Decision with International Law

However, the decision in *Teoh* is not free from controversy. This arose, not from any question of statutory interpretation but rather as to whether Australia’s ratification of the *Convention on the Rights of the Child* could give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention. The majority of the court (Mason CJ and Deane J, together with Toohey J in a separate judgment) answered the question in the affirmative.

In *Teoh*, Mason CJ and Deane J. said at 291:

“[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

²⁸ See: *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77,80-81.

²⁹ See: Charlesworth et al, *No Country is an Island: Australia and International Law* (Sydney, UNSW Press, 2006) at 30.

³⁰ (1998) 195 CLR 337, at 384 (Gummow and Hayne JJ).

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 will act in conformity with the Convention and treat the best interests of the children as “a primary consideration”.

Justice McHugh however, delivered a strong dissent on the point in *Teoh*. He said (at 305-306):

“In my opinion, no legitimate expectation arose in this case because: (1) the doctrine of legitimate expectations is concerned with procedural fairness and imposes no obligation on a decision-maker to give substantive protection to any right, benefit, privilege or matter that is the subject of a legitimate expectation; (2) the doctrine of legitimate expectations does not require a decision-maker to inform a person affected by a decision that he or she will not apply a rule when the decision-maker is not bound and has given no undertaking to apply that rule; (3) the ratification of the Convention did not give rise to any legitimate expectation that an application for resident status would be decided in accordance with Art 3.”

The central question in controversy in *Teoh* was whether the doctrine of ‘legitimate expectation’ should be confined to the concept of ‘procedural fairness’ as it is employed in administrative law, or expanded, as contemplated by the majority in *Teoh*, to directly affect the subject matter of the decision made by a decision-maker.

The 2003 High Court decision in *Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 (“*Lam*”) suggests that the *Teoh* view of the ‘legitimate expectation arising from a treaty’ principle is not shared by some members of the High Court, particularly McHugh and Gummow JJ. at 95 – 96 and Hayne J at 111-112. Indeed, the authority of *Teoh* in this respect must now be examined in the light of *Lam*. This is so even though the critique of *Teoh* is confined to statements of *obiter dicta*, where nearly two thirds of the written content of the case is devoted to issues not directly raised by the facts before the Court.³¹

Nevertheless, the *Teoh* decision has not, at least for the moment, been overruled and remains part of Australian law. On the facts, *Lam* was not the appropriate vehicle to reconsider the ‘legitimate expectation arising from a treaty’ principle of *Teoh*. The simple fact was that *Lam* did not involve any such ‘legitimate expectation’ arising from the act of treaty ratification.

Accordingly, it is submitted that the approach of the High Court in *Teoh* to statutory interpretation and the use of treaties remains, at least for the present, undisturbed.

Section 15AB *Acts Interpretation Act* 1901 (Cth)

A provision which is often overlooked, even by the High Court, is s 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth). This section provides that recourse may be had to

³¹ “*A Prelude to the Demise of Teoh : The High Court Decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*”, Wendy Lacey, (2004) 26 *Sydney Law Review* 131.

“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)).

It should also be noted that in such cases, ambiguity is not essential to the application of s 15AB. An example of the potential for the application of s.15AB is its application to the war crimes provisions of the Commonwealth *Criminal Code* 1995. On 1 September 2002 the “Rome Statute” entered into force for Australia.³² The treaty establishes the International Criminal Court and defines various war crimes falling within its jurisdiction. Chapter 8 of the Schedule to the *Criminal Code* 1995 (Cth) (Offences against humanity and related offences) incorporates the war crimes prescribed under the Rome Statute.³³ as part of Australian domestic law. The novelty and scope of this legislation has had a deep impact on Australian criminal law ³⁴enabling prosecutions to be undertaken in Australia for international crimes. A number of these crimes contain elements which are defined by direct reference to other international treaties. For example, the reference to the Geneva Conventions to define an essential element in the following offence:

268.25 War crime--torture

- (1) A person (the *perpetrator*) commits an offence if:
 - (a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and
 - (b) the perpetrator inflicts the pain or suffering for the purpose of:
 - (i) obtaining information or a confession; or
 - (ii) a punishment, intimidation or coercion; or
 - (iii) a reason based on discrimination of any kind; and

³² Rome Statute of the International Criminal Court [2002] ATS 15.

³³ In order to ensure the primacy of Australian jurisdiction to prosecute for international crimes, and thereby to enable ratification of the Rome Statute, the Australian government introduced the *International Criminal Court Act* 2002 (Cth) (*ICC Act*) and the *International Criminal Court (Consequential Amendments) Act* 2002 (Cth) (*Consequential Amendments Act*), (the *ICC Acts*). The *ICC Act* establishes procedures to enable compliance by Australia with requests for assistance from the ICC and for the enforcement of sentences. The *Consequential Amendments Act* is the vehicle for creating offences that are the ‘equivalent’ of the crimes of genocide, crimes against humanity and war crimes set out in the Rome Statute.

