Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court decision and the Government's reaction to it

Susan Roberts[1]

Introduction

The recent High Court decision of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[2] ("*Teoh's Case*") is notable for two principal reasons. First, it gives unprecedented significance to the ratification of international instruments by the Executive, in particular the *Convention on the Rights of the Child*[3] ("CROC"), by the majority stating that the ratification of such instruments creates the basis for a legitimate expectation. Secondly, it has provoked a swift and all encompassing reaction from the Government evincing an intention to reverse *Teoh's Case*.

These issues warrant close analysis for the purposes of assessing the true effect and ramifications of the decision and the appropriateness of the Government's reaction to it.

Position before the High Court Decision

Prior to the decision of the High Court in *Teoh's Case*, the domestic ramifications of Australia being a party to an international treaty were limited. The ramifications can effectively be summarised as being that:

- the provisions of a treaty were not part of Australian law unless they were incorporated into law by way of domestic legislation; [4]
- where there was ambiguity in a statute or subordinate legislation, a construction should be adopted that complies with Australia's obligations under international instruments;[5] and

---

1 Senior Legal Officer, Human Rights and Equal Opportunity Commission. The opinions expressed in this article are personal to the author and should not be taken to be the opinions of the Human Rights and Equal Opportunity Commission.

2 (1995) 128 ALR 353.

3 CROC was ratified by Australia on 17 December 1990 and entered into force in Australia on 16 January 1991. By an instrument of declaration on 22 December 1992, the Attorney-General declared CROC to be an international instrument relating to human rights and freedoms pursuant to s 47(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOCA).

4 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Kioa v West* (1985) 159 CLR 550 at 570; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418 at 500.

5 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Dietrich v The Queen* (1992) 177 CLR 292 at 306.

- the principles contained in an international instrument may be used by courts as a guide to developing the common law in Australia.[6]

As will be shown below, the decision of the High Court extended the impact of Australia ratifying an international instrument beyond these established classes and into the arena of administrative decision-making and procedural fairness.

Facts

Ah Hin Teoh, a Malaysian citizen, came to Australia in May 1988 and was granted a temporary entry permit. In July 1988, Mr Teoh married Ms Jean Lim, an Australian citizen and the de facto spouse of Mr Teoh's deceased brother. At the time of their marriage, Mrs Teoh had four children, one from her first marriage and three from the de facto relationship. Subsequently, Mr and Mrs Teoh had three children together.

In October 1988, Mr Teoh applied for and was granted a further temporary entry permit that enabled him to remain in Australia until February 1989. Prior to the expiry of the permit, Mr Teoh applied for a grant of resident status. In November 1990, whilst this application was being processed, Mr Teoh was convicted on six counts of being knowingly concerned in the importation of heroin and on three counts of being in possession of heroin. He was sentenced to six year's imprisonment with a non-parole period of two years and eight months. It was acknowledged by the court that Mr Teoh's offences were connected to the fact that his wife had a heroin addiction.

In January 1991, Mr Teoh was notified pursuant to the *Migration Act* 1958 (Cth) that his application for resident status had been refused on the ground that he could not meet the good character requirement as he had a criminal record.[7] In February 1991, Mr Teoh applied for a review of the decision. In support of the application, he provided several documents including a testimonial from Mr Teoh's mother-in-law who stated that Mr Teoh was the only person who could keep the family together.

The Immigration Review Panel ("the Panel") rejected the review in July 1991 stating that:

> All the evidence for this Application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.

---

6 *Dietrich v The Queen* (1992) 177 CLR 292 at 321 per Brennan J, at 360 per Toohey J; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J. See also the cases referred to in Kirby M, "The Australian Use of International Human Rights Norms: from Bangalore to Balliol - a view from the Antipodes" (1993) 16 UNSWLJ 363 and the text of a lecture, "Treaties in Australian Law: Role of International Standards in Australian Courts", a paper delivered by Justice Kirby at the University of New South Wales Faculty of Law on 10 May 1995.

7 (1995) 128 ALR 353 at 356.

