CASE NOTES

MINISTER FOR IMMIGRATION v AH HIN TEOH*

INTRODUCTION

On 7 April, 1995, the High Court handed down its decision in *Minister for Immigration v Teoh*, a case of considerable significance in terms of the role of international conventions in domestic law. The decision has far-reaching implications, and could potentially strengthen Australia's adherence to its human rights obligations. Unfortunately, the federal government has already attempted to reverse the effect of the High Court's decision by an executive statement, and has indicated that it will seek legislation to put the question beyond doubt.[1] While the statement exposes the federal government's professed commitment to human rights as mere rhetoric, this is scant comfort for those who might have been able to rely on *Teoh* to introduce into domestic decision-making greater respect for international human rights obligations.

The Factual Background[2]

Mr Teoh was a Malaysian citizen living in Australia and married to an Australian citizen, Ms Lim. He and Ms Lim had three children and, in addition, he acted as father to four of Ms Lim's earlier children. Mr Teoh applied for permanent residency status, but, before his application had been determined, he was convicted of six counts of heroin importation and possession and sentenced to six years' imprisonment. Following these events, Mr Teoh's application for permanent residency was refused on the basis of his character and criminal record. He then applied for a review of the decision, but the Immigration Review Panel rejected the application for review. The delegate of the Minister accepted the Panel's recommendation and refused to review the original decision. Shortly thereafter, a deportation order was made. Mr Teoh then sought review of these decisions in the Federal Court.

Initially, French J rejected Mr Teoh's application for review but, on appeal to the Full Federal Court, the appeal was allowed and Mr Teoh's application for permanent residency was referred to the Minister for reconsideration according to law. Central to the reasoning of two of the members of the Full Court (Lee and Carr JJ) was Australia's ratification of the Convention on the Rights of the

* (1995) 128 ALR 353. High Court of Australia, 7 April 1995, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ ('*Teoh*').

[1] Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, 10 May 1995, M44 (hereafter, 'the Joint Ministerial Statement'). The basis for and effectiveness of this statement is not beyond doubt; this will be addressed in the discussion below.

[2] The factual background is extracted from the judgments of the Court.

Child ('the Convention') which, they found, gave rise to a legitimate expectation in parents and children that actions which affected their interests would be conducted in a manner which adhered to the relevant principles of the Convention, in particular Art 3.1 which provided that 'in all actions concerning children ... the best interests of the child shall be a primary consideration'.[3] The delegate's failure to initiate appropriate inquiries and obtain appropriate reports concerning the future welfare of the children thus gave rise to an error of law. The Commonwealth then appealed to the High Court, which heard the case before a bench of five only, despite the importance of the principles under consideration.

THE HIGH COURT DECISION

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

Mason CJ, Deane and Toohey JJ

Mason CJ and Deane J (with whom Gaudron J agreed as to the status of treaties[4]) restated a number of basic principles concerning the role of treaties in domestic law. First, they reaffirmed that, in the absence of implementing legislation, the provisions of an international convention do not form part of Australian municipal law. They saw this basic principle as based on the constitutional principle of the separation of legislative and executive power, which required the conclusion that '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'.[5] It was common ground that the provisions of the Convention had not been incorporated into Australian law in this way.[6] In this formulation of the relationship between treaties and domestic law, Mason CJ and Deane J remain firmly within the 'transformation' theory of the relationship between treaties and domestic law.[7] Toohey J took the same approach.[8]

Secondly, Mason CJ and Deane J (with the apparent agreement of Gaudron J,[9] although the extent of her agreement is not entirely clear) acknowledged that international conventions to which Australia is a party are a legitimate guide in judicial development of the common law. However, they urged

3 (1995) 128 ALR 353, 361.

4 Ibid 375.

5 Ibid 362.

6 Ibid.

7 That is, the theory that treaties are not automatically 'part of' domestic law - some act of transformation by the Parliament is required before a treaty can have effect in domestic law. The converse of transformation is incorporation, that is, where treaties, once ratified, become 'part of' domestic law without an Act of Parliament.

8 Ibid 370.

9 Ibid 375.

caution in the use of conventions in this way by the courts, lest development of the common law be seen as a 'backdoor means' of incorporating conventions into Australian law without Parliamentary sanction.[10] They offered some, albeit rather vague, guidance as to when the courts might use a convention to develop the common law:

> Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.[11]

Toohey J made no comments about the use of international law in the development of the common law.

