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The End For Teoh? Re Minister for Immigration and Multicultural Affairs; Ex parteLam

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Abstract

It would appear from the title of the present paper that the 1995 decision of the High Court in Minister for Immigration and Ethnic Affairs v Teoh has had its day as one of the seminal cases in human rights and Australian public law. In one respect, following the decision of the Court last year in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam, that is true. We now can say with some degree of certainty that the notion that legitimate expectations may arise upon the executive's act of ratifying a treaty in international law is likely to be overturned in any future case where the Court is presented with an opportunity to re-open that aspect of Teoh. However, I will attempt to highlight in this paper how Teoh may continue to play a significant role in future cases dealing with the interface between international and domestic law, both through the use of legitimate expectations and otherwise.

The End For *Teoh*?

Re Minister for Immigration and Multicultural Affairs; Ex parteLam

Wendy Lacey.*

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It would appear from the title of the present paper that the 1995 decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[1] has had its day as one of the seminal cases in human rights and Australian public law. In one respect, following the decision of the Court last year in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[2] that is true. We now can say with some degree of certainty that the notion that legitimate expectations may arise upon the executive's act of ratifying a treaty in international law is likely to be overturned in any future case where the Court is presented with an opportunity to re-open that aspect of *Teoh*.[3] However, I will attempt to highlight in this paper how *Teoh* may continue to play a significant role in future cases dealing with the interface between international and domestic law, both through the use of legitimate expectations and otherwise.

The statement of Gummow J made during arguments in *Lam* that his Honour could no longer continue to write judgments on things he did not understand[4] gave a clear indication of the unease felt among some members of the bench towards the majority judgments in *Teoh*. Indeed, the intention of the Court to consider *Teoh* despite the fact that neither counsel sought to raise the case was patently clear from the transcript of proceedings. While McHugh J's dissenting opinion *in Teoh* has always been available as an illustration of his Honour's views on the subject, we may now add Justices Gummow, Hayne and Callinan as proponents of this narrower approach. The result in *Lam* is a decision comprising 4 separate judgments, of

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1 (1995) 183 CLR 273.

2 (2003) 195 ALR 502.

3 See also, Glen Cranwell, 'Re Minister for Immigration and Multicultural Affairs; Ex parte Lam' (2003) 10 *Australian Journal of Administrative Law* 208-213; Robert Orr & Susan Reye, 'Treaties and Administrative Decision-Making: Teoh in Question' (2003) 9 *Litigation Notes* 2-3.

4 *Re MIMA; Ex parte Lam* B33/2001 (24 June 2002) High Court of Australia Transcripts.

which three raise serious questions in rather lengthy obiter passages surrounding the principle established in *Teoh*.

While the ascendancy of the approach taken by McHugh J in *Teoh* is the obvious development evident in *Lam*, it is not the only development that must be considered in evaluating the effect of the case. Principal among other recent developments is the approach of Gleeson CJ in cases including *Plaintiff S157 v Commonwealth*[5] that anchors the accepted principles on the domestic relevance of international law upon the rule of law. In that case, Gleeson CJ affirmed these principles in relation to the interpretation of statutes in the following manner:[6]

> First, where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.
>
> Secondly, courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffman recently pointed out in the United Kingdom, for parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.
>
> Thirdly, the Australian Constitution is framed upon the assumption of the rule of law. Brennan J said:
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>> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

Notwithstanding the shift in support among the present members of the High Court for the legitimate expectation identified in *Teoh*, it is important to recognize the broader principles established in *Teoh* that remain unscathed following the decision in *Lam*. *Teoh* remains good authority on the well accepted principles that regulate the reception of international law into the common law, and upon the interpretation of domestic statutes. In addition, the fact that several questions remain regarding the extent to which the Court is likely to question the

5 (2003) 195 ALR 24.
6 Ibid at 34.

continuing role of legitimate expectations in general, will mean that *Teoh* continues to be discussed in broader administrative law contexts.

Lam itself must be viewed in context, and in light of the fact that the Gleeson Court is unquestionably a more formal and legalistic court than its predecessors. However, this fact only serves to highlight the traditionally cautious approach that has been adopted by successive High Courts on human rights issues - an approach that must be considered alongside the trend for human rights matters to be highly politicized within Australia.[7] As the writings of Professor Hilary Charlesworth have illustrated,[8] the politicization of human rights owes much to the politics of federalism - marked by the bitter constitutional battles of the 1980's, beginning with *Koowarta v Bjelke-Petersen* in 1982.[9] However the political fallout in the wake of both the decision in *Teoh*,[10] and the decision of the Human Rights Committee in the *Toonen* case,[11] also serve to highlight this trend, and of the role that issues of independence and national sovereignty have played within it.

This politicization of human rights in Australia has tended to fuel a perspective that the content of international human rights instruments are distinct and legally separate from Australian legal standards and principles.[12] While this view is also attributable to the dualist theory that applies in Australia – that international law is not a part of domestic law until validly incorporated – it has also been fuelled by the politics surrounding human rights protection. As a consequence, the jurisprudence of Australian courts dealing with the use of international law in developing domestic legal principles has been cautious. It reflects a conscious attempt by courts, and the High Court in particular, to be concerned with questions of legitimacy in carrying out its judicial role.[13] Even *Teoh* itself was limited in the extent to

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7 On this issue, see the detailed discussion provided in Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423-465.

8 See, Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195-232; Hilary Charlesworth, 'External Affairs Power' (1995) 29 *International Law News* 43-46.

9 (1982) 153 CLR 168. Other cases from that era include: *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

10 See Wendy Lacey, 'In The Wake Of *Teoh*: Finding An Appropriate Government Response' (2001) 29 *Federal Law Review* 219-240.

11 *Nicholas Toonen v Australia*, Communication No. 488/1992: Australia. 04/04/94. CCPR/C/50/D/488/1992. For a detailed analysis of the issues in *Toonen*, see Sarah Joseph, 'Gay Rights Under the ICCPR: Commentary on *Toonen v Australia'* (1994) 13 *University of Tasmania Law Review* 392-411; Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740.