³⁴ See: Triggs, “Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law” [2003] 25 *Sydney Law Review* 507.

- (c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and
- (d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and
- (e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 25 years.

- (2) Strict liability applies to paragraph (1)(c).

Another section of the Scheduled offences under the *Criminal Code* directly incorporates the ICCPR for the proper construction of one element of the offence:

268.76 War crime--sentencing or execution without due process

- (1) A person (the *perpetrator*) commits an offence if:
 - (a) the perpetrator passes a sentence on one or more persons; and
 - (b) the person or persons are not taking an active part in the hostilities; and
 - (c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and
 - (d) either of the following applies:
 - (i) there was no previous judgment pronounced by a court;
 - (ii) the court that rendered judgment did not afford the essential guarantees of independence and impartiality or other judicial guarantees; and
 - (e) if the court did not afford other judicial guarantees--those guarantees are guarantees set out in articles 14, 15 and 16 of the Covenant [defined to be the ICCPR]; and
 - (f) the perpetrator knows of:
 - (i) if subparagraph (d)(i) applies--the absence of a previous judgment; or
 - (ii) if subparagraph (d)(ii) applies--the failure to afford the relevant guarantees and the fact that they are indispensable to a fair trial; and
 - (g) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 10 years.

In these cases, s. 15AB has a very clear application.

However, a question arises as to the application of s. 15AB to a domestic act which is clearly intended to incorporate a treaty into domestic law, but which, apart from approving ratification by Australia of the Convention, and annexing the Convention as a schedule to the Act, makes no other substantive reference to the Convention. Such is the case with the *Racial Discrimination Act 1975*, for example, which by s.7 approves ratification by Australia of the UN sponsored *International Convention on the Elimination of All Forms of Racial Discrimination 1966*, but makes no other relevant reference to it. In this case, to what extent is it permissible to have resort to the convention in the interpretation of “racial discrimination” which is outlawed by s. 9 of the Act?

In response, two approaches may be contemplated. On the one hand, an interpretation which adopts a narrow view of the application of s.15AB, by confining its operation to cases where the statute in question makes explicit reference to a provision defined by reference to the treaty; on the other hand, the broader approach that s.15AB can be used as an aid to construction in any case where the legislation makes reference to a treaty in a context where the legislation is clearly intended to give domestic operation to a treaty or part of it.

It is submitted that the text and purpose of s.15AB are best served by application of the latter, broad approach.

Section 35 *Interpretation of Legislation Act 1984 (Vic)*

Section 35 (a) *Interpretation of Legislation Act 1984 (Vic)* directs that a construction that promotes the purpose or object underlying the Act under consideration be preferred to a construction that would not promote or is contrary to that purpose.

Section 35(b) then goes on to provide that “*consideration may be given to any matter or document that is relevant including, but not limited to*” a short list of various extrinsic materials in contemplation. Although the list does not expressly include reference any treaty or other international instrument that may be referred to in the relevant Act, still less is there any reference to international law generally. It remains arguable, that, in the appropriate case, treaties, other international instruments, or international law fall within the description of “*any matter or document that is relevant*” under s. 35(b) and by this means have direct operation as an aid to construction of domestic Victorian legislation.

Victorian Human Rights Charter

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, which for practical purposes came into operation on 1 January 2008, provides an innovative and powerful springboard for the application of international instruments to domestic law in this State.

The *Charter* contains a general interpretative provision of wide scope at section 32:

“32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

Similar (although not identical) provisions appear in the Human Rights Act 1998 (UK) and the New Zealand Bill of Rights Act 1990 (NZ) (s 6).

Since “Human Rights” are largely defined by international instruments, including human rights conventions and international case law, s 32 of the Charter promises to expose a considerable body of domestic legislative provisions to analysis through the prism of international law as never before thought possible.

The Principle of ‘Legality’

The principle of ‘legality’ is a canon of construction which Chief Justice Murray Gleeson speaking extra-judicially recently defined in the following terms:³⁵

“[C]ourts [will] decline to impute to Parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that Parliament has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.”

The Chief Justice Gleeson further observed that:³⁶

“There is nothing revolutionary about the principle of legality ... In 1908, in the High Court case of *Potter v Minahan*, O’Connor J adopted a passage in the fourth edition of *Maxwell on Statutes* which said that “[i]t is in the last degree improbable that the legislature would overthrow fundamental principles ... without expressing its intention with irresistible clearness”. The principle was stated clearly by the High Court in 1994 in *Coco v The Queen* and has since been re-asserted in a series of High Court decisions including *Plaintiff S157/2002 v The Commonwealth* and *Al-Kateb v Godwin*. It has been asserted in the House of Lords by, for example, Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Pierson* and Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*. It is the working hypothesis of a liberal democracy.”