Thirdly, Mason CJ and Deane J also clarified the role of treaties in the interpretation of legislation (again, with the apparent agreement of Gaudron J). Toohey J was again silent on this issue. Mason CJ and Deane J confirmed that, where a statute is ambiguous, the courts should favour a construction that accords with Australia's international treaty obligations, at least where the statute was enacted after, or in anticipation of, entry into the treaty.[12] The basis for this finding was the presumption that Parliament intends to give effect to Australia's obligations under international law. Mason CJ and Deane J went on to indicate that they took a wide view of what constituted 'ambiguity', so that:

> courts should favour a construction, as far as the language of the legislation permits, that is in conformity with and not in conflict with Australia's international obligations ... If the language 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.[13]

Thus, the principle was simply a canon of construction and did not import the provisions of the international convention into municipal law as a source of individual rights and duties. Once again, the judges were at pains to avoid any allegation of 'incorporating' treaties 'by the back door'.

The real substance of the decision, however, emerges in the judges' consideration of the role of international conventions in generating a legitimate expectation in individuals that the terms of conventions ratified by Australia will be adhered to by the Australian government in its administrative decisions. Mason CJ and Deane J found that ratification of the Convention by Australia was a significant event:[14]

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act,[15] particularly when the instrument

[10] Ibid 362.

[11] Ibid 363.

[12] Ibid 362.

[13] Ibid.

[14] Ibid 365 (emphasis added).

[15] See *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 343; *Tavita v Minister for Immigration* [1994] 2 NZLR 257, 266.

> evinces 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 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[16].

Toohey J made a similar comment, observing that the submission that decision-makers need pay no regard to Australia's international obligations was 'unattractive'.[17]

Three judges went on to observe that personal knowledge of the Convention and its terms by the individual concerned was not necessary; rather, the concept was based on an 'objective' standard — it was enough that the expectation be a reasonable one, in the sense that there be materials to support it.[18] Thus, in this case, there was a legitimate expectation, founded on the Convention, that the decision-maker would treat the best interests of the children as 'a primary consideration'. Their Honours made it clear that the existence of a legitimate expectation did not compel the decision-maker to act in the way expected; all it produced was a requirement that, under notions of procedural fairness, the person affected be given notice of any intention not to adhere to the terms of the Convention and an adequate opportunity of arguing against such a course of action.[19] They concluded that, in this case, the decision-maker had not approached her decision on the basis that the interests of the children were a primary consideration and that there had been a want of procedural fairness.[20] Accordingly, they allowed the appeal.

Gaudron J

Gaudron J reached the same result as Mason CJ, Deane and Toohey JJ, but by a different route. She preferred to base her judgment on the status of Mr Teoh's children as Australian citizens, which meant that

> any reasonable person who considered the matter would ... assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their welfare.[21]

Procedural fairness required that Mr Teoh be informed if the Minister's delegate was intending to proceed on some other basis, so that he could be given an opportunity to persuade her otherwise. Thus, Gaudron J utilised the notion of

16 Cf *Simsek v Macphee* (1982) 148 CLR 636, 644.
17 (1995) 128 ALR 353, 373.
18 Ibid 365 (Mason CJ and Deane J), 373 (Toohey J).
19 Ibid.
20 Ibid 366 (Mason CJ and Deane J), 374 (Toohey J).
21 Ibid 375-6.

legitimate expectation, but based it on the fact of the children's citizenship, rather than the ratification of the Convention.

In relation to the 'status of the Convention in Australian law', Gaudron J agreed with Mason CJ and Deane J. The scope of this agreement is not entirely clear, however it seems that her Honour confined her agreement to Mason CJ's and Deane J's general comments regarding status, rather than agreeing with the more significant, legitimate expectation aspects of their judgment. In her view, the Convention was 'only of subsidiary significance in this case'.[22] She did not need to use the Convention to found a want of procedural fairness, but did use it to confirm the existence of the expectation that the children's interests would be given primary consideration:

> The significance of the Convention ... is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.[23]

Gaudron J agreed with Mason CJ and Deane J that, although the failure of the Minister's delegate to make further inquiries had not involved any breach of duty, there had nonetheless been a want of procedural fairness because she had not treated the interests of the children as a primary consideration and had not informed Mr Teoh of this.[24]

McHugh J

McHugh J rejected the appeal primarily on his view of the doctrine of legitimate expectation. In his view, after *Kioa v West*[25] and *Annetts v McCann*,[26] 'a question must arise as to whether the doctrine of legitimate expectations still has a useful role to play'.[27] He preferred to see this area of the law in terms of a general presumption that the rules of procedural fairness are applicable to administrative decision-making and that, in the absence of a clear legislative provision to the contrary, decision-makers are required to bring to the attention of persons affected by the decision the critical issues on which the decision is likely to turn.[28] Thus, McHugh J would prefer to abandon the notion of legitimate expectation in favour of a broader principle. However, he noted that the doctrine of legitimate expectations has continued to be applied by the High

