One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government:

Teoh's Case and the Internationalisation of Administrative Law

MARGARET ALLARS*

1. *Introduction*

The internationalisation of Australian administrative law began dramatically, on 7 April 1995 when the High Court delivered its decision in *Minister for Immigration and Ethnic Affairs v Teoh (Teoh's* case).[1] The general context was one of rapid development during the 1980s and early 1990s of a distinctively Australian administrative law. The common law of the United Kingdom had provided an inheritance of general common law principles of excess of power and natural justice. However, from this inheritance of case-law only some "old chestnuts" continued to be cited by Australian judges.[2] Statutory reform of procedure for obtaining judicial review at the federal level had brought with it a freshness and invigoration of the common law in Australia, which owed nothing to the United Kingdom.[3] Australian administrative lawyers had little reason to read the case-law of the United Kingdom or of North America, and every reason to attempt to keep abreast of the dynamic developments in Australian jurisprudence. *Teoh's* case introduced a new, international dimension to this jurisprudential context. This was not a sudden change of heart so as to recognise a certain increased persuasiveness of overseas case-law. The new dimension was more subtle than that. Henceforth, any administrator who proposed to make a decision involving a departure from the

* Associate Professor, Faculty of Law, University of Sydney.

1 Unreported, High Court of Australia, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, 7 April 1995 (*Teoh's* case).

2 Examples are *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *R v Port of London Authority; ex parte Kynoch Ltd* [1919] 1 KB 176; *H Lavender & Son Ltd v Minister for Housing & Local Government* [1970] 1 WLR 1231; *Anisminic Ltd v Foreign Compensation Commisssion* [1969] 2 AC 147; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338; *Ridge v Baldwin* [1964] AC 40; *Dimes v The Proprietors of the Grand Junction Canal* (1882) 3 HLC 759.

3 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), followed by the *Administrative Law Act* 1978 (Vic), *Administrative Decisions (Judicial Review) Act* 1989 (ACT), *Judicial Review Act* 1991 (Qld).

provisions of an international treaty ratified by Australia but not incorporated into domestic law, would deny procedural fairness to an individual whose interests would be affected by the decision and who had not first been given a hearing on the issue of departure from the treaty. The decision would be void.

The High Court's decision was surprising, for three reasons. First, it was well-established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australia's municipal law by statute.[4] In a case of ambiguity Australian courts favour an interpretation of a statute or delegated legislation which accords with Australia's obligations under an international treaty, particularly where the legislation was enacted after, or in contemplation of, ratification of the treaty.[5] Where a reference is made to a treaty in order to give meaning to an expression used in a statute, consideration may be given to the treaty for wider purposes of interpretation than just removal of ambiguity.[6] However, the latter two principles are simply principles of statutory interpretation. *Teoh's* case appeared to alter the position by giving ratified but non-incorporated conventions a legal effect well beyond that of guidance in statutory interpretation. Second, attempts in recent years to argue that non-incorporated treaties have some limited legal effect, drawing upon existing principles of administrative law, had been unsuccessful.[7] Third, Australia has ratified over 900 treaties, including international conventions protecting individual rights and freedoms. Individual rights and freedoms are in issue in many areas of public administration. To comply with the principle enunciated in *Teoh's* case, federal and state agencies and tribunals would need to expend enormous resources in training and procedural reforms in decision-making processes.

Although the decision in *Teoh's* case was a surprise, it will be argued in this article that with one exception the judgments of the majority judges in *Teoh* involved only a modest doctrinal step. The real surprise is that the issue was not brought before the High Court four years earlier and that the High Court's decision was not readily predicted, given the Court's known perception of its role in relation to the executive branch of government.

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4 *Chow Hung Ching v R* (1948) 77 CLR 449 at 478; *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v MacPhee* (1982) 148 CLR 636 at 641–2; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211–2, 224–5; *Kioa v West* (1985) 159 CLR 550 at 570; *Dietrich v R* (1992) 177 CLR 292 at 305; *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 74 per McHugh J.

5 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* id at 38; *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 534–5 per Gummow J.

6 *Minister for Foreign Affairs and Trade v Magno* id at 535 per Gummow J.

7 *Simsek v MacPhee* above n4; *Kioa v West* above n4 (discussed below in text accompanying notes 111–5); *Lim v Minister for Immigration, Local Government and Ethnic Affairs* above n4 (discussed below in text accompanying notes 61–7, 74); *Sundrampillai v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 29 ALD 479.

2. *The Decision*

A. The Facts

Teoh, a citizen of Malaysia, came to Australia in 1988 on a temporary entry permit. Prior to his visit he had met in Malaysia the de facto spouse of his brother. Following the brother's suicide she had travelled to Malaysia to return his ashes to his family. At that time she had four children, one being the child of her first marriage and three being children of the relationship with Teoh's brother. After a visit Teoh accompanied her to Australia, married her and was granted a further temporary entry permit. Prior to its expiry in February 1989, he applied for permanent residency on the ground of his marriage to an Australian citizen. That application was pending when he was convicted in 1990 of six counts of importing heroin and three counts of being in possession of heroin. He was sentenced to six years imprisonment with a two year and eight months non parole period. The sentencing judge accepted that Teoh's conduct in obtaining the heroin by mail from Malaysia was in part a result of his wife's addiction to heroin. Mrs Teoh was later convicted of further drug related offences for which she received a sentence of two years imprisonment. During that period, until October 1992, the children were placed in the care of the state of Western Australia.

The Minister's delegate refused to grant Teoh resident status under section 6A(1) of the *Migration Act* 1958 (Cth), as unamended, because the policy requirement of good character was not met by an applicant who had a criminal record. On review, the Immigration Review Panel recommended that the delegate's decision be affirmed. The delegate accepted the recommendation of the Panel and a deportation order was issued against Teoh. In the intervening years, two children had been born to the Teohs and a third was born in 1992, shortly after the making of the deportation order. Teoh's deportation to Malaysia would result in the breaking up of the family, which included seven children aged between 20 months and 10 years. The wife was unable to care for the children without him and it was clear they would be taken into care if the deportation order was implemented. The Panel stated:

> It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the granting of permanent residency. The compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record.