The principle of legality again may be utilized to draw upon international law in assisting to define and give flesh to fundamental human rights and freedoms.

Given the expansion of legislation in Australia designed to deal with terrorism, for example, where the curtailment of human rights and freedoms is controversial if not commonplace, the principle of legality can be expected to feature powerfully in argument and in judicial decision making, which may draw heavily upon international human rights law in the process.

³⁵ Chief Justice Murray Gleeson, “The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights” Victoria Law Foundation Oration, Melbourne, 31 July 2008 at 23 (citations omitted).

³⁶ *Ibid* at 23-24

CONSTRUING INTERNATIONAL INSTRUMENTS

The Limitations of Some International Instruments

As noted in an extra curial address by Chief Justice Nicholson in 2002,³⁷ an important limitation in reliance upon international instruments is this: Where provisions of international instruments ‘reveal but do not resolve the conflicting interests which, as a matter of municipal law, attend the case’ before the Court, the solution to the problem in hand must be found in municipal law, not in the artificial extension of unincorporated international law.

International conventions will not always be expressed in terms that will throw light on the question of statutory interpretation under consideration. As Denning LJ said, some treaties are expressed in language “so wide as to be incapable of practical application” and, in such cases, “it is much better for us to stick to our own statutes and principles, and only look to the Convention for guidance in case of doubt” *R v Chief Immigration Officer; Ex parte Bibi* [1976] 1 WLR 979, at 964.

The High Court recognised this shortcoming in *Project Blue Sky v Australian Broadcasting Authority*, (1998) 153 ALR 490, 517-518 [96] (*per* McHugh, Gummow, Kirby and Hayne JJ):

“Furthermore, while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language as a result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed.”

Take for example Article 17 of the United Nations sponsored *Convention on the Rights of Persons with Disabilities*³⁸ (signed by Australia in March 2007) which provides:

Article 17 - Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

In such cases the convention or agreement leaves to the State party considerable leeway as to the means by which the identified goal is to be achieved. Nevertheless, it is for the courts to do their best to give a cogent meaning and application to the provisions of international conventions and agreements which fall into this class.

³⁷ Chief Justice Alastair Nicholson ‘Australian Judicial Approaches to International Human Rights Conventions and “Family Law”’ (Speech delivered at The Miller Du Toit and The Law Faculty of the University of Western Cape Family Law Conference, Cape Town, South Africa, 26 March 2002) at 33 <<http://www.familycourt.gov.au/papers/pdf/capetown.pdf>> last viewed 19 August 2008.

³⁸ [2006] ATNIF 15.

Specialist International Courts and Bodies

Australian courts should and do give weight to the views of specialist international courts and bodies such as the International Court of Justice, the European Court of Human Rights³⁹ and the human rights treaty bodies established to supervise implementation by States parties of their obligations under the provisions of particular human rights treaties.⁴⁰

An example is to be found in *Dietrich* in the joint judgment of Mason CJ and McHugh J at 306 -307:

“An analysis of the views of the Human Rights Committee on communications submitted to it relating to Art.14(3)(d) reveals little more than that the Committee considers that legal assistance must always be made available in capital cases (*Pinto v. Trinidad and Tobago*, CCPR/C/39/D/232/1987). However, the European Court of Human Rights has approached the almost identical provision in the ECHR by emphasizing the importance of the particular facts of the case to any interpretation of the phrase "when the interests of justice so require" (*Monnell and Morris v. United Kingdom* (1987) 10 EHRR 205, at p 225; *Granger v. United Kingdom* (1990) 12 EHRR 469, at pp 480-482). As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.”

Another example is to be found in the judgment of Kirby J in *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 302, where His Honour had regard to the Handbook on Procedures and Criteria for Determining Refugee Status⁴¹:

“In 1979, the United Nations' High Commissioner for Refugees published the *Handbook on Procedures and Criteria for Determining Refugee Status* used by Sackville J ("the Handbook"). Its purpose was to assist parties to the Convention and Protocol in determining claims to refugee status. It drew on the experience of the High Commissioner's office as well as the practices of contracting states after the Convention came into force in 1954. The Handbook is frequently cited in refugee decisions in the United States. Upon the precise issue in hand, it has been criticised as unhelpful. It may be used in Australia to assist in the interpretation of the Convention so long as it does not purport to usurp the function of the court or tribunal in giving meaning to the words of the Convention definition.”

Use of the Vienna Convention on the Law of Treaties

³⁹ For example *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *John Fairfax Publications v Doe* (1995) 37 NSWLR 81 at 90 per Gleeson CJ; *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 190 CLR 225 at 253-255 per McHugh J; *R v Swaffield*; *Pavic v The Queen* (1998) 192 CLR 159 at 213-214 per Kirby J.