22 Ibid 375.
23 Ibid 376.
24 Ibid.
25 (1985) 159 CLR 550.
26 (1990) 170 CLR 596.
27 (1995) 128 ALR 353, 381.
28 Ibid.

Court, and so he went on to consider the impact of the doctrine in Mr Teoh's case.[29]

In McHugh J's view, none of the previously recognised sources of a legitimate expectation were present in this case, thus, for Mr Teoh to succeed, the doctrine of legitimate expectation would have to be extended. In any event, he noted, a legitimate expectation would not oblige the decision-maker to apply the Convention.[30] In McHugh J's view, the rules of procedural fairness would not have required the decision-maker to inform Mr Teoh that she was not going to apply Art 3 of the Convention, because she had done nothing to lead Mr Teoh to believe that it would be applied.[31] In addition, the state of mind of the person concerned was not, in McHugh J's view, irrelevant, notwithstanding that there was an objective element to the concept of legitimate expectation: 'A person cannot lose an expectation that he or she does not hold'.[32] Thus, McHugh J concluded that Mr Teoh could not succeed in this case. However, he also went on to consider the effect of the Convention in the event that an extension of the doctrine of legitimate expectations was accepted.

McHugh J, like the majority, confirmed that treaties must be incorporated by legislation in order to form part of Australian domestic law.[33] He also agreed that they may be used to interpret legislation or to develop the common law.[34] In McHugh J's opinion, however, ratification of a treaty does not give rise to a legitimate expectation on the part of Australian residents that public officials and tribunals will act in accordance with the terms of the treaty.[35] He reasoned that ratification is a positive statement of commitment to the terms of the treaty only to other states parties to the treaty which may be enforced by the mechanisms available to the states parties under the terms of the treaty. This strictly contractual interpretation of the effect of treaties, combined with the traditional position at Australian law that treaties are not part of the law of the land unless specifically incorporated, led McHugh J to conclude that ratification was not a statement to the Australian community and that no legitimate expectation of compliance with the terms of the treaty could arise.[36] Furthermore, he noted that the implementing mechanism for many human rights treaties is the Human Rights and Equal Opportunity Commission Act 1986 (Cth), which confers only investigative, advisory, educative and conciliatory powers on the Commission. This suggested that it was

> difficult to accept that Parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of s.47 of the HREOC Act when such remedies are not provided for by the Act.[37]

29 Ibid.
30 Ibid 382.
31 Ibid 382-3.
32 Ibid 383.
33 Ibid 384.
34 Ibid.
35 Ibid 385-6.
36 Ibid.
37 Ibid 386.

In addition, he expressed concerns about the ramifications for administrative decision-making of finding a legitimate expectation based on ratification,[38] the possibility that state government officials could be affected[39] and the problems of implementation of treaty obligations which require 'years of effort, education and expenditure of resources'.[40]

In the alternative, McHugh J found that, even if a treaty could be regarded as raising a legitimate expectation of compliance with its terms, the express terms of the policy of the Department of Immigration and Ethnic Affairs displaced any such expectation, notwithstanding that the terms of the policy were not in fact applicable to Mr Teoh's case;[41] that Art 3 of the Convention did not apply in this situation where the decision was directed at the parent of a child rather than the child;[42] and that, in any event, on the facts of the case, the decision-maker had made the children's interests a primary consideration.[43] McHugh J thus addressed all the issues raised in the case and found against Mr Teoh on every one.

COMMENT

There are a number of levels on which we will analyse the Court's decision in *Teoh*. First, we will assess how the Court's approach to the use of international law in the municipal sphere has developed in relation to the transformation/incorporation debate, in relation to development of the common law and in relation to statutory interpretation. Secondly, we will assess the more radical step of using a treaty to found a legitimate expectation. Finally, we will assess the political and legal impact of the decision, particularly in terms of its impact on Australia's protection of human rights.

A *The Relationship Between International Law and Domestic Law*

The judgments in *Teoh* have taken further some aspects of the relationship between international law and domestic law, although many of the comments are *obiter dicta*. First, all judges remain wedded, at least in theory, to the 'transformation' theory of the relationship between treaties and domestic law. In particular, Mason CJ and Deane J were at pains to emphasise that they were not engaging in 'incorporation' by the back door. Nonetheless, Mason CJ, Deane and Toohey JJ accorded the Convention a significant role: although not part of domestic law, it was able to give rise to a less than legal right, a right to procedural fairness stemming from the legitimate expectation created by ratification of the Convention. Gaudron J accorded the Convention a less

38 Ibid 385.
39 Ibid.
40 Ibid.
41 Ibid 387.
42 Ibid.
43 Ibid 388-9.

significant role, using it to confirm fundamental values already protected by the common law.