12 See Charlesworth et al, above n 7 at 424-425.

13 Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Brian R Opeskin & Donald R Rothwell, *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997, at 220. See also the decision of Mason CJ and Deane J in *Minister for*

which it afforded protection of human rights. At the recent conference celebrating the centenary of the Court two papers served to illustrate the significance of the caution taken by the High Court and which stems from the desire to preserve the legitimacy of judicial review. While Sir Gerard Brennan offered a detailed account of the achievements of the Court in cases that involved largely incremental developments in the protection of human rights,[14] Professor Hilary Charlesworth was strong in her criticism of the judicial caution displayed in the interpretation of constitutional guarantees in particular.[15]

In the present paper, I intend to focus on only a limited number of issues that arise from the decision in *Lam*. My analysis stems from the position that not all is lost of the majority position taken in *Teoh*, just as all is not lost for arguments to be raised that draw upon the relevance of international human rights standards. My discussion develops in two ways: that aspects of the decision in *Teoh* remain good law; and that *Lam* merely reflects part of a broader change in High Court jurisprudence that has forced practitioners and commentators to clarify the basis and structure of their arguments that rely upon international standards. The conclusion is reached that the potential significance of international standards in domestic law has not been fundamentally altered by changes to the membership of the bench, though it has changed it to a degree. Recent changes have heralded an era in which human rights lawyers must evaluate with some degree of rigour, both the premises and the practical instances in which human rights arguments can be made.

Of the issues that I believe will come to be of particular interest in future cases, included is the issue of ambiguity that forms a requisite element of accepted principles for the domestic use of international law in relation to statutory interpretation. In addition, questions surrounding the relationship between international law and the Australian common law, and specifically the role of the doctrines of incorporation, transformation, and so-called harmonization, are likely to arise for further clarification. With regard to the latter issue, it may well prove that the separate opinion of Gaudron J in *Teoh* will assume a particular significance in future cases. In considering these two subjects, the view is advanced in this paper that *Lam* represents an opportunity for lawyers to reconsider and clearly articulate the

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Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 288: 'A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials.'

14 Sir Gerard Brennan, 'Human Rights, International Standards and the Protection of Minorities', Paper presented at the High Court of Australia Centenary Conference, Hyatt Hotel Canberra, 11 October 2003.

15 Hilary Charlesworth, 'Human Rights, International Standards and the Protection of Minorities', Paper presented at the High Court of Australia Centenary Conference, Hyatt Hotel Canberra, 11 October 2003.

legal basis upon which they seek to rely upon international standards, preferably beyond the tool of legitimate expectation. While the questioning of *Teoh* was not comprehensive in *Lam*, and there remains some scope for *Teoh*-like arguments to be developed, there may actually be better reasons for attempting to develop arguments that lead to more substantive recognition of human rights than can be the case with legitimate expectations, which offer protection in only a limited, procedural sense.

The 1995 Decision in *Minister for Immigration and Ethnic Affairs v Teoh*[16]

The applicant in *Teoh*, had been subject to a deportation order following a criminal conviction for importing heroin into Australia. The facts and proceedings of *Teoh* are outlined extensively by commentators elsewhere,[17] and need not be reproduced here. It may be stated, however, that Mr Teoh was essentially the responsible parent for seven Australian-born children (including Mr Teoh's biological and step-children). What is important in the present context, however, is to revisit the legal principles established in *Teoh's* case, and in particular, the dissenting view of McHugh J in *Teoh*. Consequently, the separate judgment of Toohey J will not be addressed in the present paper, and the decision of Gaudron J will only be addressed in the final section dedicated to the relationship between international law and Australian common law.[18]

At one level, the majority of the High Court simply re-articulated the existing principles regarding the legitimate use that may be made of unincorporated international treaties in Australian law. Thus, as Mason CJ and Deane J stated:[19]

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16 The following section closely follows an extract from an article entitled, 'A Prelude To The Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lam'*, to be published by the author in the March edition of the (2004) 26 *Sydney Law Review*.

17 See for example, A Twomey, 'Minister for Immigration and Ethnic Affairs v Teoh' (1995) 23 *Federal Law Review* 348 at 348-361; M Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 202 at 202-241; L Katz, 'A Teoh FAQ' (1998) 16 *AIAL Forum* 1 at 1-14; S Sheridan, 'Legitimate Expectations: Where Does the Law Now Lie?' (1998) 87 *Canberra Bulletin of Public Administration* 125 at 125-133; K Walker, 'Who's The Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights' (1995) 25 *Western Australian Law Review* 238 at 238-254; R Piotrowicz, 'Unincorporated Treaties in Australian Law' (1996) *Public Law* 160 at 503-506; PW Perry, 'At the Intersection: Australian Law and International Law' (1997) 71 *Australian Law Journal* 841 at 841-859.

18 Toohey J was largely in agreement with Mason CJ and Deane J. Gaudron J took a different perspective, based on the fact that a legitimate expectation was not even needed. For Gaudron J, the common law contained a requirement that in all matters affecting children their welfare would be a primary consideration. For a discussion of these judgments see the article by M Allars, above n 17.

19 (1995) 183 CLR 273 at 287.

> [T]he fact that the Convention 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 party,[20] 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.
>
> 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.[21]

Their Honours also referred to the accepted use that may be made of international instruments in the development of the common law:[22]

> 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.[23] 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.

In these respects, the majority judgment was uncontroversial. The principal legal controversy concerned the question of 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.'[24] The fact that the majority of the Court, including Mason CJ and Deane J (together with Toohey J, who delivered a separate judgment), answered this question in the affirmative, was what created the controversy surrounding the decision.[25] In addressing the question posed, the joint judgment offered the following reasoning:

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20 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

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

22 (1995) 183 CLR 273 at 288.

23 *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 321, per Brennan J; at 360 per Toohey J; *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 569, per Kirby P; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770.

24 (1995) 183 CLR 273 at 288.

25 For an overview of the political and legal response to the Court's decision, including 2 executive statements, 3 federal bills, 1 state Act, and various cases at the Federal Court level, see W Lacey, 'In the Wake of Teoh: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 219-240.

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act,[26] particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, *ratification of a convention is a positive statement by the executive government* of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. *That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention*[27] and treat the best interests of the children as "a primary consideration". [emphasis added]

In relation to the expectation identified in *Teoh*, the fact that an individual may not have been aware of the Convention's existence would not preclude the expectation from arising.[28] For Mason CJ and Deane, it was enough that the expectation was 'reasonable in the sense that there are adequate materials to support it'.[29] The effect of the legitimate expectation was not to create a binding rule of law, whereby a decision-maker was compelled to act in conformity with the Convention. Such a result would have involved the incorporation of the Convention 'by the backdoor', and would have linked the effect of the legitimate expectation with substantive outcome, rather than with the procedures to be adopted.

This distinction is critical in administrative law, and stems from the separation of powers in Australia. Judicial review of administrative action by the courts is limited to consideration of the legalities of decision-making, rather than the actual merits of the case – which is an administrative function to be performed by the executive.[30] Indeed, it is by virtue of the existence of a constitutional separation of powers in Australia that the decision in *Coughlan*[31] stands at odds with Australia's constitutional framework, and is unlikely to be followed here.