⁴⁰ See as examples of references to the jurisprudence of human rights treaty bodies *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 177 CLR 292 at 307 per Mason CJ and McHugh J; *Johnson v Johnson* (2000) 174 ALR 655 at 665 para [38] per Kirby J.

⁴¹ UN Doc HCR/PRO/4 (1979).

The Vienna Convention on the Law of Treaties (1969)⁴² ('the *Vienna Convention*') is binding on Australia.⁴³ Article 31 of the *Vienna Convention* provides a key guide to the construction of international treaties:

"Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

In *A v Minister for Immigration and Ethnic Affairs*, McHugh J. (with whose analysis Gummow J agreed⁴⁴) delivered a detailed exposition of the use of Article 31 of the *Vienna Convention* in construing treaties incorporated into Australian domestic law. It is worth citing in full:⁴⁵

"The first paragraph of the article [Article 31 of the *Vienna Convention*] contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions. This principle has been described as the "very essence" of a textual approach to treaty interpretation. Third, the ordinary

⁴² [1974] ATS 2.

⁴³ *The Vienna Convention on the Law of Treaties* was signed in Vienna on 23 May 1969 and entered into force on 27 January 1980. It is in force for Australia following its Accession on 13 June 1974 (Australian Treaty Series [1974] ATS 2), but has not been adopted by the United States. The *Vienna Convention* is the authoritative treaty on the international law of treaties, establishing the procedures by which treaties are adopted, interpreted, and invalidated. It is considered for the most part to reflect already existing and binding customary law on treaties, and thus apart from some necessary gap-filling and clarification, it is not viewed as a change in existing international law. This means that the Vienna Convention is arguably binding on non-parties, such as the United States.

⁴⁴ (1997) 190 CLR 225 at 277.

⁴⁵ (1997) 190 CLR 225 at 251 – 256 (citations omitted).

meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose.

Commentators differ as to the correct interpretation of Art 31. Differences of opinion exist as to the circumstances in which the "context ... object and purpose" of the treaty may be used to supplement the "ordinary meaning" of the treaty. Inherent in this debate is the question of whether the textual interpretation of the words, embodied in the phrase "ordinary meaning", should be afforded interpretative precedence. Some commentators have argued that the literal meaning has no precedence and that the object of the treaty must always be taken into account; some have argued that the two general levels of inquiry embodied in par 1 of Art 31 have a single combined operation; and some have argued that words and phrases of a treaty are in the first instance to be construed according to their plain and natural meaning and that it is only when the result of such an inquiry is doubtful that one should look to a treaty's context, object and purpose.

Australian decisions provide no clear answer as to whether Art 31 *requires* or merely *allows* recourse to the context, object and purpose of a treaty in interpreting one of its terms. It is clear that such recourse is, in some circumstances, permissible. On numerous occasions, Australian courts have sought to discern the purpose of a treaty so as to construe a treaty term. What is not clear from the decided cases, however, are the circumstances which require or allow recourse to the context, object and purpose of a treaty. Nor have those cases clarified the nature of the relationship between the context, object and purpose of a treaty and the "ordinary" textual analysis of one of its provisions.

However, in my view, the opinion of Zekia J in the European Court of Human Rights in *Golder v United Kingdom* states the correct approach for interpreting Art 31. Zekia J stressed that a holistic approach was required by Art 31 of the Vienna Convention. Having considered the text of Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), and having described the textual analysis as "the primary source of ... interpretation", he said [at 544]:

"I pass now to the contextual aspect of Article 6(1). ... [T]he examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a *single combined operation* which takes into account all relevant facts as a whole." (emphasis in original)

Later, having considered the context, object and purpose of the European Convention, he concluded [at 547]:

"I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted."

Thus, Zekia J emphasised an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered. Similar sentiments were expressed by Murphy J in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* where, in reference to the UNESCO Convention for the Protection of the World Cultural and National Heritage, his Honour said:

"The Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose (Art 31(1), Vienna Convention on the Law of Treaties)".

In my opinion, the approaches of Zekia J and Murphy J are correct and should be followed in this country. First, as Brownlie points out, Art 31 is headed in the singular: "General rule of interpretation". This use of the singular indicates that Art 31 is to be interpreted in a holistic

manner. As the International Law Commission, whose draft articles on the law of treaties exactly mirrored Art 31 of the Vienna Convention, commented:

"The Commission, by heading the article 'General rule of interpretation' in the singular ... intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. ... [T]he Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."

Second, taking the text as the starting point is consistent with the basic principle of interpretation that courts should focus their attention on the "four corners of the actual text" in discerning the meaning of that text. The text of the treaty, being the starting point in any investigation as to the meaning of the text, necessarily has primacy in the interpretation process. As the International Law Commission has noted:

"The article ... is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."