> However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The Compassionate [sic] claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record.[8]

This recommendation was accepted by the delegate of the Minister ("the delegate") in July 1991 and in February 1992 an order was made that Mr Teoh be deported. Mr Teoh sought a review of both the acceptance of the recommendation and the decision to deport.

Federal Court Decisions

The case was heard at first instance by French J in September 1993.[9] His Honour dismissed the appeal, finding that the acceptance of the Panel's recommendation and the ordering of deportation had not, as alleged by the appellant, been an improper exercise of power, a denial of natural justice, nor did it involve the consideration of irrelevant factors by the decision-makers.

The appeal against the decision at first instance was heard by Black CJ, Lee and Carr JJ.[10] The appellant was granted leave by the Full Court to amend the grounds of review to include the further particular that the respondent failed to make appropriate investigations into the hardship to the [appellant's] wife and her children were the [appellant] refused resident status.[11]

It was on this ground alone that the Full Court accepted that the decision-maker's power had been improperly exercised. Black CJ found that the existence of CROC emphasised the need for special care to be taken in respect of decisions that separate children from a parent[12] and that the decision-maker had failed to obtain more information in respect of the welfare of the family unit prior to making the decision to refuse the appellant resident status.[13]

Lee and Carr JJ held that the ratification of CROC created a legitimate expectation in parents and children, whose interests would be affected by the actions of the Commonwealth relating to children, that the Commonwealth's actions would be of a nature that complied with the principles of CROC.[14]

---

8 *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 at 441.

9 *Ah Hin Teoh v Minister for Immigration, Local Government and Ethnic Affairs*, (Unreported, Federal Court, French J, 3 September 1993).

10 (1994) 121 ALR 436.

11 (1994) 121 ALR 436 at 440 per Black CJ at 445-446 per Lee J, at 456-458 per Carr J.

12 (1994) 121 ALR 436 at 443 per Black CJ. See Carr J who expressly rejected the existence of a fiduciary obligation at 462. Lee J at 447 referred to the submission but did not directly address the issue.

13 (1994) 121 ALR 443 at 442-443.

14 (1994) 121 ALR 443 at 449 per Lee J and at 466 per Carr J.

The Full Court ordered a stay of the deportation order until the decision had been reconsidered in light of the Court's finding. The respondent appealed against the decision to the High Court of Australia.

High Court Decision

The appeal was heard by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.[15] The main issue to be considered by the Court was whether a legitimate expectation existed as found by Lee and Carr JJ and, if so, the consequences of the legitimate expectation.[16]

Legitimate Expectation

The doctrine of legitimate expectation was considered by Mason CJ, Deane, Toohey and McHugh JJ. Mason CJ, Deane and Toohey JJ accepted as correct the finding of Carr and Lee JJ that the ratification of an international convention can be a basis for the existence of a legitimate expectation and that, in this instance, there had been a want of procedural fairness. McHugh J dissented on this point and Gaudron J did not rely upon it in her reasons.

Mason CJ and Deane J (in a joint judgment) held that:

> ...ratification 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 any 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'.[17]

Toohey J agreed that:

> ...by ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' make 'the best interests of the child a primary consideration'.[18]

---

15 (1995) 128 ALR 353. With leave of the High Court, the Human Rights and Equal Opportunity Commission intervened in the appeal.

16 (1995) 128 ALR 353 at 358 per Mason CJ and Deane J.

17 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J.

18 (1995) 128 ALR 353 at 373.

It was held by Mason CJ, Deane and Toohey JJ that it is not necessary for persons seeking to rely upon such a legitimate expectation (or in the case of a child, for their parent or guardian) to actually have the expectation themselves, but rather that the existence of the expectation be reasonable in the circumstances.[19]

Their Honours held, however, that the presence of the legitimate expectation does not compel the decision-maker to act in a way that complies with that expectation. To require compliance would be to incorporate "the provisions of the unincorporated convention into our municipal law".[20] All that the decision-maker is required to do by way of procedural fairness, if he or she is proposing to make a decision inconsistent with the legitimate expectation, is to provide the affected person with the opportunity to present a case for not adopting the proposed course.[21]