Teoh sought review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (*ADJR Act*), arguing that three errors of law had been made. The first was that the delegate denied procedural fairness by failing to provide him with an opportunity to contradict the finding that he was not of good character. The second was that the delegate failed to take into account relevant considerations. The third was that the delegate exercised her discretionary power in accordance with a policy without regard to the merits of Teoh's case. At first instance French J dismissed the application.

B. In the Full Federal Court

In the Full Federal Court the first argument was abandoned. However, the Full Court granted leave to amend the application so as to raise two additional submissions. The first was that procedural fairness was denied because the delegate failed to make appropriate investigations into the hardship to Mrs Teoh and the Commonwealth had a fiduciary duty to make adequate provision for the welfare of children. The second was that the delegate failed to take into account the relevant consideration of hardship to the wife and children. From the account given in the Full Court and the High Court, the application and the appeal appear to have been poorly framed and argued.[8] It was not until the hearing before the Full Court with regard to the alleged fiduciary duty of the delegate to carry out investigations into the impact of the deportation upon the children, that a submission based upon the Declaration of the Rights of the Child (the Declaration) and the United Nations Convention on the Rights of the Child (the Convention) "seems to have surfaced".[9] The fiduciary duty argument was unsuccessful,[10] but the Convention and Declaration, linked with the concept of a legitimate expectation, ultimately provided the basis for the judgments of Lee and Carr JJ.

The Convention was ratified by Australia on 17 December 1990.[11] Pursuant to section 47 of the *Human Rights and Equal Opportunity Act* 1986 (Cth), on 22 December 1992 the Attorney-General declared the Convention to be an international legal instrument relating to human rights and freedoms.[12] The principle of most importance in *Teoh's* case was found in Article 3.1 of the Convention: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The Full Federal Court allowed Teoh's appeal and set aside the decision of the delegate, referring it for reconsideration according to law. The Court held unanimously that the delegate should have initiated appropriate enquiries regarding the future welfare of the children. However, the reasoning of the judges differed.

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8 See the description of counsel's argument in *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436 at 447 per Lee J. At 456 Carr J noted that "counsel who appeared for [Teoh] at the hearing of the appeal had not appeared for [him] at the trial and took the brief on an honorary basis at the request of the registrar of the court at extremely short notice when it became apparent that [Teoh] would otherwise have been unrepresented".

9 Above n1, judgment of Toohey J, par 22.

10 None of the judges of the Full Court adverted to the fact that this aspect of the fiduciary duty argument fell outside the grounds argued in the amended application. Although a fiduciary duty to inquire would be a novel ground of judicial review, Carr J was prepared to accept it as one aspect of the submission of failure to comply with the duty of inquiry established in the case-law (*Teoh v Minister for Immigration and Ethnic Affairs* above n8 at 458–9, 461). The issue was disposed of by Carr J (Black CJ and Lee J not deciding) on the ground that the hallmark of a fiduciary relationship is that the beneficiary has, under the municipal law, rights to enforce the terms of the undertaking and hence there was no fiduciary relationship in the present case.

11 The Convention entered into force for Australia on 16 January 1991: *Australian Treaty Series* (*ATS*) 1991 No 4.

12 *Commonwealth of Australia Gazette* No GNI 13 Janaury 1993 at 85–107.

Black CJ based his decision upon the twin grounds of the delegate's failure to consider the merits of the case and failure to make adequate inquiries regarding the welfare of the children.[13] Black CJ affirmed that the Convention was not part of Australian domestic law, but proceeded to describe it as having legal effect of an amorphous nature:

> The Convention, does, however, form part of the general background against which decisions affecting children are made, in that it is a statement of what the international community, including Australia, regards as appropriate behaviour by nations with respect to children within their jurisdiction. It reflects the standards to which Australia is seen by the international community to aspire as a mature and civilised nation. Those standards emphasise that special care should be taken when decisions are made that may profoundly affect the lives of young children by parting them from a parent and exposing their family to the risk of disintegration.[14]

Lee J agreed that there was a duty of inquiry. However, the concept of a legitimate expectation, which did not feature at all in the judgment of Black CJ, was the central element of the judgments of Lee and Carr JJ, and ultimately provided the focus for the High Court's decision on the role of international conventions in administrative law.

Lee J held that the Convention provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention. Lee J regarded procedural fairness as giving rise to a duty of good administration. This duty required administrators to apply the principles of the Convention so far as this was consistent with the national interest and not contrary to statutory provisions.[15]

Carr J held that the delegate had a duty of inquiry, and that this duty was a requirement of procedural fairness. Were it not for the Convention, Carr J would have held that procedural fairness, including the duty of inquiry, was in the circumstances of the case satisfied.[16] He took the view that although the Convention was not part of municipal law, the children had a legitimate expectation that the application for permanent resident status would be treated by the Minister in a manner consistent with the Convention. Procedural fairness therefore required the delegate to consider whether the family relationship would be ruptured and the children become wards of the state. Procedural fairness required the initiation of appropriate inquiries into this aspect of the impact of the deportation of Teoh.

Each of the judgments in the Full Court involved some conflation of basic principles of administrative law. The judgments are most conveniently considered in the discussion of each principle, in Sections 3 and 4 below.

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13 Discussed further in text accompanying notes 121–9.

14 *Teoh v Minister for Immigration and Ethnic Affairs* above n8 at 443.

15 *Teoh v Minister for Immigration and Ethnic Affairs* id at 450, relying upon *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 and *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 43 ALR 261.

16 *Teoh v Minister for Immigration and Ethnic Affairs* id at 466.