The need to give the text primacy in interpretation is accentuated by the tendency of multilateral instruments to be the result of various compromises by various States or groups of States. If the subjective intentions of their representatives were the criterion, the interpretation of many international instruments might be impossible.

Third, the mandatory requirement that courts look to the context, object and purpose of treaty provisions as well as the text is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation.

Fourth, international treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity. The lack of precision in treaties confirms the need to adopt interpretative principles, like those pronounced by Zekia J, which are founded on the view that treaties "cannot be expected to be applied with taut logical precision".

Accordingly, in my opinion, Art 31 of the Vienna Convention requires the courts of this country when faced with a question of treaty interpretation to examine both the "ordinary meaning" and the "context ... object and purpose" of a treaty."

In the same case Dawson J said, in relation to Article 31 of the *Vienna Convention*:⁴⁶

"Under that rule, the starting point must be the text of the treaty. Of course, the text of a treaty is often couched in fairly general terms due to differences in language and legal conceptions among those to whom it is to be addressed and as part of an attempt to reach agreement among diverse nations. Accordingly, technical principles of common law construction are to be disregarded in construing the text. As Lord Wilberforce said in *Buchanan & Co v Babco Ltd*:

"I think that the correct approach is to interpret the English text ... in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance".

⁴⁶ (1997) 190 CLR 225 at 240 (citations omitted).

Article 31(1) also allows, indeed requires, recourse to the context, object and purpose of a treaty. Article 31(2) states that the context includes, inter alia, the text of the treaty including its preamble and annexures. Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear. To say as much is, perhaps, to state no more than the accepted canon of construction that an instrument is to be construed as a whole and that words are not to be divorced from their context or construed in a manner that would defeat the character of the instrument.”

Kirby J added: ⁴⁷

“In construing domestic law which, in turn, adopts a provision of an international treaty, it is permissible to have regard to the history of the treaty provisions and such matters as would be available for the construction of the treaty itself. The Vienna Convention on the Law of Treaties is designed to codify and express certain rules of customary international law for the interpretation of treaties. The Convention has been called in aid by this Court as by other courts of high authority. Section 3 of the Convention is titled "Interpretation of treaties". By Art 31 it is provided (sub-art 1) that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". By Art 32 recourse may be had to supplementary means of interpretation. These include "the preparatory work of the treaty and the circumstances of its conclusion" but only "in order to confirm the meaning resulting from the application of article 31" or to determine the meaning where, applying that Article, the interpretation is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". This rule, which is not dissimilar to that now applicable to the construction of federal legislation in Australia, was invoked by the parties to take the Court to the travaux préparatoires explaining how the definition of "refugee" in the Convention came to include the reference to "membership of a particular social group".

Whilst by international law it is permissible to apply a principle of construction known in the common law as the *ejusdem generis* rule, and whilst it is therefore appropriate to give meaning to the reference to "membership of a particular social group" in the context of the other specific grounds of persecution catalogued in the definition, care must always be observed in the application of that canon of construction for reasons often mentioned.”

Travaux Préparatoires (Treaty Preparatory Work)

Article 32 of the *Vienna Convention* provides:

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

⁴⁷ (1997) 190 CLR 225 at 294 – 295 (citations omitted).

In *Povey v Qantas Airways Limited* (2005) 216 ALR 427 McHugh J in the course of construing Article 17 of the Warsaw Convention 1929⁴⁸ said in reference to Article 32:⁴⁹

“Article 32 declares that resort may be had to extrinsic sources to confirm the meaning in certain circumstances. Those sources may be consulted to confirm the meaning that results from applying Art 31. They may also be used to ascertain the meaning where the application of Art 31 results in a meaning that is manifestly absurd, unreasonable, *Malaysian International Shipping Corp, Berhad*: ‘[The] extrinsic sources include the travaux préparatoires and the circumstances of the conclusion and history of the negotiation of the treaty. Primacy must be given, however, to the natural meaning of the words in their context ...’”

STATUS OF THE INTERNATIONAL INSTRUMENT IN AUSTRALIAN LAW

Where the international Instrument is Incorporated into Australian Law

The most straightforward case in which a court may be called upon to directly construe the provisions of an international treaty is where the treaty is directly incorporated into Australian law by legislation.

An recent example is the case of *Szaty v Minister for Immigration and Citizenship* [2007] HCA 40 (30 August 2007) which required the High Court to consider the Convention Relating to the Status of Refugees (“the *Refugees Convention*”). Gummow, Hayne and Crennan JJ noted [at 47] that the *Refugees Convention* was introduced into Australian municipal law by s 366(2) of the *Migration Act 1958* (Cth) providing for protection visas. To be entitled to a visa of this kind an applicant must fall within Article 1A(2) of the *Refugees Convention*. This defined a “refugee” as any person who:

“[Owing] to well-founded fear of being persecuted for reasons of...political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.”