In so far as statutory interpretation is concerned, Mason CJ and Deane J (with Gaudron J's apparent agreement) confirmed and expanded the role of international conventions in this area. Traditionally, in order for the courts to use a treaty as an aid to statutory interpretation, two criteria had to be fulfilled. First, the legislation had to have been enacted to give effect to the treaty; and, secondly, there had to be an ambiguity, in the narrow sense, in the language of the legislation.[44] In *Teoh*, Mason CJ and Deane J took a more flexible view. They indicated that, in order to use an international convention as an interpretative aid in the construction of legislation, it is not necessary that the legislation was enacted to give effect to the international convention. What is required is that the legislation be enacted after the ratification, or in anticipation of it. Thus the principle of statutory construction is applicable to any statute enacted after ratification, because after ratification Australia is bound by the convention. And they expressly acknowledged that they took a wide view of what amounted to an ambiguity in the language of a statute, so that statutes should be construed, so far as their language permits, 'in conformity and not in conflict with Australia's international obligations'. Thus, if the language of the legislation is susceptible of a construction that is in conformity with Australia's international obligations under a treaty, 'then that construction should prevail'.[45] McHugh J, too, seemed to envisage a wide approach in that he placed treaties in the same position as customary international law for the purposes of statutory interpretation and the rule for customary international law has always been broadly stated.[46] This approach to the canon of statutory construction thus attempts to ensure that Australia is not placed in breach of international obligations inadvertently or unnecessarily, whilst clearly preserving the ability of the Parliament to legislate in breach of its treaty obligations. Whether this approach will be taken up by the other members of the Court is not yet clear, although there is certainly support for a wider view of ambiguity in Dawson J's judgment in *Dietrich v R*.[47]

In relation to the use of treaties in judicial development of the common law, *Teoh* is significant because it confirms the acceptance by a majority of the Court of a doctrine which has been gaining gradual acceptance in a series of recent

[44] *D & R Henderson v Collector of Customs (NSW)* (1974) 48 ALJR 132, (Mason J); *Yager v R* (1977) 139 CLR 28, 43-4 (Mason J); *Dietrich v R* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

[45] (1995) 128 ALR 353, 362.

[46] See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 424 (Dixon J), 444 (McTiernan J); *Morgan v White* (1912) 15 CLR 1, 13 (Isaacs J); *Polites v The Commonwealth* (1945) 70 CLR 60; *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 275 (Dixon CJ).

[47] (1992) 177 CLR 292, 348-9 (Dawson J).

cases.[48] In *Teoh*, Mason CJ, Deane, Gaudron and McHugh JJ all accepted that there is a role for international conventions in the development of the common law. Coupled with the majority's comments in the *Native Title case*,[49] it now seems quite clear that a doctrine which was not fully accepted as recently as 1992 (in *Dietrich v R*[50]) is now accepted by a substantial majority of the Court.

In addition, Mason CJ and Deane J set out some guidance, albeit vague, as to when an international convention may be used in the development of the common law, thus giving the principle some greater depth. In their view, the Court should have regard to the extent to which the convention or provision in question has been accepted by the international community; the nature and purpose of the provision in question; and the relationship of the convention to existing domestic law. These comments are somewhat obscure, but it seems that they are all directed to the use of international conventions to confirm the existence of fundamental values which may then inform the development of the common law. This approach builds on earlier High Court decisions concerning the use of treaties in the development of the common law.[51] The comment concerning the relationship of the convention to existing domestic law is perhaps the most obscure, but may be directed to the Court's reluctance to use international law in a way that would 'fracture a skeletal principle' that underlies the common law. Again, this builds on earlier decisions of the Court.[52]

As with other recent High Court cases which have considered the issue of the relationship between international law and domestic law, the role of customary international law is barely touched on. It is quite possible that although the Convention on the Rights of the Child is a very young treaty, the number of parties to the Convention, combined with practice of non-party states consistent with the treaty obligations, mean that some of the obligations have translated into customary international law. The position regarding customary international law in the Australian context is unclear. Unlike the English courts, Australian courts have tended toward the view that customary international law, similar to treaties, requires some governmental action to make it part of domestic law.[53] In the most recent cases

[48] *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 607 (Murphy J); *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 406 (Murphy J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J, with whom Mason CJ and McHugh J agreed); *Dietrich v R* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J's qualified acceptance), 349 (Dawson J: 'not so clearly established'); *EPA v Caltex Refining Co Pty Ltd* (1993) 68 ALJR 127, 135 (Mason CJ and Toohey J); *State of Western Australia v The Commonwealth ('the Native Title Case')* (1995) 128 ALR 1, 64.