C. *In the High Court*

The Minister's appeal to the High Court was dismissed by a majority consisting of Mason CJ, Deane, Toohey and Gaudron JJ. McHugh J dissented. In a joint judgment Mason CJ and Deane J affirmed that ratification of an international convention may generate a legitimate expectation. However, they held that Lee and Carr JJ had erred in suggesting, by inference from their findings about a duty of inquiry, that the delegate was in some sense bound to comply with Article 3.1 of the Convention as if it were a principle of municipal law. Mason CJ and Deane J expressed the consequences of generation of a legitimate expectation as follows:

> ... if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.[17]

Mason CJ and Deane J found that the delegate had given the policy requirement of good character paramount importance and that she had not made the principle in the Convention "a primary consideration".[18] The delegate had not given notice to Teoh that she proposed to make a decision inconsistent with the Convention and an opportunity to present a case against such a course of action. The delegate therefore denied Teoh procedural fairness. The reasoning of Toohey J was similar with respect to the procedural fairness issue.[19]

Gaudron J agreed with Mason CJ and Deane J as to the status of the Convention in Australian law.[20] However, she preferred to base her judgment on a more radical approach of finding at common law a human right of children as citizens. That approach is discussed in Section 3.

McHugh J dissented, holding that 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 Article 3. The doctrine of legitimate expectation imposed no obligation on a decision-maker to give substantive protection to any right, benefit, privilege or matter. Moreover, the doctrine did 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. McHugh J's judgment was robust and conveyed in a debating style designed to expose the illogicalities in the concept of legitimate expectation and to canvass the serious consequences the majority's decision would cause for public administration. The flaws in this dissent are discussed in Sections 3 and 5.

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17 Above n1, judgment of Mason CJ and Deane J, par 37.

18 United Nations Convention on the Rights of the Child Art 3.1.

19 Toohey J differed on the issue of a duty to make inquiries: see above n1, judgment of Toohey J, par 33 and discussion at text accompanying notes 129–31.

20 Above n1, judgment of Gaudron J, par 3.

3. *The Context: Migration Decision-Making and Human Rights*

A. Migration Decision-Making

i. Historical Antecedents

The application of administrative law principles in a factual matrix where deportation will destroy a family's cohesion is not a novel exercise for the Federal Court. Federal Court cases in the area of migration decision-making are characterised by a tension between compassion towards an immigrant and the members of the community with whom he or she has family ties within Australia and the public interest in a planned, appropriate and fair scheme of migration to Australia.

During the 1980s the Federal Court regularly decided appeals from the Administrative Appeals Tribunal (AAT) involving review of the application of a criminal deportation policy, whose later versions were severe, providing that non-citizens convicted of drug trafficking would invariably be deported except where there were compelling circumstances. Family disintegration was in many cases a likely consequence of deportation. Punctuating the conventional articulation of the court's refusal to trespass upon the merits of administrative decisions, a line of cases decided well before the ratification of the Convention in 1990 contained a judicial plea for more humanity in migration decision-making affecting families, particularly in order to protect Australia's international standing. In the early cases Smithers, Brennan and Deane JJ were prepared to articulate their repugnance for decisions which apparently disregarded the impact of deportation upon families and their human rights. The cases are historical antecedents to recent Federal Court cases which created an environment for the Full Federal Court to give serious consideration in *Teoh's* case to an argument based upon the Convention and Declaration.

The historical antecedents commence with *Re Pochi and Minister for Immigration and Ethnic Affairs,*[21] a case famous in administrative law for establishing the principle that administrative decisions should be based upon logically probative evidence. On this ground Pochi succeeded in gaining an order setting aside the deportation decision. Pochi's wife was a naturalised Australian and their childen were born as Australian citizens. In the AAT, in the course of holding that there was no probative evidence for the conclusion that Pochi's deportation would be in the best interests of Australia, Brennan J said:

> ... it is certain that deportation of the applicant would destroy or gravely damage a growing Australian family, and that would be a grave detriment not only to them but to Australia. His deportation, separating him from his Australian wife and children or requiring them to accompany him to a country that the children do not know, would be destructive of their prospects in life as well as his. Such a consequence is not justified by evidence which

21 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 (AAT); *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 (Full Federal Court); *Pochi v Minister for Immigration and Ethnic Afairs* (1982) 151 CLR 101 (High Court). See also *Re Stone and Minister for Immigration and Ethnic Affairs* (1981) 3 ALD N129; *Re Georges and Minister for Immigration and Ethnic Affairs* (1978) 1 ALD 331 at 339.

> fails to prove that he was engaged in trading in marihuana, but which raises only a suspicion that he was so engaged.[22]

The plea for a humanitarian approach in the criminal deportation area was influenced by the sense of Deane and Smithers JJ that the deportation of a person by reason of his or her conviction for an offence with a sentence of one year or longer operates as a double punishment. When the Full Federal Court upheld the decision of Brennan J in *Pochi's* case, Deane J expressed concern about the invasion of the human right of liberty of the person:

> If the slate were clean, I should have thought that there was a great deal to be said for the view that the banishment, consequent upon his conviction of a criminal offence of one who has become an accepted member of the Australian community was an interference with personal liberty by way of punishment.[23]

An appeal by the Minister from the Full Court decision was dismissed by the High Court on jurisdictional grounds. Although the issue did not arise for decision, Murphy J interpreted the power to deport as subject to an implied limitation that the power not be exercised so as to intefere with human rights associated with the family:

> The breaking-up of a family (or forcing the spouse and children to leave their homeland) is incompatible with the way in which "a mature and civilised nation should act"... In my opinion s12 of the Act is valid but does not permit the Minister to order the deportation of the plaintiff in circumstances which would either break-up his family or compel his wife and children, who are Australians, to leave Australia. To do so would be a misuse of the power, a breach of the implied conditions of its exercise.[24]