The actual effect of the legitimate expectation identified in *Teoh* was not of this class of decision, however. It did not involve a development of the law in conflict with the constitutional separation of powers. The effect of the legitimate expectation in *Teoh's* case

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

27 cf *Simsek v Macphee* (1982) 148 CLR 636 at 644.

28 (1995) 183 CLR 273 at 291.

29 Ibid.

30 As Brennan J stated in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36: 'The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.' His Honour continued at 38: 'If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.'

31 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213; [2000] 3 All ER 850.

was limited to a procedural guarantee, which was itself premised upon the right of the decision-maker to act inconsistently with a treaty obligation. Where a decision-maker proposed to decide a matter inconsistent with a legitimate expectation, procedural fairness would require that any persons affected be given notice and an adequate opportunity of presenting a case against such a course of action.[32]

However, in the High Court's decision in *Teoh*, Justice McHugh delivered a strong dissenting judgment, that treated the legitimate expectation identified by the majority as one involving the substantive protection of the treaty, rather than being concerned with procedural requirements. He began his discussion of the issue with the following statements:[33]

> 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.

Obviously the point from which McHugh J departed was, therefore, entirely different from that of the majority. From the very outset then, they were approaching the question from different perspectives. In his judgment, McHugh J also questioned several aspects of legitimate expectations. First, his Honour questioned the practical role for the doctrine following the decision in *Kioa v West*,[34] where the High Court had adopted a broad approach to the types of interests sufficient to enliven procedural fairness requirements. While this is an accurate analysis of the position since *Kioa* regarding what is referred to as the 'threshold test', it is submitted that the doctrine of legitimate expectations must still play a role in determining the content of procedural fairness requirements in any given case.

The other criticism contained in McHugh J's judgment, concerned the objective nature of the expectation in *Teoh*. For McHugh J, the subjective state of mind of an individual affected by a decision should be treated as relevant to whether the expectation is 'objectively reasonable', as the following statement indicates:[35]

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32 (1995) 183 CLR 273 at 291-292.
33 (1995) 183 CLR 273 at 305-306.
34 (1985) 159 CLR 550.
35 (1995) 183 CLR 273 at 314.

> It must be an expectation that is objectively reasonable for a person in the position of the claimant. But that does not mean that the state of mind of the person concerned is irrelevant. … If a person does not have an expectation that he or she will enjoy a benefit or privilege or that a particular state of affairs will continue, no disappointment or injustice is suffered by that person if that benefit or privilege is discontinued. A person cannot lose an expectation that he or she does not hold.

Clearly, the reasoning in HcHugh J's dissenting judgment stands directly at odds with that of the majority. However, following changes in the membership of the High Court since 1995, and with McHugh J being the only judge remaining from the *Teoh* decision, *Lam* provided an opportunity to again test the reasoning of the majority in that case. Though, as has been pointed out, *Teoh* was not relied upon in argument (as no legitimate expectation was premised upon the ratification of a treaty), in 2003 McHugh J found himself on a bench and among judges sympathetic to the views he had earlier expressed in dissent. It is against this background, that the decision in *Lam* must be considered.

The Factual Background in *Lam*[36]

The case in *Lam* arose out of the fact that Mr Lam had had his Transitional (Permanent) Visa cancelled in early 2001 and his deportation ordered, following a conviction for serious offences. Like many in this situation, Mr Lam had established a family during his time in Australia, and his deportation would have either entailed relocating his Australian-born children to another country, or Mr Lam being separated from them. Consequently, the issue of deportation upon the welfare of his two children was a central issue. Mr Lam, the applicant, was born in Vietnam but had arrived in Australia as a 13 year old refugee in 1983. On arrival he was granted a Transitional (Permanent) Visa, which was cancelled on 23 January 2001 pursuant to a decision of the Minister under s 501(2) of the *Migration Act* 1958 (Cth). The applicant had been convicted of several criminal offences, the most serious of which had been trafficking in heroin for which Mr Lam had been sentenced to 8 years imprisonment. As a consequence, the applicant had failed to meet the character test contained in s 501(6) of the Act, and became liable to deportation.

[36] The following section closely follows an extract from an article entitled, 'A Prelude To The Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lam'*, to be published by the author in the March edition of the (2004) 26 *Sydney Law Review*.

The proceedings before the High Court involved an application for orders of certiorari and prohibition under s 75(v) of the Constitution, to quash the Minister's decision and to prevent the Minister from taking steps to deport Mr Lam. The major argument presented by counsel for the applicant involved an allegation of want of procedural fairness, based on the failure of a Departmental Officer to follow an announced procedure. The relevant facts were as follows.

Mr Lam, although unmarried, was the father of two girls, both of whom had been born in Australia in 1989 and 1993 respectively, and who were Australian citizens. Mr Lam had been estranged from the girls' mother for some time, and the girls had been living with relatives for much of Mr Lam's period of imprisonment. Mr Lam had entered into another relationship with an Australian woman and was engaged to be married.

In September 2000 an officer of the Department of Immigration and Multicultural Affairs had written to Mr Lam indicating that his visa may be liable to cancellation under s 501 of the *Migration Act* 1958 (Cth). In the letter, details of the legislation had been set out, an opportunity for Mr Lam to comment prior to any decision of the Minister was given, and a list of relevant matters to be taken into account in making a decision under s 501 was set out. Those matters included 'the best interests of any children with whom you have an involvement'.

Mr Lam exercised his right to comment on the matters relevant to the decision to be made, in what Gleeson CJ referred to as a lengthy submission 'obviously prepared with skilled assistance'.[37] The applicant's letter was dated 30 October 2000. On the matter relating to his children, the applicant provided information regarding his daughters and their current circumstances, and advanced arguments as to why their interests required that he not be deported. These arguments included the fact that the girls had no contact with people from Vietnam, that they were happily settled in Australia, that he planned to marry upon his release from prison, and that the children would have to be cared for by the State were he to be deported.[38] Annexed to Mr Lam's letter, were letters from both his fiancée and from the children's carers, represented in this case by a letter from Ms Tran. The letter from the carer supported the facts raised in Mr Lam's letter regarding the children's circumstances, and his arguments related to his deportation. In particular, the letter indicated that the welfare of the children would be best served in the long term if the children were cared for by Mr Lam and his fiancée.

37 (2003) 195 ALR 502, per Gleeson CJ at [7].
38 Ibid.

On 7 November 2000, an officer of the 'Character Assessment Unit' within the Department wrote to Mr Lam, stating the following:

> The United Nations Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the children shall be a primary consideration.
> Would you therefore kindly provide the full name, address and telephone number of the children's carers. The Department wishes to contact them in order to assess your relationship with the children, and the possible effects on them of a decision to cancel your visa.
> Would you please provide the full contact details of the mother of the children as well.