[49] (1995) 128 ALR 1, 64.

[50] (1992) 177 CLR 292.

[51] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J); *Dietrich v R* (1992) 177 CLR 292, 337 (Deane J), 373 (Gaudron J); *EPA v Caltex* (1993) 68 ALJR 127, 135; *The Native Title case* (1995) 128 ALR 1, 64.

[52] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 43 (Brennan J); *Dietrich v R* (1992) 177 CLR 292, (Mason CJ, McHugh and Brennan JJ).

[53] Gillian Triggs, 'Customary International Law and Australian Law' in Manfred Ellinghaus, Adrian Bradbrook and A Duggan (eds), *The Emergence of Australian Law* (1989) 376; James Crawford and W

in which the Court could have considered the issue, *Mabo [No 2]* and *Dietrich*, the Court has shied away from identifying customary international law as an issue. Given the amorphous nature of customary international law and the Court's obvious concerns not to be seen as going beyond the sources of law consistent with the framework of the Constitution, it appears that the Court prefers to legitimate the use of international law by making reference to treaties, rather than customary international law, and by using treaties as part of accepted common law judicial techniques.[54]

B *Development of the Doctrine of Legitimate Expectation*

Teoh is of considerable significance for the doctrine of legitimate expectations. First, it rehabilitates the doctrine from what had been seen by some[55] as a descent into obsolescence since the High Court decisions in *Kioa v West*.[56] In *Teoh*, McHugh J indicated his preference for a broader approach to procedural fairness, so that the question becomes 'what does fairness require in all the circumstances of the case?'[57] On this approach, there is no need for any doctrine of legitimate expectation.[58] However, it is clear from the judgments of the majority that the doctrine is alive and well and, indeed, expanding. For it is clear that *Teoh* has not only reaffirmed the relevance of legitimate expectation, but has also extended the circumstances that can give rise to a legitimate expectation and clarified the operation of the doctrine to some extent.

The extension of which we speak is the majority's view that ratification of a convention is an act that can give rise to a legitimate expectation that the government will adhere to the terms of the ratified convention in its administrative decision-making. Quite clearly, ratification had not hitherto been used in Australia to found a legitimate expectation; indeed, such an argument was specifically rejected by Stephen J in *Simsek v Macphee*.[59] Interestingly, none of the majority judges found it necessary to expressly overrule *Simsek*; it warranted only a footnote in passing.[60] However, that is not to say that the majority's approach has taken the doctrine of legitimate expectation outside its traditional

Edeson, 'International Law and Australian Law' in K Ryan, (ed) *International Law in Australian Law* (2nd ed, 1984) 71; *Chow Hung Ching v R* (1948) 77 CLR 449.

54 Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends', forthcoming, *Sydney Law Review*.

55 Margaret Allars, *Introduction to Australian Administrative Law* (1990) 240.

56 (1985) 159 CLR 550.

57 Despite the fact that, in the joint judgment of Mason CJ, Deane and McHugh JJ in *Annetts v McCann* (1990) 170 CLR 596, 598, the role of legitimate expectations was endorsed in these terms:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or *legitimate expectations*, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words [emphasis added].

58 (1995) 128 ALR 353, 381.

59 (1982) 148 CLR 636, 644.

60 (1995) 128 ALR 353, 365 (Mason CJ and Deane J), 370 (Toohey J).

sphere of operation. Indeed, the majority's approach builds on developments that have already occurred New Zealand.[61]

Traditionally, four sources of legitimate expectation have been recognised:

> (1) a regular course of conduct which has not been altered by the adoption of a new policy; (2) express or implied assurances made clearly on behalf of the decision-making authority within the limits of the power exercised; (3) the possible consequences or effects of the expectation being defeated especially when those consequences include economic loss and damage to reputation, providing that the severity of the consequences are a function of justified reliance generated from substantial continuity in the possession of the benefit or a failure to be told that renewal cannot be expected; and (4) the satisfaction of statutory criteria.[62]

The majority's approach falls clearly into the second source identified: that of 'express or implied assurances' or undertakings. The majority classified the ratification of a convention as an undertaking to the Australian people of the government's intention to give effect to the convention in question. The executive, as an arm of government, is able to set general governmental policies, so a statement by the executive *qua* executive (rather than by an individual Minister or decision-maker) should, as a matter of principle, be able to generate an expectation that the statement is intended to apply to the executive as a whole. The majority have thus not departed from the existing framework of the doctrine of legitimate expectation, they have merely clarified its operation by making it clear that, in order to give rise to a legitimate expectation, an undertaking need not come directly from the decision-maker.