Murphy J reached this conclusion on the basis of interpretation of the *Migration Act* as a whole. In introducing amendments to the Act, the Minister had claimed an intention of placing Australia in advance of other countries in its humanitarian and just approach to migration, including preservation of families by reuniting them.[25]

Federal Court judges have been acutely aware of the temptation to interfere with the merits where deportation will result in disintegration of a family. Thus, in *Nevistic v Minister for Immigration and Ethnic Affairs*,[26] Deane J said:

> The gravity of the consequences of the deportation of the applicant, to the applicant himself, to his wife and to their four Australian children, leads inevitably to a desire to ensure that the applicant has access to every legitimate avenue of appeal. It cannot, however, warrant the court's purporting to arrogate to itself a jurisdiction which it does not possess.[27]

In *Nevistic's* case the Full Federal Court dismissed an appeal by a criminal deportee, holding that the AAT had independently exercised its discretion in affirming the deportation decision. Four young children of a family would have had to either leave Australia and live in Yugoslavia, whose culture and language was unknown to them, or remain in Australia with their mother but

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22 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 58.
23 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 685.
24 *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 151 CLR 101 at 115.
25 Id at 115.
26 (1981) 34 ALR 639.
27 Id at 645–6.

without their father. Lockhart J expressed his concern about the welfare of the children, but had to conclude that the AAT had not failed to take into account this relevant consideration.[28] In a passage cited with approval by Murphy J in *Pochi's* case,[29] Deane J observed with regard to the policy:

> By its terms, it deals in a draconian and, indeed, callous fashion with what I would conceive to be the essential problem in the assessment of the merits of the present matter. That problem relates to the circumstances in which Australia, as a mature and civilized nation, should act in a manner which entails depriving four vulnerable and innocent young Australian children either of their father or the opportunity of growing up in their native land.[30]

In *Barbaro v Minister for Immigration and Ethnic Affairs*,[31] a case where deportation of a labourer on a marijuana farm would have separated a father from a family with strong bonds — his wife and five children — who were respected, hard-working members of the community, Smithers J interpreted the statutory scheme for migration as intended to be compatible with human rights:

> The relevant considerations are the drastic nature of deportation so far as it affects deportees and their families, the presumption that a nation with respect for human rights would intend that a sanction so fearsome would only be imposed on a basis of fairness and by reference to existing fact, and the absence of any reason for not so acting towards persons, whether Australian citizens or not, who are entitled to the protection of, as well as being subject to the laws of, Australia.[32]

In the view of Smithers J, "hardship" was a "totally inadequate word" to describe the impact, which would be a "disaster" involving "incalculable" loss to the children.[33] In 1983 Smithers J said:

> The law must be administered by the Minister in the best interests of Australia. So to do extends to Australia's interests broadly regarded and embraces, on occasion and according to circumstances, the taking of decisions by reference to a liberal and even compassionate outlook appropriate to a free and confident nation and conscious of its reputation as such.[34]

The line of cases seeking to instil a humanitarian approach as a legal requirement by implication from the *Migration Act* petered out after *Tabag v Minister for Immigration and Ethnic Affairs*.[35] In that case two judges of the Full Federal Court expressly declined to follow the obiter dictum of Murphy J in *Pochi's* case if it were intended to be a statement of general application rather than referring only to the particular facts of *Pochi's* case.[36] Deportation

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28 Id at 652.

29 *Minister for Immigration and Ethnic Affairs v Pochi* above n26 at 115.

30 Id at 647.

31 (1982) 46 ALR 123.

32 Id at 127–8.

33 Id at 132, 133, 135, 136.

34 *Ates v Minister of State for Immigration and Ethnic Affairs* (1983) 67 FLR 449 at 455–6. See also *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169 at 180–1, where Burchett J referred to the interests of Australia as including "Australia's good name" and emphasised that "[p]articularly in the case of a marriage to an Australian citizen, the life of the foreigner, if the application is not dealt with promptly, is very likely to become set on a course which is involved, personally and financially, in Australia, and which tends to weaken his ties to his homeland".

35 (1982) 45 ALR 705.

36 Id at 718, 731 per Jenkinson J, with whom Keely J agreed on the issue. Woodward J did

would result in the mother accompanying the husband back to Turkey, and being separated from her older daughter, two sons and two grandchildren. It was not clear whether the younger daughter aged 15 years, who could not speak or write Turkish, would accompany them. The question of what was cruel, inhumane or uncivilised was one of the merits which was for the AAT, not the court to consider. To accept the dictum of Murphy J would be to accept that there is a defined relative weight to be given to the humanitarian consideration of disruption of a family.

ii. Revival of the Judicial Plea for a Humanitarian Approach

Despite the decision in *Tabag's* case, approximately 10 years after the decisions in *Pochi*, *Nevistic* and *Barbaro*, the plea for a humanitarian approach was revived, in a broader context than criminal deportation. This was the context of judicial review of applications for permanent residence on the "strong compassionate or humanitarian grounds" basis available prior to 1989,[37] or on the basis of "extreme hardship or irreparable prejudice" which would be caused to an Australian permanent resident or citizen by deportation of the applicant, a ground available after 1989.[38] There was an increased urgency in the tone of the plea, and failure to heed it operated as an indicator of an error of law. The plea arose not in the criminal deportation context but in the general migration context. The early line of cases was not relied upon.[39] However, the later cases arose against a background of High Court proclivity to recognise and protect human rights.