The question in issue was whether the protection under the Act extended to the case where a refugee applicant might reasonably relocate to a safe district or place within the country of nationality or habitual residence. The case therefore involved the Court in a construction of the *Refugees Convention* in order to find the answer under the *Migration Act*.

Where the International Instrument is Ratified Before the Legislation in Question has been Passed by Parliament

⁴⁸ The Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Warsaw Convention 1929 as amended by the Montreal Protocol No 4) .

⁴⁹ (2005) 216 ALR 427 at 440 (citations omitted).

In this case there is a clear presumption that Parliament intended to legislate consistently with Australia's international obligations, even where the ratified treaty has not been incorporated into domestic law.

In *Teoh*, Mason CJ and Deane J noted the principle that 'Parliament, prima facie, intends to give effect to Australia's obligations under international law'.⁵⁰

Where the International Instrument is Ratified After the Legislation in Question has been Passed by Parliament

At present, there appears to be no direct authority for the proposition that domestic legislation must be construed in a manner which is consistent with international obligations assumed under a treaty which has entered into force after the passing of the relevant legislation.

In such a case there is no room for the presumption that *Parliament, prima facie, intends to give effect to Australia's obligations under international law*, at least in the sense that, at the time of the passing of the legislation, Parliament necessarily had in contemplation the specific provisions of an international instrument which had not yet been negotiated, let alone entered into force.

Nevertheless, there is room to apply the presumption in the sense that at the time of the passing of the legislation Parliament may be taken to have intended the legislation to be applied in the future in a manner which is generally consistent with Australia's obligations under international law as those obligations develop and are assumed in the future.

Such an argument was put by the Respondent in a recent appeal before the Full Court of the Federal Court in *Secretary, Department of Employment and Workplace Relations [subsequently re-named] v Jansen* (No VID 885 of 2007) ("*Jansen*") heard on 26 February 2008 before Gyles, Stone and Buchanan JJ.

Jansen involved an appeal in which Mr Jansen was an applicant for a Disability Support Pension under the *Social Security Act* of 1991. The central issue was the construction of a Schedule 1B to the Act in relation to the question of whether Mr Jansen was qualified to receive the pension under the provisions of the Schedule.

Counsel for the Respondent called in aid the provisions of the *Convention on the Rights of Persons with Disabilities*⁵¹ (the "*Disabilities Convention*"). It was submitted that the construction of the Schedule urged by the Appellant (the Secretary) conflicted with the obligations Australia had assumed by signing the *Convention*. However, the *Social Security Act* 1991 was passed and came into operation in Australia well before the *Disabilities Convention* had been negotiated, let alone entered into force for Australia.

⁵⁰ (1995) 183 CLR 273 at 287

⁵¹ [2006] ATNIF.

Judgment in *Jansen* at the time of writing has been reserved.

Where the International Instrument has Been Signed but not Ratified and has not Yet Entered Into Force for Australia

Jansen raised another difficulty arising from the status of the treaty itself.

Although the *Convention on the Rights of Persons with Disabilities* has now been ratified by 16 countries, pursuant to Article 45 of the Convention not less than 20 ratifications from State parties are required before the Convention enters into force. Australia signed the treaty on 30 March 2007 (along with 79 other nations) and is now moving towards ratification.⁵² However at the time *Jansen* was argued, the Convention had not been formally ratified by Australia.

In treaty law 'Signature' is the formal term used to show that a party agrees with the content of an international instrument. It does not necessarily signify an intention to be bound. Its significance, at least in part, is historical and harks back to the time when absolute monarchies were the norm, transport and communications awkward with nothing faster than a horse to rely upon. As a consequence, representatives of states were given 'full powers' within their authority to bind their sovereign to the treaty by signature.⁵³ Later ratification was a formality.

In the modern context, the position is reversed. Whether signature is effective in bringing the treaty into operation depends on the intention of the parties.⁵⁴ If the parties intend that they will only be bound by the treaty once they complete the further act of ratifying the treaty (which is now the usual case), then signature itself will not formally bind the parties. This must await ratification, usually undertaken by depositing formal instruments of ratification with the United Nations.

Nevertheless, a treaty which has been signed (but not yet ratified) does have legal status under international law. Signature of a treaty gives rise to a legal obligation on the part of the signing party to refrain from acts which would defeat the object and purpose of a treaty, until such time as a signatory makes it clear that it is no longer intending to become a party to the treaty. Article 18 of the *Vienna Convention*, provides:

*Obligation not to defeat the object and purpose
of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose
of a treaty when:

⁵² The Attorney-General's department advised that it has called for expressions of interest in public consultation on ratification by 30 March 2008.