Though Mr Lam replied with the appropriate information, the Department chose not to take any steps to contact the children's carers, opting to prepare a document for the Minister on the information already in their possession. No problems arose in relation to the contents of this document, only in relation to the Department's failure to contact the carer of the children. Because of this it was argued that procedural fairness was not provided, as Mr Lam had not been informed of the decision not to contact the carer. This was argued despite the fact that no evidence was directly led indicating that Mr Lam 'was misled into taking or failing to take some step, or deprived of an opportunity to advance his case in some way'.[39]

The transcripts of the hearing before the High Court indicate that evidence concerning the language background of the children and of their capacity to integrate into Vietnamese society could have been introduced.[40] This evidence was not directly used to argue a denial of procedural fairness. Rather, it was left open for the Court to find that the absence of an *opportunity* to present further evidence was insufficient. The basic premise of the applicant's case was that Mr Lam was denied procedural fairness, as he had a legitimate expectation created by the letter of 7 November that was not fulfilled. While the decision-maker was not bound to comply in substance with that expectation, the argument presented was that Mr Lam should have been notified of the decision not to follow through with the representation made to Mr Lam, affording him an opportunity to respond.[41]

The Attack on *Teoh* in *Lam*

The principal issue for the four judges who addressed *Teoh* directly in *Lam* (namely, McHugh & Gummow JJ, Hayne J and Callinan J), was the issue of treaty ratification in the creation of a legitimate expectation. Justices McHugh and Gummow sought to distinguish the

39 Ibid at [20].
40 See, *Re MIMA; Ex parte Lam* B33/2001 (24 June 2002) High Court of Australia Transcripts.
41 Ibid at [23].

expectation in *Teoh* from other 'legitimate' or 'reasonable' expectations, which included expectations involving 'an actual or conscious appreciation that a benefit or privilege is to be conferred or a particular state of affairs will continue'.[42] Their Honours considered that:[43]

> It is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any convention as a "positive statement" made "to the Australian people" that the executive government will act in accordance with the convention and to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point.

Even more pointedly, their Honours made the following claim:[44]

> *Haoucher* does not stand beside *Teoh*. In the former case there was a statement made in the Parliament bearing immediately upon the exercise of the particular power in question. In *Teoh* there were in the Convention various general statements and there was no expression of intention by the executive government that they be given effect in the exercise of any powers conferred by the Act.

This point is directed to an issue of controversy that arose in the aftermath of *Teoh*, namely, whether *Teoh* involved the application of, or a significant extension of, the decision in *Haoucher*.[45] This issue draws on the categorisation of treaty ratification with a considered statement of government policy.[46] In *Haoucher*, a legitimate expectation was held to have existed on the basis of the contents of a published policy statement.[47] Commentators such as Allars[48] and Twomey[49] have argued that *Teoh* is consistent with the earlier decision in *Haoucher*, on the basis that the act of ratification is akin to a considered statement of policy.

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42 Ibid at [91].

43 Ibid at [95].

44 Ibid at [96].

45 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648. For an analysis of that controversy see: M Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204; K Walker & P Mathew, 'Minister for Immigration v Ah Hin Teoh' (1995) 20 *Melbourne University Law Review* 236; M Aronson & B Dyer, *Judicial Review of Administrative Action*, LBC Information Services, Sydney, 2000 at 327-328.

46 See M Allars, above n 17 at 224-225; M Aronson & B Dyer, *Judicial Review of Administrative Action*, LBC Information Services, Sydney, 2000 at 327-328.

47 (1990) 169 CLR 648.

48 M Allars, above n 17 at 224-225.

49 A Twomey, 'Minister for Immigration and Ethnic Affairs v Teoh' (1995) 23 *Federal Law Review* 348 at 353-354.

Other commentators, such as Aronson and Dyer,[50] have argued to the contrary. It would appear that the present High Court have serious reservations also in relation to that analogy.

Essentially the concern with *Teoh* rested on the fact that a significant expectation could arise by virtue of the act of ratification alone, and even in cases where an individual affected by a decision had no knowledge of the expectation itself. Their Honours did, however, accept the more conventional effects of an unincorporated treaty in domestic law, including its role in assisting with statutory interpretation, and where ratification is coupled with an additional step in the conduct of foreign affairs.[51] What ultimately emerges as their major concern with the decision, is the fact that they interpret it as introducing mandatory considerations relevant to procedural fairness, and consequently, as overstepping the legitimate bounds of judicial review derived from the Constitution.[52]

Justice Hayne in his judgment also made several statements regarding the decision in *Teoh*, although he stopped short of providing a detailed critique of the case. He did, however, indicate that there were many issues relating to legitimate expectations generally that remained to be considered, and that the application of the *Teoh* principle stood to be limited or confined in some way. However, Hayne J was not as quick to reject the reasoning in *Teoh* altogether, but left open the potential for its review and potential refinement and limitation. On these points, his Honour made the following statements:[53]

> [Used in its broader sense] legitimate expectation is a phrase which poses more questions than it answers. What is meant by "legitimate"? Is "expectation" a reference to some subjective state of mind or to a legally required standard of behaviour? If it is a reference to a state of mind, whose state of mind is relevant? How is it established? These are questions that invite close attention to what is meant by legitimate expectation and what exactly is its doctrinal purpose or basis. Not all are dealt with explicitly in *Teoh*. At the least they are questions which invite attention to the more fundamental question, posed by McHugh J in *Teoh*, of whether legitimate expectation still has a useful role to play in this field of discourse now that it has served its purpose in identifying those to whom procedural fairness must be given as including more than persons whose rights are affected.

And on the issue of *Haoucher*, Hayne J made the following statement:

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50 M Aronson & B Dyer, above n 46, at 328.
51 Ibid at [100].
52 Ibid at [101-102].
53 Ibid at [121-122].

> It may be that, for the reasons given by McHugh and Gummow JJ in this matter, *Teoh* cannot stand with the Court's earlier decision in *Haoucher v Minister for Immigration and Ethnic Affairs*. It may also be that further consideration may have to be given to what was said in *Teoh* about the consequences which follow for domestic administrative decision-making from the ratification (but not enactment) of an international instrument [footnotes excluded].