In 1993 in *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs*[40] Burchett J held *Wednesbury*[41] unreasonable a decision that a brother who was close to his sister, an Australian citizen, was not a "special need relative" entitled to permanent resident status within the Migration (1993) Regulations. The sister's childhood of humiliation and deprivation by her mother evoked judicial memories of the story of the "little girl Pearl" in the American novel *The Scarlet Letter,* moving Burchett J to a much greater extent than it had done the Minister's delegate:

> Neither 'horrendous' nor 'horrific' is suggested by the bland summary appearing in the reasons for the decision. But a reading of the original material would leave most persons of normal understanding and humanity in a state not very far from tears.[42]

Despite the special relationship with the brother in the past and the beneficial effect of his presence in Australia in preventing her from sliding into

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not regard Murphy J's dictum as requiring as a matter of law that no valid deportation could be made if it involved family break-up. Woodward J took the dictum to be one which left room for the merits of the case to be considered by the decision-maker, and the present case was not such a strong one as *Pochi's* case.

37 *Migration Act* 1958 (Cth) s6A(1)(e), as unamended.

38 Migration Regulations reg 131A(1)(d)(v), later found in Migration (1993) Regulations reg 1.3, par 812.723(5)–(7).

39 In *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 418 at 432, Burchett J referred to the Full Federal Court decision in *Pochi's* case, but only for the purpose of stating the "no evidence" rule as formulated by Deane J.

40 (1993) 117 ALR 418.

41 *Associated Provincial Picture House Ltd v Wednesbury Corporation* above n2.

42 Above n40 at 421.

depression again, the Minister's delegate decided that refusal of the application would not cause "extreme hardship or irreparable prejudice" to the sister, within the statutory definition of "special need relative". Referring to the recommendation accepted by the delegate who rejected the brother's application, Burchett J said:

> Such spartan concepts (which might also conceal a certain arrogance) have no place in a consideration of special need, extreme hardship, or irreparable prejudice, as grounds for the exercise of some administrative benevolence on behalf of Australian citizens, and in Australia's true interests. After all, an understanding of the regulations here in question should not overlook that they focus on the needs of Australian citizens and residents, rather than those of would-be migrants. They also recognise Australia's moral obligations, particularly to its own people, and Australia's national interest in behaving in a civilised manner.[43]

In the view of Burchett J the court should favour a humanitarian, if not human rights, interpretation of the compassionate ground for the grant of a permit by reason of "extreme hardship and irreparable prejudice" to an Australian citizen:

> ... such cases [of complex and personal relationships between a relative applicant and an Australian citizen] are probably at the heart of the benevolent intent of the regulation which, on ordinary principles, as I have already indicated, should be given a broad and generous construction in favour of the Australian citizens and residents that it was intended to benefit, and in furtherance of the good name of Australia that its humanity maintains.[44]

The "broad and generous" interpretive approach of *Fuduche's* case was extended in 1994 in *Chaudhary v Minister for Immigration and Ethnic Affairs*,[45] to the grant of entry permits on "strong compassionate and humanitarian grounds" pursuant to section 6A(1)(e) of the *Migration Act* (the predecessor provision to that considered in *Fuduche's* case). In *Chaudhary* the Full Federal Court held that the Minister's delegate had erred in law in refusing the application of a Fijian child with profound disabilities for permanent resident status. The delegate's error could be understood as either a failure to take into account the relevant consideration of "human values, and of the significance of human, as distinct from material endowments".[46] Alternatively, it could be described as an interpretive error of regarding the national interest in excessively narrow terms, by equating Australia's interest with the avoidance of the burden upon public funds of caring for the child. According to the Full Court, Australia's interests have an international human rights dimension:

> Australia's interests [have] a far wider meaning, and we think a more realistic meaning, than is suggested by a mere concentration upon economics. It was only in the bitterness of war that Napoleon's celebrated jibe about "a nation of shopkeepers" was born. True national interest has a concern for Australia's name in the world, and may at times involve a measure of generosity. Certainly, it is in Australia's best interests to be seen as civilised and compassionate, as an advanced nation equipped with an advanced and available

43 Id at 426.
44 Id at 430.
45 (1994) 121 ALR 315.
46 Id at 318.

> medical technology, and as willing to accept some of the responsibilities of a leading country in our area of the Pacific. Parliament's adoption of the "strong compassionate ground" is evidence that these issues were not absent from its intentions. Nor could an assessment of where Australia's interests lay in the present matter ignore the negative impact in our region of a decision to put material cost so far ahead of human values in relation to a gravely disabled child who has now been resident here for a number of years, and is likely not only to be denied whatever chances of progress she has, but also to be condemned to regression, if thrown back on the limited resources of Fiji.[47]

Although this line of case-law did not explicitly draw upon international conventions, it provided an interpretive environment conducive to the step which was taken by the Full Federal Court in *Teoh's* case. In *Teoh's* case Black CJ relied upon the standard of the "mature and civilised nation", citing the judgments of Deane J in *Nevistic's* case and of Murphy J in *Pochi's* case, in order to reach a general statement about the background role of international treaties where decisions affecting children are made.[48] Black CJ did not give detailed consideration to the obiter dictum of Murphy J or its rejection in *Tabag's* case. Carr J said that irrespective of the Convention, the interests of people subject to deportation are to be protected by applying the principles enunciated in *Barbaro's* case.[49] None of the judges in the Full Federal Court in *Teoh's* case referred to the more recent cases of *Fuduche* and *Chaudhary*.

The judgment of Black CJ in the Full Federal Court combined with the "broad and generous" interpretive approach in *Fuduche*,[50] produced a potent scope for judicial intervention in relation to a range of entry permit decisions, provided deportation would result in disruption of a family. Thus, in *Chen v Minister for Immigration and Ethnic Affairs*[51] Davies J set aside a decision to deport a woman who had two children by an Australian citizen who was legally married to another woman and maintained two households. The definition of "special need relative" for the purposes of reg 127 of the Migration Regulations encompassed the relationship of parent and child and so authorised the grant of a permit to a parent who was an illegal entrant to Australia if the child in Australia has a need to the presence in Australia of that parent.