Toohey J was more prepared to entertain the notion that the decision-maker actually initiate inquiries. His Honour found that if the decision-maker had made inquiries of the institution where the children had been placed in care and of the Department of Community Welfare, she would have been in a better position to meet the legitimate expectation that arises from CROC.[22]

In his dissenting judgment, McHugh J found that the Full Court erred on all the grounds submitted by the appellant. Putting to one side the question of whether the doctrine of legitimate expectation "still has a useful role to play",[23] McHugh J held that to find a legitimate expectation in this instance would erroneously expand the doctrine. His Honour made the following points as he considered the issues before him:

- the ratification of an international convention by the Executive only gives undertakings to other parties to the convention and it does not give any sort of undertaking (on which a legitimate expectation could be based) to residents or citizens of Australia;[24] and

- if it is the case that a legitimate expectation does exist then that expectation must actually be entertained by the affected person [25] and the decision-maker need only inform the affected person that the convention will not be considered, if the decision has led the affected person to believe it will be applied.[26]

---

19 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J; at 373 per Toohey J.

20 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J. Mason CJ and Deane J found that Carr and Lee JJ had been requiring such compliance by requiring the decision-maker to initiate inquiries and seek reports in respect of the children and had erred in doing so.

21 *Ibid.*

22 (1995) 127 ALR 353 at 374.

23 (1995) 128 ALR 353 at 381. His Honour relied upon *Kioa v West* (1985) 159 CLR 550 and *Annetts v McCann* (1990) 170 CLR 596 as leaving little room for the continued application of the doctrine.

24 (1995) 128 ALR 353 at 385.

25 (1995) 128 ALR 353 at 383.

26 *Ibid.*

His Honour held that there was no lack of procedural fairness as the decision-maker had given no indication that the principles of CROC would be applied and had not been requested to apply them. McHugh J's basic position is that:

> It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision had no knowledge. [27]

Consideration of the Practical Consequences of a Legitimate Expectation Existing

Only Toohey and McHugh JJ specifically addressed the question of the practical impact on administrative decision-makers of the finding that a legitimate expectation may arise from the ratification of a convention.

In respect of the appellant's submission that the sheer number of conventions which Australia has ratified will impose an unrealistic burden on decision-makers, Toohey J commented that:

> ...particular conventions will generally have an impact on particular decision-makers and often no great practical difficulties will arise in giving effect to the principles which they acknowledge. [28]

McHugh J was not so confident that the practical difficulties could be overcome:

> If the result of ratifying an international convention would give rise to a legitimate expectation...[i]t would follow that the convention would apply to every decision made by a federal official unless the official stated that he or she would not comply with the convention. If the expectation were held to apply to decisions made by State officials, it would mean that the Executive Government's action in ratifying a convention had also altered the duties of State government officials. The consequences for administrative decision-making in this country would be enormous. Junior counsel for the minister informed the court that Australia is a party to about 900 treaties. Only a small percentage of them has been enacted into law. Administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would not be complying with those conventions. [29]

---

27 (1995) 128 ALR 353 at 383.
28 (1995) 128 ALR 353 at 373.
29 (1995) 128 ALR 353 at 385.

As noted below, McHugh J's concern as to the practical consequences of the decision has been shared by the Federal Government and provoked a strong reaction from it.

Common Law Rights of Children

Gaudron J found in favour of Mr Teoh but for reasons different than those relied upon by Mason CJ, Deane and Toohey JJ. In a novel and far-reaching judgment, her Honour found that it is not necessary to rely upon CROC to establish that the best interests of children should be a primary consideration in the making of administrative decisions. The fact that the child is an Australian citizen is enough to establish the principle:

> ...it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child s best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare.[30]

Accordingly, CROC is only relevant to the extent that its ratification gives expression to "a fundamental human right which is taken for granted by Australian society".[31]

Her Honour held that whilst the decision-maker was not required to initiate inquiries, procedural fairness required her to inform Mr Teoh that the children s best interests were not being taken into account as a primary consideration and offer him the opportunity to persuade her otherwise.[32]

The Government's Reaction to Teoh's Case

The High Court's decision in *Teoh's Case* was met with interest by the media [33] and with comment from the Federal Government that it would result in a review by the Government of all international treaties.[34]

A detailed response from the Government was released in the form of a joint statement by the Minister for Foreign Affairs and the Attorney-General on 10 May

---

30 (1995) 128 ALR 353 at 375.