Though Hayne J raised the presence of several matters that still warrant further consideration, or perhaps more accurately, matters that the Court is eager to reconsider, he accepted that *Lam* was not the case to do so. Accordingly, he refrained from offering lengthy obiter comments and accepted that such matters 'need not be answered in this case'.[54]

Justice Callinan's judgment bore many similarities to the joint judgment of McHugh and Gummow JJ, particularly in the strength of his attack on the decision in *Teoh*, but also in the fact that only four paragraphs were actually directed at determining the issues in question. Justice Callinan, however, premised his attack on *Teoh* on the fact that he was not convinced by counsel for the applicant that they did not need to rely on the decision as authority. Callinan J began this attack with the following statements:[55]

> In my opinion, the expression "legitimate expectation" is an unfortunate one, and apt to mislead. In the case of *Teoh*, it was, with respect, a complete misnomer. … Moreover, the necessity for the invention of the doctrine is questionable. The law of natural justice has evolved without the need for recourse to any fiction of "legitimate expectation".

While Callinan J clearly had concerns with the underlying reasoning of the majority in *Teoh*, his major criticism was against the 'objective assessment' of an expectation espoused most strongly in the judgment of Toohey J in that case. His rejection of that approach was argued as follows:[56]

> I would observe with respect, that an "undertaking" presupposes a recipient of it, just as an "engendering" will be meaningless unless it has an effect upon the mind of someone.
>
> It seems to me, with respect, that if a doctrine of "legitimate expectation" is to remain part of Australian law, it would be better if it were applied only in cases in which there is an actual expectation, or that at the very least a reasonable inference is available that had a party turned his or her mind consciously to the matter in circumstances only in which that person was likely

54 Ibid at [122].
55 Ibid at [140].
56 Ibid at [144-145].

> to have done so, he or she would reasonably have believed and expected that certain procedures would be followed.

To give further indication of the level of concern with issues surrounding the decision in *Teoh*, Callinan J made the extraordinary statement that he could not help but make further reservations regarding the decision, 'before moving to the facts of this case'. Those further reservations related to the relevance of unincorporated treaties in *Teoh*, and on this point Callinan J's view was stated as follows:[57]

> The fact remains that the Convention is not part of Australian law. … In consequence, the view is open that for the Court to give the effect to the Convention that it did, was to elevate the Executive above the parliament. This in my opinion is the important question rather than whether the Executive act of ratification is, or is not to be described as platitudinous or ineffectual [footnotes excluded].

Before actually moving to the facts of the case, Callinan J also confirmed his support for the views expressed by McHugh and Gummow JJ regarding the absence of substantive rights in relation to legitimate expectations.

Evaluating the Implications Of *Lam*: What Remains of *Teoh*?

I have written a detailed critique of the judgments in *Lam* that is not limited to the three judgments outlined here, but includes references to the judgment of Gleeson CJ.[58] That critique centred upon issues of administrative law, and questioned the reasoning processes adopted in each of the judgments. Though I have not outlined the judgments comprehensively here, there is discernible a trend towards using notions of detriment and reliance when determining whether a denial of procedural fairness has occurred. My view is that notions which are better suited to a private law context, in particular the law of estoppel, have only a limited role to play in public law. In focussing upon whether an individual has relied upon a representation to their detriment, the Court developed an approach to the issue that creates difficulties for both decision-makers and judges. The decision-maker who intends not to follow through with a representation made to an individual must themselves consider whether that will result in unfairness, and whether the individual would be denied an opportunity to present evidence that the decision-maker has no awareness of. Similarly, the courts are

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57 Ibid at [147].

58 This article entitled, 'A Prelude To The Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lam*', is to be published in the March edition of the (2004) 26 *Sydney Law Review*.

seemingly drawn into an assessment of the substantive unfairness in the outcome, rather than an assessment of the fairness of the procedures adopted.

Lam was not exactly an ideal case. There was only limited additional evidence that could have been presented had Mr Lam been notified of the change in procedure. This evidence was briefly alluded to during the hearing and related to the language background of the children, and how that would affect them upon their return to Vietnam. In addition, counsel did not stress this evidence as he relied upon the absence of an *opportunity* to respond to the change in procedure, rather than the opportunity to present specific new evidence. In my view the Court should have acknowledged the technical breach of procedural fairness, whilst accepting that the facts did not support the granting of the remedy.[59] By doing so, the Court would have adopted a principle that decision-makers could have easily implemented, and which would have avoided instances where a decision-maker wrongly assumes that proceeding inconsistently with a previous representation would result in no unfairness to an individual. Instead the Court found that no breach of procedural fairness had occurred, as the applicant had not relied upon the representation made to his detriment.

The actual decision in *Lam* has not been applied consistently in lower courts. The most common application of the decision relates to the 'practical injustice' test adopted by Gleeson CJ in *Lam*, used for assessing whether procedural fairness has been denied.[60] In many cases the decision has been referred to but not applied, in some cases it has been distinguished,[61] and in one case the decision was ignored altogether.[62] Thus, there remain questions surrounding the application and utility of *Lam* from a general administrative law perspective. Until the High Court clarifies the broader role of legitimate expectations in administrative law, as well as the relevance of practical injustice to the questions of breach of procedural fairness and the discretion to either grant or deny a remedy, lower courts are likely to apply the case in different ways.

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59 A similar approach has actually been adopted following the decision in *Lam* in the Full Court of the Federal Court, in the case of *Dagli v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 298 (19 December 2003), per Lee, Goldberg and Weinberg JJ.

60 See for example, *Ongel v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCA 525 (30 May 2003); *Untan v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 69 (11 April 2003); *NAFF of 2002 v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 52 (31 March 2003).

61 *Dagli v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 298 (19 December 2003); *Huynh v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FMCA 207 (25 July 2003).

62 *Long v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 218 (18 September 2003).

Notwithstanding these concerns, it is clear that ratification of a treaty will no longer found a legitimate expectation that a decision-maker will provide an opportunity to respond where they choose not to act in accordance with its terms. The issue of objectively held expectations was not directly questioned in the decision of McHugh and Gummow JJ, was only briefly referred to by Hayne, yet was directly questioned by Callinan J. Thus, on this latter point, the attack on *Teoh* was not consistent. Consequently, the effect of the judgments in *Lam* must be seen to be confined to essentially one primary issue – the act of ratification upon the creation of legitimate expectations. In addition to the accepted interpretive principles articulated in *Teoh*, which have not been undermined or questioned in *Lam*, there may be scope for arguing that legitimate expectations arise where ratification is supplemented by additional action.