However, six days after the High Court delivered its decision in *Teoh's* case, the Full Federal Court rejected the "broad and generous" approach of *Fuduche* in a case concerned with the "extreme hardship and irreparable prejudice" ground for an entry permit.[52] This was an interpretation of the migration legislation which unduly favoured the applicant for a permit.[53] The Full Court in a joint judgment made no reference to *Chaudhary*, although this

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47 Ibid.

48 *Teoh v Minister of Immigration and Ethnic Affairs* (1994) 121 ALR 436 at 443. For Black CJ's statement of principle, see text accompanying note 14.

49 Id at 462. Carr J also mentioned in this connection *Tabag's* case, discussed in text accompanying note 34.

50 See text accompanying notes 40, 42–4.

51 (1994) 123 ALR 126.

52 *Minister for Immigration and Ethnic Affairs v Teo* (unreported, Full Federal Court, Black CJ, Gummow and Beazley JJ, 13 April 1995), partially reversing the judgment of Burchett J in *Teo v Minister for Immigration and Ethnic Affairs* (1994) 35 ALD 242.

53 *Minister for Immigration and Ethnic Affairs v Teo* id at 22.

was a Full Court decision where *Fuduche* was followed. No reference was made to the High Court decision in *Teoh's* case. Reference was made to the Full Court decision in *Teoh's* case but in relation to another point.[54]

In *Teoh's* case the High Court did not refer to early cases in this line of case-law, such as *Barbaro*, nor to later cases such as *Fuduche*. The High Court decision achieved the "broad and generous" interpretive approach by a different route. A humanitarian approach is imposed upon migration decision-making, because international human rights norms are a source of legitimate expectations of members of the community that the policy structuring administrative discretion will be consistent with those human rights norms.

iii. Arguments Based on International Human Rights Norms

Prior to *Teoh's* case, attempts to rely upon non-incorporated international conventions in challenging administrative decisions had been unsuccessful. Most of these attempts were made in the context of judicial review of migration decisions, and none directly argued a denial of procedural fairness based upon a legitimate expectation generated by a representation, practice or policy.

Arguments attempting to link international obligations with the structuring of administrative discretion by administrative law principles commenced in *Tabag's* case, inspired by the enactment in 1981 of the *Human Rights Commission Act* 1981 (Cth) which came into force during the AAT's hearing of *Tabag's* case. The International Covenant on Civil and Political Rights (ICCPR), ratified by Australia in 1980, was set out in a Schedule to the Act, but was not explicitly incorporated into municipal law. The preamble to the Act recited that it was desirable that the conduct of persons administering the laws of Australia should conform with the provisions of the ICCPR. Article 23(1) of the ICCPR stated "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". In *Tabag's* case, Woodward J regarded the ICCPR as a reminder of the importance of the family, but as adding nothing to the court's role of intervention by applying common law principles which require relevant considerations to be taken into account and decisions not to be *Wednesbury* unreasonable.[55] Jenkinson J, with whom Keely J concurrred on this point, disposed of the argument by holding that on the evidence the AAT had not failed to have due regard to the *Human Rights Commission Act* or to the ICCPR.[56]

In 1983 the Federal Court rejected an argument that the preamble to the *Human Rights Commission Act* was effective to modify the powers of the Minister for Immigration to deport pursuant to the *Migration Act* 1958 (Cth).[57] Then in 1985, the High Court decision in *Kioa v West*[58] made it clear that it was hopeless to argue that a non-incorporated international convention

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54 Id at 12.

55 Woodward J's view that a court may interfere where a decision-maker gives inadequate weight to a relevant consideration is incorrect. However, here Woodward J appears to have been frankly admitting that interference on the ground of *Wednesbury* unreasonableness amounts to the same thing.

56 Above n35 at 732.

57 *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575 per Smithers J.

58 (1985) 159 CLR 550, discussed in detail in text accompanying notes 112–6.

was a relevant consideration the decision-maker was bound to take into account. In 1987 in *Gunaleela v Minister for Immigration and Ethnic Affairs*,[59] it was argued that an error of law had been made in the interpretation by the Minister's delegate of the definition of "refugee" in Article 1A of the Refugee Convention. The Full Federal Court held that Article 1A had not been misinterpreted. The Court left open the issue whether such an error in interpretation would constitute an error of law within section 5(1)(f) of the *ADJR Act* in view of the fact that the definition of "refugee" had not been incorporated into the *Migration Act* as part of municipal law.[60] The Court was more comfortable with the proposition that misconstruction of an article of a non-incorporated ratified treaty could amount to an exercise of power which was *Wednesbury* unreasonable.[61]

In 1992 arguments based on the ICCPR were yet again unsuccessful, in *Lim v Minister for Immigration and Ethnic Affairs*.[62] In *Lim's* case reliance was placed upon the ratification of the ICCPR , the Convention relating to the Status of Refugees 1951 and the Protocol relating to the Status of Refugees 1967 and the *Human Rights and Equal Opportunity Act* 1986 (Cth) (whose predecessor was the *Human Rights Commission Act* 1981 (Cth))[63]. None of these international instruments assisted the boat people who challenged the validity of Division 4B of the *Migration Act* 1958 (Cth), which provided for their detention in custody. No change to domestic law was effected by ratification of the ICCPR.[64] There may have been a question of the operation of the Refugee Convention and Protocol in Australian law, since these treaties fell into the slightly different category where reference is made specifically to a treaty in a domestic statute.[65] However, if any human rights were derived by the inclusion of the ICCPR in a schedule to the *Human Rights and Equal Opportunity Act*, or by reference to the Refugee Convention and Protocol in the *Migration Act*, a validly enacted later statute may exclude them. The judges accepted that courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with Australia's obligations under an

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59 (1987) 74 ALR 263.

60 Id at 281.

61 Ibid.

62 (1992) 176 CLR 1.