McHugh J, on the other hand, emphasised the number of conventions to which Australia is a party as an indication that an expectation that the executive will abide by ratified conventions could not be reasonable,[63] because the effect on decision-makers would be overwhelming.[64] In our opinion, this view of the practical effect of the majority's judgment is an overreaction. Although the exact scope of *Teoh* is as yet unknown, it is safe to say that most of the 920 treaties to which Australia is a party[65] will be irrelevant to most decision-makers. Only a small number of treaties will be relevant, indeed there is indication in the judgments of Mason CJ, Deane and Gaudron JJ that only

61 See *Tavita v Minister for Immigration* [1994] 2 NZLR 257. In that case, the New Zealand Court of Appeal did not ultimately decide the issues concerning the relationship between international law and domestic law, or the impact of the international conventions in question on administrative decision-making. However, the Court gave clear indications that ratification was not of no effect (265-6):

> [T]he main burden of [the Minister's] argument was that in any event the Minister and the Department are entitled to ignore the international instruments.
>
> That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although ... a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it.

62 Pamela Tate, 'The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice' (1988) 14 *Monash Law Review* 15, 48-9.

63 As does the Joint Ministerial Statement, above n 1.

64 (1995) 128 ALR 353, 385.

65 See Joint Ministerial Statement, above n 1, 2.

human rights treaties will be relevant, although this is by no means definite. In addition, not every decision made will be affected by the legitimate expectation doctrine. As mentioned above, if the statutory scheme rules out reference to a treaty, then there can be no legitimate expectation that the treaty will be adhered to. Further, it is only where a decision impacts upon a person adversely that the doctrine becomes relevant. Thus both the class of decisions and the classes of treaties caught by the *Teoh* decision are limited. It would, we suggest, be a relatively straightforward exercise to produce a set of guidelines or a manual for decision-makers to assist them in ascertaining whether the doctrine applies and what must be done if it does. The logistics are not such as to make the expectation of compliance unreasonable.

The other point of significance in the majority judgment is the confirmation of what some judges had said in earlier cases: that a legitimate expectation is an objective, rather than a subjective, concept. That is, it is not necessary that the individual claiming the existence of the expectation be aware of the undertaking given by the executive or that the individual personally entertain the expectation. All that is required is that the expectation is reasonable, in the sense that there are adequate materials to support it.[66] As Tate puts it, a legitimate expectation is an 'objective state of a person, something quite distinct from a subjective hope or state of mind'.[67] It is a device permitting the courts to offer some measure of protection to interests falling short of legal or proprietary interests. This approach is not new: it was impliedly accepted by Mason and Deane JJ in *Kioa v West*, where their Honours discussed whether an infant child held a legitimate expectation, when she obviously did not personally hold any expectation at all. Toohey J had made the point expressly in *Haoucher v Minister for Immigration and Ethnic Affairs*,[68] and the only judge (until now) who seemed to view legitimate expectation as a subjective concept was Brennan J who, for that very reason, has consistently refused to apply the doctrine of legitimate expectation in a series of cases.[69] The majority thus simply confirmed the correctness of the objective view of legitimate expectation. In contrast, McHugh J expressly refused to accept the correctness of the objective approach.[70]

Finally, it should be emphasised that, in keeping with the traditional conception of legitimate expectation,[71] there is no suggestion that the expectation (in this case, that the convention will be applied) is legally enforceable. The executive cannot be made to comply with the convention, it can only be required to accord a hearing to persons affected before departing from the terms of the

66 (1995) 128 ALR 353, 365 (Mason CJ and Deane J), 373 (Toohey J).

67 Tate, above n 62, 49-50, 67-8. See also Moira Paterson, 'Legitimate Expectations and Fairness: New Directions in Australian Law' (1992) 18 *Monash Law Review* 70, 73.

68 (1990) 169 CLR 648, 670.

69 *Kioa v West* (1985) 159 CLR 550; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Annetts v McCann* (1990) 170 CLR 596.

70 (1995) 128 ALR 353, 383.