The judgments in *Lam* clearly indicate that the High Court no longer accepts that ratification alone is sufficient to found a legitimate expectation. But will that also be the position in relation to any instruments that are ratified following consideration by the Joint Standing Committee on Treaties (JSCOT), where ratification is recommended by a joint committee of the federal parliament? What also of the instruments scheduled to the *Human Rights and Equal Opportunity Commision Act* 1986 (Cth)? In these instances, the argument that ratification of a treaty which, according to the present High Court, is a statement only to the international community, is modified by some form of action on the part of federal parliament. Thus, the criticism that *Teoh* cannot stand beside *Haoucher* in such instances is less persuasive. Such a view has already been taken by Federal Magistrate Driver in the case of *Huynh v Minister for Immigration & Multicultural & Indigenous Affairs*.[63]

Perhaps what ultimately remains as the most important question within this context, and from a human rights perspective, is whether the tool of legitimate expectation should be defended as an appropriate vehicle for giving at least procedural protection to human rights. Perhaps *Lam* should be seen as an opportunity for revisiting and strengthening the recognized principles for resort to international standards in Australian law. In doing so, it may be that more substantive protection of rights is the outcome. In support of such a view, Justice Perry of the South Australian Supreme Court recently made the following statement:[64]

> In any event, at its best, *Teoh* is relevant only to the process of administrative decision-making. Even in that area it is of limited value in terms of internationalizing the law in this country. *Teoh* has nothing to do with substantive as opposed to procedural rights, and it does not assist the

63 [2003] FMCA 207 (25 July 2003).

64 Hon Justice John Perry, 'The Use and Application of International Law in Australia and in Decision-Making', Paper presented to the Law Society of South Australia, Adelaide, 29 October 2003, at 15.

> *courts* as opposed to *administrators* in their decision-making. It does not provide a satisfactory platform from which to develop and expand the relationship between international human rights norms and the domestic law of Australia.

Even beyond the tool of legitimate expectation, *Teoh* still represents a valuable authority on the relationship that exists between international law and domestic law. In my view, two aspects of the decision in *Teoh* will continue to occupy a significant role in the future development of the law in this area. First, the question surrounding the level of ambiguity required before international law may be resorted to in the interpretation of statutory provisions. In this sense, the joint judgment of Mason CJ and Deane J will be particularly relevant. Secondly, the alternative approach adopted by Gaudron J in *Teoh*, premised on the identification of a particular obligation within the common law, rather than upon an expectation arising through treaty ratification, may also assume a particular significance in future legal developments. I will address each of these in turn.

Ambiguity and the Interpretation of Statutes

It appears beyond doubt that an international instrument will only be relevant to the interpretation of statutory provisions where ambiguity arises in the statute's terms.[65] On the issue of ambiguity and statutory interpretation, the judgment of Mason CJ and Deane J in *Teoh* displays a broad approach to identifying ambiguity within a statute, while accepting that ambiguity was required. Their Honours offered the following comments on this issue:

> 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 party,[66] 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.
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> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is conformity and not in conflict with the established rules of international law.[67] 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

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65 See, for example the decision of Gummow & Hayne JJ in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 386.

66 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

67 *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69, 77, 80-81.

> 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.

This view is not entirely inconsistent with that endorsed by Gleeson CJ in *S157* (quoted above), although Gleeson CJ appears to adopt a somewhat narrower approach to the issue of ambiguity. Justice Gummow, however, when he was a member of the Federal Court, addressed the issue of ambiguity in his decision in *Minister for Foreign Affairs & Trade v Magno*.[68] There, Gummow J appears to have accepted that some ambiguity must be present, excepting cases where the statute specifically refers to a convention in its terms, or adopts the nomenclature of the convention in anticipation of subsequent ratification.[69]

The other principle strongly endorsed by Gleeson CJ in *S157*, is that which derives from the presumption adopted in cases such *Wentworth v New South Wales Bar Association*,[70] and *Coco v R*.[71] That fundamental rights and freedoms will not be treated as having been removed or limited unless a statute makes that intention expressly clear, is well articulated in the case law. It is strengthened, however, by Gleeson CJ's strong commitment to the rule of law, and that decision-makers will be confined to the proper scope of their statutory powers. In a sense, human rights arguments, at least for Gleeson CJ, are embedded in principles which derive from the rule of law.

Applying these principles to the case of administrative discretion, the relevance of international law, and in particular, international human rights law, is evident. If discretion is seen as the absence of fixed rules[72] and as the ability to choose between different courses of action,[73] discretionary powers are prima facie ambiguous. Indeed, the very benefit of a discretionary power, unconfined (or only narrowly or partially confined) by fixed rules, is to assist the decision-maker in providing 'individualized justice'[74] in different cases. Discretionary powers, therefore, are particularly suited to a construction that favours consideration of Australia's international obligations. While some discretions are limited or

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68 (1992) 37 FCR 298 at 303-305; (1992) 112 ALR 529 at 533-535.

69 Ibid.

70 (1992) 176 CLR 239 at 252.

71 (1994) 179 CLR 427 at 437.

72 See for example, Keith Hawkins, 'The Use of Legal Discretion: Perspectives From Law and Social Science' in Keith Hawkins, *The Uses of Discretion*, Clarendon Press, Oxford, 1992, at 11.

73 de Smith in JE Evans (ed), *Judicial Review of Administrative Action*, 4th edn, London, 1980 at 278; Rosemary Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd edn, Clarendon Press, Oxford, 1990, at 1-2; Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges' (1975) 75 *Columbia Law Review* 359 at 365.

74 John Bell, *Policy Arguments in Judicial Decisions*, Clarendon Press, Oxford, 1983 at 3.

guided by the identification of relevant and/or irrelevant factors, for parliament to remove fundamental human rights considerations as relevant, it would appear that parliament is required to provide clear statutory language to that effect.

On this analysis, the need for a legitimate expectation in the *Teoh* sense, is reduced, if not eliminated altogether. Yet, the presence of a broad statutory discretion may indicate a completely unconfined power to be exercised within the specific limits of the Act in question, and may go against the argument presented. However, it is submitted that the presence of ambiguity that arises as a result of the grant of discretionary power, must be considered together with the principle that fundamental rights and freedoms must be limited or removed only by express and unambiguous statutory language. Considered together, a discretionary power granted by a statute to an administrative decision-maker should be exercised in a manner that involves consideration of any relevant international legal obligation. In other words, the international instrument becomes a relevant consideration to the exercise of the discretion. This approach differs slightly to that expressed by Gummow J in *Magno*, who left it open for a decision-maker to take account of an international obligation or agreement of their own initiative. He stated at [para 18] as follows:

> … difficult questions of administrative law and of judicial review arise where, whilst the international obligation or agreement in question is not in terms imported into municipal law and the municipal law is not ambiguous, nevertheless, upon the proper construction of the municipal law, regard may be had by a decision-maker exercising a discretion under that law to international agreement or obligation.