63 The ICCPR and the Declaration of the Rights of the Child appeared in a schedule to the *Human Rights Commission Act* 1981 (Cth), with a preamble to the Act stating that it was desirable that administrators conform to the scheduled conventions. When *Lim's* case and *Teoh's* case were decided, unlike the predecessor legislation of 1981, the *Human Rights and Equal Opportunity Act* 1986 (Cth) contained no preamble, but the conventions remained set out in schedules to the Act.

64 Above n62 at 74 per McHugh J.

65 This explains why Brennan, Deane and Dawson JJ referred collectively to the treaties "to the extent, if at all — that they are operative within Australia": Id at 38. These judges can be assumed to have regarded the ICCPR as not incorporated, but the Refugee Convention and Protocol, to which reference is made in the *Migration Act*, was a different category of case, enumerated by Gummow J in *Magno's* case. It also explains why Toohey J said: "The plaintiffs have not demonstrated that the Convention or Protocol have any specific bearing on their pending applications for release from custody. Had they done so, questions may have risen for consideration as to the operation of the Convention and the Protocol in Australian muncipal law, but again s54T [expressly stating that Division 4B overrode any existing inconsistent law in force in Australia, whether written or unwritten] of the Act would have prevailed": at 52.

international treaty.[66] However, in *Lim's* case the provisions of Division 4B for detention of boat people were quite unambiguous. To the extent of any inconsistency, the provisions of Division 4B prevailed over earlier statutes.[67]

Counsel for the boat people in *Lim's* case did not argue that the treaties generated legitimate expectations. On the basis of the statutory and factual context in *Lim's* case, that argument would have been unsuccessful, even after *Teoh's* case.[68]

By the early 1990s executive control of migration decision-making was tightening. External merits review of a wide range of migration decisions was introduced but conferred upon two new specialist tribunals, the Immigration Review Tribunal, and the Refugee Review Tribunal, rather than upon the AAT which had an established jurisdiction to review criminal deportation decisions. The ambit of migration decisions justiciable by the Federal Court was severely curtailed.[69] Where decisions were justiciable, the grounds of review were restricted, with denial of procedural fairness, and *Wednesbury* unreasonableness being no longer available.[70] In place of the common law principles of procedural fairness, a code of procedure made under the *Migration Act* would in future settle issues of the disclosure of information and opportunities to respond.[71] The definition of "refugee" in Article 1A of the Refugee Convention had now been specifically incorporated into the *Migration Act*.[72] However, with regard to international obligations, a trend commenced of direct and explicit executive response to Federal Court interpretations of that definition. This took the form of legislation providing that the grant of refugee status in a "safe third country", in particular for Vietnamese refugees who had settled in the People's Republic of China under the "Comprehensive Plan of Action", precludes a visa application based on a claim to refugee status in Australia.[73] A Bill was also introduced into Parliament to remove the effect of a Federal Court decision that refugee status could be established by parents who did not accept the "one child policy" in the People's Republic of China or who were coerced into being sterilised, because they had a well-founded fear of persecution by reason of their membership of a particular social group, within the Convention definition of "refugee".[74]

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66 Above n62 at 38 per Brennan, Deane and Dawson JJ.

67 Id at 52 per Toohey J at 74–5 per McHugh J. A similar conclusion was reached by the Full Federal Court in *Khoshabeh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 122 ALR 453 at 462 that Art 9 of the ICCPR did not assist in the interpretation of s89 of the *Migration Act* 1958 (Cth), which provides for detention in custody of illegal entrants arriving in Australia by disembarkation at an airport. Art 9 of the ICCPR could not be relied upon to argue that s89 should be interpreted so as to authorise only a minimum period of detention and to imply a power to release detainees from custody pending a determination of a claim to refugee status.

68 See later discussion in text accompanying note 141.

69 Part 8 of the *Migration Act* 1958 (Cth), inserted by the *Migration Reform Act* 1992 (Cth).

70 *Migration Act* 1958 (Cth) s476(2), inserted by the *Migration Reform Act* 1992 (Cth).

71 *Migration Act* 1958 (Cth) Part 2 Division 2, Subdivision AB, inserted by the *Migration Reform Act* 1992 (Cth).

72 *Migration Act* 1958 (Cth) ss4 ("refugee" declared to have the same meaning as it has in Art 1 of Refugee Convention and Protocol), 22AA.

73 *Migration Legislation Amendment (No 4) Act* 1944 (Cth); *Migration Legislation Amendment Act* (No 2) 1995 (Cth).

74 *Minister for Immigration and Ethnic Affairs v Respondent A* 127 ALR 383 (1994), an order suppressing the identity of the respondent in this action was later refused: *Minister for*

B. *Accession to the First Optional Protocol and the Legitimate Influence of International Law*

At first glance it is surprising in view of *Lim's* case that barely three years later the High Court delivered a decision which radically strengthened the interface between administrative law and international human rights law. However, when the wider context of the High Court's approach to human rights is considered, it is clear that the environment was ripe for a decision conducive to the protection of human rights.

In *Lim's* case itself the High Court indirectly upheld human rights through the federal constitutional doctrine of separation of powers. The members of the Court held either that the provision in Division 4B of the *Migration Act*, denying the boat people access to the courts, violated Chapter III of the *Commonwealth Constitution Act* 1901 (Cth) or that the provision had to be read down so it was consistent with Chapter III. The doctrine of separation of powers provides a mechanism for protection of the human right of access to the courts, the right to liberty and other human rights of accused persons.[75]

Australia's accession in 1991 to the First Optional Protocol to the ICCPR[76] also prepared the ground in more general jurisprudential terms for *Teoh's* case. The accession enables an individual who has exhausted remedies in Australia to make a communication to the Human Rights Committee regarding a violation of the ICCPR. The accession had no direct impact upon Australian law.[77] However, an adverse determination by the Human Rights Committee will result in international embarrassment and domestic political pressure for legislative protection of the human rights infringed.[78]

Furthermore, the High Court regards the fact of the accession to the First Optional Protocol as a legitimate influence upon the common law. In *Mabo v Queensland (No 2)*[79] Brennan J said:

Immigration and Ethnic Affairs v Ru Guang Quan (Unreported Federal Court, 16 December 1994); Migration Legislation Amendment Bill (No 3) 1995 (Cth).