71 See Tate, above n 62, 51; Paterson, above n 67, 70.

convention. In addition, the expectation can be defeated (or will not arise) where there have been 'statutory or executive indications to the contrary'.[72] That is to say, if the statute conferring power on the decision-maker made it clear that the decision-maker was not to take into account the provisions of a convention, then such statutory direction would prevail. Further, if the executive has made it clear that it does not intend to comply with the provisions of a treaty, then that, too, will negate any legitimate expectation that might otherwise arise. This accords with the nature of a legitimate expectation as something less than a legal right, giving rise only to a right of procedural fairness: if the decision-maker has made it clear that the convention will not be adhered to, then a legitimate expectation to the contrary cannot arise and there is no need to inform the person affected that the convention will not be adhered to, as this has already been made clear. Thus, it is clear that the use of international conventions to found a legitimate expectation does not amount to the 'incorporation' of treaties into domestic law without statutory authorisation. In light of the way the doctrine operates, McHugh J's comment that this use of legitimate expectation would mean that 'the Executive Government of the Commonwealth would have effectively amended the law of this country'[73] is disingenuous. The legitimate expectation doctrine no more involves the executive in amending the law than does the formulation of governmental policy or the entry into contracts by the executive. Both these events can have legal effects, but do not involve amending the law, just as ratification leading to a legitimate expectation has legal effects but does not involve any amendment of Australian law. This argument unfortunately taps into misinformed fears about abdication of sovereignty by the executive to international bodies.[74]

The Effect on State Decision-Making

As part of the overreaction to the *Teoh* decision, it has been suggested that the effect of the case could extend to the administrative decisions of the States. In part, this suggestion was fuelled by McHugh J, who was at pains to bring the States into the equation, albeit only to reject the notion that ratification of a treaty might give rise to a legitimate expectation that State decision-makers would comply with the treaty. However, there is no suggestion in the majority's reasoning that State decisions might be affected by ratification of a treaty by the Commonwealth executive.[75] Indeed, if the reasoning of the majority is followed through in any logical way, it is clear that State decisions would not be affected: the undertaking to the Australian people is given by the *Commonwealth* executive and thus gives rise to a legitimate expectation that the *Commonwealth* executive will comply with the terms of the treaty; there is no undertaking given by the *State* executives (indeed, there could not be in relation to treaties, as the

[72] (1995) 128 ALR 353, 365 (Mason CJ and Deane J), and see 374 (Toohey J).

[73] Ibid 385.

[74] See generally, Mathew, above n 54

[75] We are not concerned here with Gaudron J's use of citizenship as the basis for the legitimate expectation, which may apply to the States.

States do not have international personality and so cannot enter into treaties), thus there is no legitimate expectation engendered that the *State* executives will give effect to any conventions in their administrative decision-making. One can reach McHugh J's conclusion as to State decisions and still find a legitimate expectation at the Commonwealth level.

Implications for Human Rights Protection in Australia and Impact of the Joint Ministerial Statement

We have argued that of the 920 treaties to which Australia is a party, the treaties likely to have most impact after the *Teoh* decision are human rights treaties.[76] Australia's entry into and implementation of human rights treaties has been hampered by concerns over ceding sovereignty and federalism,[77] meaning that the primary mechanism for implementing Australia's human rights obligations, the Human Rights and Equal Opportunity Commission, is extremely limited. The Human Rights and Equal Opportunity Act 1986 (Cth) confers merely investigatory, conciliatory, educative and advisory powers on the six Commissioners. A number of international treaties are scheduled to the Act, but the High Court has not supported the view that inclusion in the schedules creates any effect in Australian domestic law.[78] Given the failure of the legislature to use its powers to fully implement human rights treaties, the *Teoh* decision creates an important procedural mechanism for protection of human rights in Australia.

As explained earlier, the majority works hard to explain that the recognition of a legitimate expectation based on ratification of a treaty does not usurp legislative power, and they point out that the expectation may be displaced by the legislature or executive.[79] Unfortunately, the government has treated these passages as an invitation to displace any legitimate expectation aroused by ratification by issuing a general statement, applicable to all treaties presently in force or entered into in future, to the effect that no legitimate expectation will arise by reason of ratification.[80] It is unlikely that the majority envisaged a blanket suffocation of *all* such expectations in relation to *all* treaties, present and future. We would suggest that what may have been envisaged was, at most, a statement concerning particular treaties and particular kinds of decisions.

[76] See n. 65 and accompanying text.

[77] See Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

[78] See generally, *Dietrich v* R (1992) 177 CLR 292. This view is supported by *dicta* of Nicholson CJ of the Family Court in *Re Marion* (1990) 14 Fam LR 427, 449. In the appeal of *Re Marion*, however, the High Court made little or no reference to either the Act or the treaties scheduled to the Act. See *Secretary, Department of Health and Community Services (NT) v JWB & SMB* (1992) 175 CLR 218. The preference of the High Court has been to use international standards in the development of the common law. See n 48 and accompanying text.

[79] See n 16 and accompanying text.

[80] It should be noted that the statement will not operate retrospectively to defeat claims arising on the basis of a legitimate expectation generated before the statement was made.