Gummow J does not address the relationship between a discretionary power and the presence of ambiguity. However, the statutory conferral of a discretionary power can be carried out in very clear terms. The conferral of such a power may, therefore, be completely unambiguous. However, the actual power granted and its exercise is, by its very nature as a discretionary power, ambiguous. The level of ambiguity may be wide or narrow depending on the scope of the discretion and the extent to which its exercise is regulated by the statute. In this sense, the statement by Gummow J can be distinguished in that it appears to only consider ambiguity in the narrow sense of conferral of discretionary power, and where a decision-maker considers the international obligation as a relevant matter of their own initiative.

Gummow J did, however, consider the legal consequence of misconstruing the international obligation, and whether it would amount to an error of law. His following comments identify the question as being unresolved:

> If that agreement or obligation is misconstrued by the decision-maker, is there reviewable error of law? Or is the "error" to be classified as factual in nature? If the latter is correct, the scope for judicial review will be narrowed. The question is unresolved …

It is submitted that if international human rights instruments are to be treated as relevant considerations, the existing principles regulating this area of administrative law should be applied. Thus, the decision-maker is free to place as much weight on the convention as he or she determines, and the failure to take account of the convention where relevant may amount to an error of law for which a remedy is available.[75]

In proposing that there is scope for international human rights instruments to be treated as containing obligations that are relevant to the exercise of administrative discretion, the list of instruments scheduled to the *Human Rights and Equal Opportunity Commission Act* 1985 (Cth) must be considered. While several international human rights instruments are either scheduled to or have been declared as relevant instruments under the Act, these instruments do not form a direct part of Australian law in the sense of creating enforceable rights. However, their actual legal status in domestic law is still to be properly resolved by the courts.[76]

On the importance in Australian domestic law, of the scheduling of certain international instruments to the *Human Rights and Equal Opportunity Act* 1986 (Cth), Professor Ivan Shearer has made the comment that they may be taken as having been 'quasi-incorporated'. Shearer bases this statement on the following two factors:[77]

> In the first place, the provisions of the instruments are schedules to a statute, and thus have an immediate visibility denied to other non-incorporated instruments. It is hard to resist the impression that, in this sense, Parliament intended them to have a privileged or special status so far as executive and judicial organs are concerned. Moreover, scheduling treaties to an Act is a frequently used way in which they are made part of Australian law in other cases. In the second place, international procedures for scrutiny of their application exist; under most conventions there are national reporting requirements and forums are established for the discussion of those reports.

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75 See, for example, the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

76 See the discussion of relevant cases in W Lacey, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 219-240.

77 I A Shearer, 'The Relationship Between International Law and Domestic Law' in B R Opeskin & D R Rothwell (eds), *International Law and Australian Federalism*, Melbourne University Press 1997, at 56.

In a similar vein, Sir Anthony Mason has made the following statement:

> [I]t might be suggested that a convention recognized in this way has a higher status than other non-implemented conventions, but in the absence of a definition of the expression 'higher status', it is not easy to attribute specific legal consequences to that higher status.

Recently, Justice Perry made the strong statement that the time had arrived when Australian courts should begin to give effect to the principles expressed in the ICCPR and other instruments scheduled to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).[78] However, he also acknowledged that before the courts could do so the culture of the legal profession would need to change – by freeing itself of the 'virulent form of legal positivism' that infects Australian jurisprudence.[79]

In addition, the availability of individual complaint mechanisms to Australians has also been accepted as having significance in Australian domestic law. One such mechanism includes the right of individual communication permitted under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). In relation to this instrument, Brennan J made the following comments in *Mabo v Queensland [No 2]*:[80]

> [T]he opening up of international remedies to individuals pursuant to Australia's accession to the 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 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 question still to be addressed by the High Court in this context, concerns the significance of those treaties which are both scheduled to, or have been declared as relevant instruments under the HREOC Act, in addition to which Australians have been provided with the ability to make individual communications to international bodies regarding cases of alleged breach or non-compliance. This list narrows the relevant human rights instruments to 2: the

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78 Hon Justice John Perry, 'The Use and Application of International Law in Australia and in Decision-Making', Paper presented to the Law Society of South Australia, Adelaide, 29 October 2003, at 18.

79 Ibid at 19.

80 (1992) 175 CLR 1 at 42.

International Covenant on Civil and Political Rights (ICCPR); and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[81] Based on the statements in *Mabo*, *Teoh* and other cases, these human rights instruments must be treated as having particular prominence among international instruments that may be legitimately used in Australian law. In the context of relevant considerations and administrative and judicial decision-making, there appears to exist a strong argument for asserting that the failure to consider these instruments where relevant could potentially amount to an error of law warranting the quashing of a decision upon review.[82]

The above discussion has concentrated on administrative discretion, and of the potential use that may be made of international human rights law in the exercise of discretionary powers held by administrative decision-makers. Much of the same approach can be taken in respect of discretionary powers exercised by the judiciary. There are particular distinctions between judicial and administrative discretion that must be considered, however. Specifically, most administrative discretion is conferred by way of statute, whereas many important judicial discretions arise at common law. In addition, judges regulate the exercise of discretion through the development of guidelines where parliament has not already sought to regulate the exercise of the discretion itself. Administrative decision-makers, on the other hand, are under no obligation to develop guidelines. Yet, as Brennan J pointed out in *Drake*,[83] the development of government policy plays a crucial role in the regulation of discretionary powers by administrative officials.

There is an emerging jurisprudence in Australia that has developed the notion that a judge's discretion should be exercised in a manner consistent with international human rights law. Of the Australian judges most prominent in this area, included are Justice Kirby (formerly Kirby P of the NSW Court of Appeal), Justice Perry and the former Chief Justice of the ACT Supreme Court, Miles CJ (formerly Miles J of the NSW Court of Appeal).[84] That discretions are either granted under statute or the common law means that the accepted methods of resort

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81 Australia has not signed the Optional protocols under the Convention on the Elimination of All Forms of Discrimination (CEDAW), nor the Convention Against Torture (CAT).

82 Thus, these instruments would be seen to reflect relevant considerations that a decision-maker was *bound* to take into account in the sense identified by Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39.

83 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 per Brennan J.

84 For an analysis of this jurisprudence, see W Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere', Paper delivered at the 11th Annual Meeting of the Australian and New Zealand Society of International Law, *International Governance and Institutions: What Significance for International Law*, Wellington, NZ, 4-6 July 2003. The paper should be available from the following website: http://law.anu.edu.au/anzsil/. Alternatively, a copy can be obtained from the author.

to international law can be used to accommodate use of international standards in the exercise of discretion. As Kirby J stated in *AMS v AIF*, with respect to discretionary powers granted under the *Family Law Act* 1975 (Cth):[85]

> I would certainly hold that a judge, exercising jurisdiction of the kind invoked here, may properly inform himself or herself of the general principles of relevant international law. This is especially so where those principles are stated in international human rights instruments to which Australia is a party.