31 (1995) 128 ALR 353 at 376. Mason CJ and Deane J also at 336 comment that the "principle expressed in Article 3.1 of CROC may have a counterpart in the common law as it applies to cases where the welfare of a child is matter relevant to the determination to be made".

32 *Ibid.*

33 Unfortunately some of the media reports choose to attribute inappropriate and unnecessary relevance to the dynamics of the Teoh family: see "Extraordinary judgment", Padraic McGuinness, *The Sydney Morning Herald*, 11 April 1995 where it was remarked that CROC "has been interpreted to protect a drug runner married to a heroin addict, simply because they have children who have the misfortune to have them as parents".

34 "Court puts spotlight on treaties", *The Sydney Morning Herald*, 15 April 1995, p 3.

1995 ("the Joint Statement").[35] It notes that whilst only a small number of the 920 treaties Australia has ratified may give rise to a legitimate expectation:

> ...the High Court 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. It is not in anybody's interests to allow such uncertainty to continue. [36]

The Government announced its intention to rectify the perceived uncertainty by restoring the pre-*Teoh Case* position by statutory amendment.[37] The Government also made the following "clear and express statement":

> 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 that treaty have not been enacted into domestic Australian law. ... 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. [38]

On 28 June 1995, legislation was introduced into Parliament to reverse the position created by *Teoh's Case*.[39] The Administrative Decisions (Effect of International Instruments) Bill 1995 ("the Bill") provides that:

> The fact that Australia is bound by, or a party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument, does not give rise to a legitimate expectation, on the part of any person, that:
>
> (a) an administrative decision will be made in conformity with the requirements of that instrument; or
>
> (b) if the decision were to be contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course.[40] The

---

35 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. A statement in similar terms was released by the Attorney-General of South Australia on 8 June 1995.

36 Joint Statement at p 2.

37 In taking this course, the Government relies upon the statement by Mason CJ and Deane JJ that the legitimate expectation may be displaced by "statutory or executive indications to the contrary", see (1995) 128 ALR 353 at 365

38 Joint Statement at p 2.

39 It should be noted that such an intention would not appear to defeat the "common law right" referred to by Gaudron J *op cit* at note 30.

40 The Bill, cl 5.

> legislation is to be taken as having commenced on 10 May 1995, the date of the Government's Joint Statement.[41]

It is important to analyse whether *Teoh's Case* warranted such an Executive and legislative reaction and the possible consequences of the reaction.

Commentary on Teoh's Case and the Government's Reaction

How far does Teoh's Case really go?

The primary issue to consider when assessing *Teoh's Case* and the majority's finding of legitimate expectation, is whether it really represents any more than one would expect from the fact that Australia enters into international conventions? If the entering into such conventions is to have no impact on the way in which Australian citizens are treated then is the ratification of such instruments really a nonsense; an outcome that, it is submitted, to use the words of the New Zealand Court of Appeal in *Tavita v Minister for Immigration*, would be "an unattractive argument, apparently implying that...adherence to the international instruments has been at least partly window dressing."[42]

It is submitted that it is necessary that the entering into of international instruments by Australia will have some direct significance to Australian citizens. The consequences of ratification should not just be limited to providing a tool of interpretation or assisting in the development by the courts of the common law.[43] If a legitimate expectation can be created by a statement to the House of Representatives by the Minister for Immigration as to deportation policy [44] or by press releases concerning an amnesty for prohibited immigrants,[45] then it would appear inconsistent if a legitimate expectation could not arise from the ratification by the Executive of a treaty before the international community.