⁵³ See: Lord McNair, *The Law of Treaties*, (Oxford, Clarendon, 1961) at 120.

⁵⁴ Article 12 of the *Vienna Convention on the Law of Treaties* states that the consent of a party to be bound is expressed by signature when the treaty provides that signature shall have that effect. Likewise article 14 states that ratification will express consent when the treaty so provides.

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Further, Australia has recognized an obligation to proceed to ratification in good faith once it has signed a treaty. The Department of Foreign Affairs and Trade has advised that it is Australia's policy to adhere to this duty of good faith and that Australia does not sign treaties without an intention to ratify them.⁵⁵

Another relevant factor in determining the status of a signed, but not ratified, treaty under international law, is whether the treaty contains a 'no reservation clause'.

A reservation to a treaty is essentially a qualification to a State's acceptance of a treaty.⁵⁶ Reservations are a unilateral statement purporting to exclude or to modify the legal obligation and its effects on the reserving State. These must be included at the time of signing or ratification so that a party cannot add a reservation after it has already joined a treaty.

The contemporary international approach to reservations is relatively liberal. This is in the interests of encouraging the largest number of state parties to participate in treaty making. While some treaties by their terms do not permit reservations to be made, most modern treaties provide a facility for reservations, provided that the reservations are not inconsistent with the goals and purposes of the treaty.

Article 46(1) of the *Disabilities Convention* is such a provision. It provides that:

'Reservations incompatible with the object and purpose of the present Convention shall not be permitted.'

Thus Australia, having signed the *Disabilities Convention*, has not only evinced an intention to be bound by the Convention, it has also placed itself in a position where, although it remains technically in a position to ratify the convention with the addition of a reservation, its legal capacity to do so is strictly limited.

Further, in this situation it is fairly arguable that the provisions of an international convention which Australia has signed, but not yet ratified, can serve as an indication of the value Australia places on the rights and duties provided for in the Convention

⁵⁵ Senate Legal and Constitutional References Committee, "*Trick or Treaty? Commonwealth Power to Make and Implement Treaties*" (Commonwealth of Australia, Canberra, November 1995), Vol 6, at 1158.

⁵⁶ See: Vienna Convention on the Law of Treaties, Article 2 Sec. 1(d) which defines "reservation" to mean: "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

and, therefore, as indicative of contemporary values. A convention having this status for Australia can thus provide an authoritative statement of the contemporary context in which the legislation is to be construed.

SOME RECENT PRACTICAL EXAMPLES IN VICTORIA

The themes of this paper are well illustrated in the following four cases recently decided by Bell J. of the Supreme Court of Victoria:

A. Tomasevic v Travaglini [2007] VSC 337 (13 September 2007)

Tomasevic concerns the duty of the Court to ensure a fair trial by giving due assistance to a self-represented litigant and to which art 14(1) of the ICCPR was also relevant. The Victorian Charter did not apply to the proceeding because the judicial review application was issued by Mr Tomasevic before the commencement of the relevant provisions of the *Charter of Human Rights and Responsibilities Act* 2006, on 1 January 2008. Bell J. held that international human rights law can have an independent significance for the exercise of judicial powers and discretions. The central points in the reasoning of His Honour were as follows:

- Apart from the Charter, the UN sponsored *International Covenant on Civil and Political Rights* 1966 (the ICCPR) does not ‘operate as a direct source of individual rights and obligations’ because it has not otherwise been incorporated into Australian law. But like other international instruments to which Australia is a party, the ICCPR has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the Charter;
- Bell J. went on to specify, by reference to the authorities, what that significance could be. He opined that, subject to certain limitations and to an evolving extent, the ICCPR, and other [international] instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights;
- He then held that the ICCPR should be taken into account in the case;
- Bell J held that it followed that, even though the Charter did not affect consideration of Mr Tomasevic’s application for judicial review, the ICCPR did. Accordingly, in order to determine the application, His Honour considered that it was necessary for him to identify what was required for the proper performance of the duty of the trial judge to ensure a fair trial by giving due assistance to Mr Tomasevic as a self-represented litigant. Bell J considered that this should be

done in terms that take into account the importance of that duty in promoting and respecting the fundamental human rights of equality before the law and access to justice which are specified in the ICCPR.

B. *DPP v TY (No 3)* [2007] VSC 489 (13 September 2007)

This case concerned the principles to be applied in the sentencing of a young offender (aged 14 years). It raised issues of the exercise of the sentencing discretion and the relevance of international human rights (specifically the *Convention on the Rights of the Child 1989*) in that exercise.