The only question arises concerns the presence and level of ambiguity required – an issue which has been discussed above.

International standards are potentially valuable sources for lawyers to refer to when dealing with the exercise of a discretion by a judge. They are also potentially relevant to the exercise of administrative discretion in a manner distinct from that articulated by the High Court's decision in *Teoh*. Discretionary power is by its very nature unfixed by strict legal rules, though it may be regulated by statute, or, in the case of judicial discretion, by judicially developed guidelines. Its presence brings with it ambiguity, and thus a basis upon which international legal standards may be relevant to the interpretation and application of a statute, or of the discretions developed at common law. While parliament may interfere with the exercise of discretion by removing the relevance of international instruments in the exercise of a discretion, their attempts to do so should be subject to the principles re-articulated by Gleeson CJ earlier this year in *S157*.

International Law and the Australian Common Law: The Decision of Justice Gaudron in *Teoh*

The decision in *Lam* leaves unscathed the judgment of Gaudron J in *Teoh*. Following the decision in *Lam*, therefore, the decision of Gaudron J may assume a significance that rests on the alternative reasoning employed by her Honour in comparison to the majority judges. It raises the question of the relationship between the common law and international legal standards – an issue that has tended to be resolved according to the doctrine of transformation, but which remains to be authoritatively examined by the present High Court. The most recent opportunity presented to the Court to address this issue arose in the case of

[85] *AMS v AIF* (1999) 199 CLR 160 per Kirby J at 218.

Nulyarimma v Thompson,[86] however, that case was denied special leave to appeal to the High Court.

In *Teoh*, Gaudron J adopted different reasoning to the judgments of Mason CJ and Deane J, and Toohey J in that case, though her decision formed part of the majority. What is significant about Gaudron J's reasoning, particularly in light of *Lam*, is the limited importance that her Honour attached to the act of treaty ratification and the doctrine of legitimate expectation. In addition, obiter comments concerning the existence of an obligation at common law to have the best interests of vulnerable individuals, specifically children, made a primary consideration in the exercise of discretionary decisions, is also significant. This latter issue was addressed by Gaudron J through the notion that obligations arise through citizenship:[87]

> I agree with Mason CJ and Deane J as to the status of the Convention in Australian law. However, I consider that the Convention is only of subsidiary significance in this case. What is significant is the status of the children as Australian citizens. Citizenship involves more than obligations on the part of the body politic of which he or she is a member. It involves obligations on the part of the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. And there are particular obligations to the child citizen in need of protection. So much was recognized as the duty of kings,[88] which gave rise to the parens patriae jurisdiction of the courts. No less is required of the government and the courts of a civilized democratic society.
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> In my view, 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, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case. And it may be that, if there is a right of that kind, a decision-maker is required, at least in some circumstances, to initiate appropriate inquiries, as Carr and Lee JJ held [in the decision of the Full Court of the Federal Court] should have happened in this case. However, it was not argued that there is any such right and, thus, the case falls to be decided by reference to the requirements of natural justice.

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86 (1999) 96 FCR 153.

87 (1995) 183 CLR 273, per Gaudron J at 304.

88 See, in relation to the "direct responsibility of the Crown" which founds the "parens patriae" jurisdiction originally conferred on the English Court of Chancery, *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259 and the cases there cited; cf at 279-280. See, in relation to the paramountcy of the child's welfare in the exercise of that jurisdiction, *Marion's Case*, at 292-293 and the cases there cited.

The judgment of Gaudron J proceeded on the basis that ratification of the Convention simply confirmed the significance of a fundamental human right already taken for granted within Australian society.[89] Thus, the expectation arose by virtue of the existence of a fundamental right at common law, rather than as a consequence of ratification. However, ratification would be significant to confirm the existence of the right at common law, in cases where there existed any doubt as to its place in the common law.[90] The content of the particular right in issue was described by Gaudron J as follows:[91]

> Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, 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 future welfare. Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker. They would make that assumption or have that expectation because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of their expectation that a civilized society would be alert to its responsibilities to children who are, or may be, in need of protection.

What is interesting about the approach of Gaudron J, is the subsidiary role that she attaches to international law. While her Honour identified the similarities between fundamental common law notions with international human rights standards, the latter merely served to reinforce the former. In my view, this approach reflects one that has much to contribute to the debate surrounding the reception of international law into Australian law. It avoids the perception that human rights are identified through a top-down approach, whereby international law appears to be superimposed upon the Australian legal landscape. In reverses the conceptualization of the issue, by making the Australian common law the primary focus, and by using comparable international standards to reinforce our understanding of the principles and guarantees contained within the common law. Consequently, Gaudron J adopts an approach that avoids being directly drawn into a reasoning process that is only likely to enliven the political controversy that ordinarily pervades such matters.

Conclusion

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89 (1995) 183 CLR 273 at 304-305.
90 (1995) 183 CLR 273 at 305.
91 (1995) 183 CLR 273 at 304.

Although the decision in *Lam* marks a shift in the perspective of the High Court majority, the decision of Gleeson CJ in *S157* marks a return to more conventional uses of international law in Australian law, and to human rights arguments that are solidly grounded in the rule of law. While human rights lawyers may be required to deal with technical and legalistic matters with this approach, it may prove to be a welcome opportunity to reconsider the premises which underlie the use of international legal standards, and to more fully explore their potential.

Lam should not be seen as undermining the authority of *Teoh* in its entirety. It is essentially limited to the issue of whether the ratification of an unincorporated treaty can found a legitimate expectation. Other issues, including the notion of objective expectations, and the broader question of the role that the doctrine of legitimate expectations should generally play in administrative law, are still open for narrowing in future cases. However, the decision in *Lam* leaves open the potential for legitimate expectations to arise where ratification is accompanied by other factors involving the parliament. Perhaps more importantly though, it leaves untouched the well accepted principles of the domestic use of international legal standards, and places a renewed emphasis upon the traditional means of resorting to international law. In respect of both the question of ambiguity in the interpretation of statutes, as well as the approach of Gaudron J towards the relationship between international law and the common law, *Teoh* will continue to play an important role in future cases.

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As a postscript to this discussion, I was recently informed by a colleague involved in the *Teoh* litigation that Mr Teoh continues to reside in Perth, Western Australia. Of Mr Teoh's children, the so called 'seven little Australians' within his care, only one continues to reside at home, and two of the children are involved with their father in a successful sushi-making business in Perth. While the Court's decision in *Lam* may indeed mark the end of a central principle established in *Teoh*, the 2003 decision remains of no consequence to the eight people directly affected by the Court's earlier judgment.