In reacting to *Teoh's Case*, the Government has appeared to misinterpret the fact that the effect of the decision is to find that the consequence of ratification is limited to the creation of a legitimate expectation. It is implied in the Joint Statement that the effect of *Teoh's Case* is to confer rights and obligations on individuals:

> ...the Government remains fully committed to observing its treaty obligations. However, we believe it is appropriate to retain the long-standing, widely accepted and well-understood distinction between treaty action undertaken by the Executive which creates international rights and obligations and the implementation of treaty obligations in Australian law. The implementation of

---

41 The Bill, cl 2.

42 [1994] 2 NZLR 257 at 266. This case raised the point (which the Court did not have to determine) of whether in the making of a decision to deport, the decision-maker had to take into account CROC and the *International Convention on Civil and Political Rights*.

43 *op cit* notes 4 and 5.

44 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 655 per Deane J and at 682 per McHugh J.

45 *Salemi v Mackellar [No 2]* (1977) 137 CLR 396 at 440 per Stephen J.

> treaties by legislation is the way that the rights, benefits and obligations set out in treaties to which Australia is a party are conferred or imposed on individuals in Australian law.[46]

If this is the Government's understanding of the decision then it is ill-founded. The High Court expressly rejects the suggestion that the ratification of international instruments by the Executive can be a direct source of individual rights or impose obligations on individuals.[47] The existence of a legitimate expectation is not the bestowing of rights, benefits or obligations upon an individual. It does not compel the decision-maker to act in accordance with the expectation.[48] It only gives rise to a requirement of procedural fairness. Given that this is the effect of *Teoh's Case*, it is suggested that the Government's response to the decision is misguided. Such a view has also been expressed by the Human Rights and Equal Opportunity Commission,[49] the Opposition,[50] academics[51] and the Honourable Elizabeth Evatt, a member of the United Nations Human Rights Committee.[52]

Practical ramifications of Teoh's Case

The main reason [53] relied upon by the Government in justification of its intention to reverse *Teoh's Case* is the perceived administrative difficulties, as highlighted by McHugh J, that will flow from the decision.[54] It is interesting to note this concern of the Government for two reasons. First, as acknowledged by the Government itself, only a small number of international treaties may actually be relevant. Secondly, it is telling to note some instances where the Government itself has actually legislated to create the very obligation upon decision-makers that it now claims requires a reversal of *Teoh's Case*:[55]

---

46 Joint Statement at p 3.

47 (1995) 128 ALR 353 at 362 per Mason CJ and Deane J; at 371 per Toohey; at 382 per McHugh J. The analysis used by Gaudron J is that there is an individual right but that it springs from citizenship and not the act of ratification.

48 For consideration of the concept of legitimate expectation, see Forsyth, "The Provence and Protection of Legitimate Expectations" (1988) 47 *Cambridge Law Journal* 238; Hadfield, "Judicial Review and the Concept of Legitimate Expectation" (1988) 39 *The Northern Ireland Legal Quarterly* 103; Tate, "The Coherence of Legitimate Expectations and the Foundations of Natural Justice" (1988) 14 *Monash University Law Review* 15.

49 See statement of Sir Ronald Wilson, President of HREOC, tabled on 16 May 1995 at the hearing of the Senate Standing Committee on Legal and Constitutional Affairs; see also "Rights chief condemns bid to neutralise Teoh ruling", *The Australian* 17 May 1995, p 2.

50 Media Release from Alexander Downer MP "Retreat by Evans and Lavarch over Treaties", 10 May 1995; "Keating to close treaties loophole" *The Sydney Morning Herald*, 11 May 1995, p 5.

51 "Treaties must be recognised: lawyers" *The Australian*, 18 May 1995 p 4.

52 "Evatt hits Canberra's treatment of treaties" *The Australian*, 25 May 1995, p 5.

53 A further hidden reason may be that it enables the Executive to retain the freedom it has had in entering into international treaties without being limited by the impact that they may have domestically. See also "Treaties require prudence", *Courier Mail* 8 May 1995, p 13.

54 Joint Statement at p 2.

55 This point was made as part of HREOC's submissions to the High Court.

- s 28(c) of the *Australian Postal Corporation Act* 1989 (Cth) provides that Australia Post is to perform its functions in a way consistent with Australia's obligations under any convention to which Australia is a party or any agreement or arrangement between Australia and a foreign country.
- s 7 of the *Australian Maritime Safety Authority Act* 1990 (Cth) provides that the Australian Maritime Safety Authority is to perform its functions in a manner consistent with Australia's obligations under any agreement between Australia and another country.
- s 160(d) of the *Broadcasting Services Act* 1992 (Cth) provides that the Australian Broadcasting Authority is to perform its functions in a way consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

It is difficult to see why the administrative implications of *Teoh's Case* are stated so highly when it is clear that decision-makers of the above organisations must perform a task identical to that required by the decision.