Given the current tendency to negate the effect of judicial decisions in relation to applicants for refugee status,[81] it might have been expected that action would be taken to diminish the impact resulting from the *Teoh* decision of human rights treaties in the area of migration law. Of course, this would require the government to be specific about its intentions to depart from international human rights standards, a course of action which is possibly politically unpalatable, even in the migration area. This suggests that the real agenda behind the blanket approach of the Joint Ministerial Statement is the minimisation of the potential impact of human rights treaties, as opposed to the stated need to return to the certainties of the pre-*Teoh* position regarding the operation of treaties in domestic law. Equally, it might be surmised that the passages in the judgments on which the government has acted were really intended as subtle reminders that ratification should be followed up with *positive* implementation of the treaty, particularly in the case of human rights treaties for which national implementation mechanisms are vital.

Regardless of the possible motivations of the Court or the executive, it is probable that the Joint Ministerial Statement will achieve its objective. Given the fact that ratification as a general statement is able to affect all arms of the executive by creating a legitimate expectation, logic would then dictate that a general statement negating all such legitimate expectations would also be effective. In our view, this surprising response of the executive is a disappointing blow to effective protection of human rights in Australia and should be roundly condemned.

C *The Future of* Teoh

The future of *Teoh* is, at this stage, somewhat uncertain. First, its effect may have been overridden by the Joint Ministerial Statement, although the effectiveness of that statement is not beyond doubt. Secondly, the government has announced an intention to legislate to override *Teoh*, legislation which would in all probability have the support of the Coalition parties in the Senate, given the current debate on the treaty-making power.[82] Finally, even if there is no effective government or legislative displacement of the legitimate expectations as propounded in *Teoh*, the precedential value of the case itself is not beyond doubt. Although the decision was 4:1, Mason CJ has since left the Court. Two

[81] For example, following the decision in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 that detention of a group of Cambodian asylum-seekers was not justified by any legislative provision, legislation was introduced to retrospectively validate their detention. See part 2, Division 6, *Migration Act* (1958) (Cth). More recently, the decision by Sackville J of the Federal Court in *Minister for Immigration and Ethnic Affairs v A and Ors* (1995) 127 ALR 383 that Chinese asylum-seekers fleeing as a result of China's one-child policy may constitute a social group within the meaning of the 1951 Convention Relating to the Status of Refugees, has prompted the introduction of Migration Legislation Amendment Bill (No 4) 1995. For analysis of the current negative trend in implementation of Australia's international obligations towards refugees, see Penelope Mathew, 'Retreating from the Refugee Convention', paper delivered at 'Australia in a Global Context: The United Nations and Law-Making for the 21st Century' Conference, 25 May 1995.

[82] See, eg, Parliament of the Commonwealth of Australia, Senate Constitutional and Legal References Committee, Discussion Paper, *Treaties and the External Affairs Power*, March 1995.

judges did not sit — The new Chief Justice Brennan and Dawson J. While Brennan CJ has embraced the use of international conventions in certain areas of domestic law,[83] he has consistently opposed the use of legitimate expectation as a mechanism for attracting a duty of procedural fairness.[84] Dawson J, on the other hand, has accepted the doctrine of legitimate expectation[85] but might be expected not to endorse an extension of that notion to recognise the generation of a legitimate expectation by ratification of an international convention. Gummow J, the new member of the Court, has likewise accepted the doctrine of legitimate expectation[86] and he has not rejected the use of international conventions in certain circumstances in domestic law.[87] His position, however, is something of an unknown quantity. The true effects of *Teoh* thus remain to be seen.

KRISTEN WALKER* AND PENELOPE MATHEW†

POSTSCRIPT

After this case note was written, the federal government introduced legislation into Parliament to reverse the High Court decision in *Teoh*. The Administrative Decisions (Effect of International Instruments) Bill 1995, if passed, will prevent ratification of an international convention from giving rise to any legitimate expectation that decision-makers will abide by the terms of the Convention or that a person affected by a decision will be given a hearing to argue against a decision to depart from the convention.‡ The Bill covers decisions on behalf of the Commonwealth, a State or a Territory. The Bill will almost certainly be passed and it is difficult to contemplate any reason why it would not be effective. The future of *Teoh* is, therefore, grim.

[83] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

[84] See above n 69.

[85] *Attorney-General v Quin* (1990) 170 CLR 1; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

[86] *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93.

[87] *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347.

* BSc, LLB (Hons) (Melb), Lecturer in Law, University of Melbourne.

† BA, LLB (Melb), LLM (Columbia), Lecturer in Law, University of Melbourne.

‡ Section 4.