In the course of his reasoning, Bell J. said:

“It is appropriate to mention the Convention on the Rights of the Child. Australia is a party to the Convention. By becoming a party, Australia has, in terms of art 40(1), recognised -

the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

The Convention has not been incorporated into Australian law, which means it cannot operate as a direct source of law. However, as I held in *Tomasevic v Travaglini*, international human rights, such as those recognised in art 40(1), can be a relevant consideration in the exercise of judicial powers and discretions. Moreover, as Maxwell P pointed out in *Royal Women’s Hospital v Medical Practitioners Board*, Australian courts have been prepared to consider international human rights conventions in exercising sentencing discretions. At least four cases have involved taking the Convention into account. Doing so can cut both ways, for where the victim is a child - and Christopher was aged barely 18 years - the Convention reminds us, to use the words of Cummins J in his recent decision in *Director of Public Prosecutions v Farquharson*: “Children are precious and are vulnerable. They are entitled to love, to care, to health, to education, to security and to safety. Most of all they are entitled to life.”

When can an international human right stated in an unincorporated convention be taken into account in the exercise of a judicial power or discretion? As a general proposition, I think it can be if the subject matter of the case before the court comes within its scope, which is a test of relevance; if taking the human right into account is not inconsistent with any applicable legislation, the operation of which such a convention obviously does not impair; and if doing so is not inconsistent with the common law (broadly defined), the content of which, equally obviously, such a convention does not alter. I did not explicate that approach in the two cases I have previously decided on this subject, but it is inherent in the analysis and the result.”

C. *In re TLB (In the Matter of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and In the Matter of an application for extended leave by TLB)* [2007] VSC 439 (13 November 2007)

This was an application for extended leave of a custodial order involving issues as to whether the grant of extended leave would endanger the safety of the applicant or members of the public, counterbalanced against the restriction on a person’s freedom and personal autonomy. Section 56 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* defines “extended leave” as leave to be absent from a place of custody for a period not exceeding 12 months, subject to certain conditions.

In the course of his reasoning, Bell J. considered the relevance of international law, in particular the application of the *Convention on the Rights of the Child* 1989 (often referred to as CRC or UNCRC).

His Honour said in this respect:

“Australia is a party to the Convention on the Rights of the Child. Under art 9(1), children should not be separated from their parents against their will unless, amongst other things, it is necessary for the best interests of the child. While the Convention has not been incorporated into Australian law, international human rights, such as those recognised in the Convention in respect of the applicant's son, can be a relevant consideration in the exercise of judicial and statutory powers and discretions. That is the case here. I think that, under s 40(1)(f), art 9(1) of the Convention is relevant to exercise of the power to grant extended leave, for art 9(1) deals with the subject of the separation of children from their parents, and the exercise of the power to grant extended leave, in a case like the present, might lead to, or prevent, that separation being brought about. This is an additional basis on which the best interests of the applicant's son should be taken into account. Again, this consideration could cut either way. But as the applicant is a caring and responsible father, and no danger to his son, the child's best interests are that he not be so separated.”

D. Ragg v Magistrates Court of Victoria [2008] VSC 1 (24 January 2008)

This judicial review application was issued by Mr Ragg on 21 December 2007 before the commencement of the relevant provisions of the *Charter of Human Rights and Responsibilities Act* 2006, which was 1 January 2008. By the transitional provisions in s 49(2), the Charter “does not affect” the proceeding.

In these circumstances, Bell J. nevertheless applied the ICCPR, reasoning that:

“I think international human rights are relevant when deciding whether the magistrate committed an error of law, because they inform the scope and application of the court's power to strike out summonses to produce issued by, as well as the related duty of a prosecutor to disclose material documents to, the defence in criminal cases. The relevant rights are the right to equality before the law and the right to a fair trial specified in art 14(1) and (3) of the International Covenant on Civil and Political Rights to which Australia is a party.”

CONCLUSION

By way of conclusion, I can do no better than return to the words of Kirby J in 1995, when he prophesied that:⁵⁷

“The influence of treaty law upon Australian law is growing. The powerful influence of international standards will have an increasing impact on the development of the common law and statute law in Australia. The full evolution of the technique described in the *Bangalore Principles* has not yet been achieved. But the idea is now amongst us. It is a powerful idea. It is one appropriate to the times in which we live. It is one which promises a gradual harmonisation between internationally accepted principles and the municipal law of a country such as Australia.

⁵⁷ The Hon Justice Michael Kirby, “*Treaties in Australian Law – Role of International Standards in Australian Courts*” University of NSW Lecture, 10 May 1995.

From a subject of esoteric interest to a few lawyers advising States and international agencies, international law is increasingly becoming of relevance to Australian law. If then we look to the United Nations and lawmaking for the 21st century, we can scarcely overlook the way in which treaty law, adopted under the United Nations, is coming to influence Australian law, directly and indirectly. It is the privilege of lawyers of this generation to contribute to this inevitable and natural historical development. But first they must realise that it is happening, and why.”