Other options to the Government's reaction

If the Government felt it was necessary to confine the consequences of *Teoh's Case*, it is disappointing that a more circumspect and limited response was not preferred. For instance, an option may have been for the Government to exclude from the operation of the Bill particular international instruments,[56] specifically those instruments scheduled to HREOCA[57] and declared pursuant to s 47(1) of HREOCA.[58]

Whilst it is accepted that the scheduling and declaration of these instruments under HREOCA does not incorporate them into domestic law,[59] it appears difficult to claim that the fact that they are scheduled to domestic legislation and, in the case of CROC, have been the subject of parliamentary consideration and debate[60] does not

---

56 Other options may have been to read the decision as being limited to personal rights (such as those contained in CROC or HREOCA) or to legislate to shift the onus of raising the international instrument from the decision-maker to the affected person. Both of these options have their disadvantages but they would have at least enabled the spirit of *Teoh's Case* to survive.

57 *Convention concerning Discrimination in respect of Employment and Occupation* (Schedule 1), *International Covenant on Civil and Political Rights* (Schedule 2), *Declaration on the Rights of the Child* (Schedule 3), *Declaration on the Rights of Mentally Retarded Persons* (Schedule 4) and *Declaration on the Rights of Disabled Persons*.

58 CROC and *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.

59 (1995) 128 ALR 353 at 362; see also *Dietrich v The Queen* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J and at 360 per Toohey J. See also House of Representatives, Administrative Decisions (Effect of International Instruments) Bill 1995, Explanatory Memorandum, p 4.

60 After being declared by the Attorney-General pursuant to s 47(1) of HREOCA on 13 January 1993, there were unsuccessful attempts in both Houses of Parliament to have the declaration disallowed: see House of Representatives Hansard, 1 September 1993, pp 691-701; Senate Hansard, 30

give rise to a legitimate expectation. Indeed it could be argued that it would have been sufficient for the High Court to limit the finding in *Teoh's Case* to the HREOCA instruments given that it is these instruments that have the greatest relevance to Australians in their every day lives. If the Government had exempted such instruments from its response to the decision then it would have limited the perceived burden on decision-makers to consideration of just seven instruments.

The Government's failure to exempt the HREOCA instruments from the intended legislative scheme also creates confusion in respect of the operation of HREOCA itself. HREOCA defines human rights as the rights and freedoms recognised in the Covenant and the Declarations or recognised or declared by any relevant international instrument .[61] The functions of the Commission include inquiring into any act contrary to human rights and the promotion and protection of human rights in various manners.[62] It seems contradictory for the legislature to establish a mechanism for the protection of the human rights of Australian citizens on the one hand and then on the other hand, for the Government to announce that the ratification of the very instruments that define the relevant human rights have no domestic significance in themselves, nor by virtue of the fact that the instruments are related to HREOCA.

It can only be concluded that in the Government's eyes these instruments are on an equal footing (that is, have little relevance to Australian citizens) with most of the other 920 international treaties that have not undergone any scheduling or declaration process.[63]

Conclusion

Teoh's Case resulted in the ratification of international treaties and instruments by the Executive finally having some relevance to Australian citizens rather than purely being an act of grandstanding on the international stage. It is disappointing and damaging to the future of human rights in Australia that the Government has been unable to accept that the entry into such instruments should have consequences for Australia's decision-makers and has chosen to legislate itself out of the effects of this soundly based landmark decision.

60— *Continued*
September 1993, pp 1473-98 and 1595-8; 5 October 1993, pp 1682-5.

61 Section 3(1) of HREOCA.

62 Section 11(1)(e) to (o) of HREOCA.

63 See footnotes 49 and 51 above for comments as to the failure of the Government to exempt the HREOCA instruments from the Joint Statement.