75 This argument about the rationale of this aspect of *Lim's* case has been developed in more detail, as an explanation for the High Court's re-affirmation of the doctrine of separation of powers in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1 in Allars, M, "Theory and Administrative Law: Law as Form and Theory as Substance" paper presented at 1995 Administrative Law Forum — Administrative Law and Public Administration: Form Vs Substance, Australian Institute of Administrative Law and Institute of Public Administration Australia, 27–28 April 1995, Canberra.

76 Minister for Foreign Affairs and Trade, Media Release, 25 September 1991.

77 *Dietrich v R* (1992) 177 CLR 292 at 391. See generally, Charlesworth, H, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *Melb ULR* 428; Caleo, C, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *Pub LR* 175.

78 The Human Rights Committee determined in 1994 that Tasmanian laws which made homosexual sexual activity a criminal offence violated ICCPR Art 17 (protection of privacy). As a result, the federal government passed the *Human Rights (Sexual Conduct) Act* 1994 (Cth). Pending before the Committee is a communication by Cambodian boat people, claiming violation of ICCPR Art 9(1) (right to liberty and security, and freedom from arbitrary arrest or detention), Art 9(4) (access to the courts), Art 9(5) (right to compensation to anyone unlawfully arrested or detained), Art 10 (humanity and respect in treatment of those detained) and Art 7 (no cruel, inhuman or degrading treatment or punishment).

79 (1992) 175 CLR 1.

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[80]

Where the legislative intention is unambiguously contrary to protection of the rights and freedoms of the ICCPR, as in *Lim's* case, no legitimate influence comes to bear. Where no such legislative intention is apparent, the impact of the accession is in influencing interpretation rather than in creation of new human rights unknown to statute or common law. In *Dietrich v R*[81] the High Court held that whilst there is no absolute right at common law to legal representation at public expense in a criminal trial, the trial of an unrepresented impecunious accused will be adjourned if necessary in order to ensure a fair trial. In developing the common law right to a fair trial in this manner, Mason CJ and McHugh J said:

> On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible.[82]

The "legitimate influence" did not, in the view of Mason CJ, Dawson, Toohey, and McHugh JJ, assist in situations going beyond resolution of ambiguity in statute or common law, such as an argument for recognition of a new fundamental right at common law.[83] However, the legitimate influence of ICCPR Article 14(3)(d) (guaranteeing the provision of legal assistance in criminal trials, without payment by accused persons of insufficient means) did assist the High Court in reaching the conclusion that in the circumstances of the case Dietrich had been denied the common law right of an accused to a fair trial. Brennan J reiterated the statement he had made in *Mabo*:

> Although this provision of the Covenant [Art 14(3)(d)] is not part of our municipal law, it is a legitimate influence on the development of the common law. Indeed, it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect.[84]

The "legitimate influence" principle enunciated by Brennan J in *Mabo* and *Dietrich* played a part in the reasoning of Lee and Carr JJ in the Full Federal Court decision in *Teoh*'s case.[85] In the High Court the principle only featured briefly in the judgment of Mason CJ and Deane J. There was no need for heavy reliance by the majority in the High Court upon the legitimate influence of the ICCPR upon the common law principles of procedural fairness. The

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80 Id at 42.
81 Above n77.
82 Id at 391.
83 Id at 392–3.
84 Id at 404. Brennan and Dawson JJ dissented.
85 *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436 at 448–9, 461–2.

reason is that the principles of procedural fairness, as described in recent case-law, could be applied in a straightforward fashion to reach the result that Teoh was entitled to a hearing if the Minister intended to depart from the Convention. The common law sufficed on its own to indicate that a legitimate expectation was generated by the Declaration and the Convention.

The legitimate influence was, however, an important element of the jurisprudential environment which must have prompted counsel for Teoh to invoke the ICCPR during the Full Federal Court hearing. Moreover, the rejection by the High Court of the proposition that ratification of an international convention generates a legitimate expectation would have produced an anomalous result. The accession to the First Optional Protocol would have operated as a legitimate influence upon judges interpreting the common law, whilst ratification of international conventions would have had no effect upon administrators. Such an uneven impact of Australia's international obligations upon the judicial branch and the executive branch would arguably be unacceptable. After all, it was the executive branch which decided to ratify the Convention and the Declaration and to accede to the First Optional Protocol.

4. *Development of Doctrine of Procedural Fairness: Modest Steps or Giant Leaps?*

A. *Origins of the Legitimate Expectation*

The concept of the legitimate expectation was, to use the description of McHugh J in *Teoh's* case "invented"[86] by Lord Denning.[87] The legitimate expectation does not amount to a legal right, but is an expectation which is reasonable, that a legal right or legal liberty will not be interfered with, or will be conferred. The concept was adopted by the High Court in the late 1970s.[88] Of particular importance was the High Court's decision in *FAI Insurances Ltd v Winnecke*[89] that an individual seeking renewal of a licence has a legitimate expectation to a hearing regarding the case against him or her, before the renewal is refused. Of more significance in preparing the ground for *Teoh's* case were two old "English chestnuts", which were in fact the last English cases to have a significant influence upon Australian administrative law. They were the Privy Council decision *Attorney-General of Hong Kong v Ng Yuen Shiu*[90] and the House of Lords decision *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)*.[91] In *Ng Yuen Shiu* a legitimate expectation, founding a right to a hearing, was held to be generated by a representation or undertaking made by an immigration official as to how applications for resident status by illegal immigrants from Macau would be processed on their merits by the Hong Kong Government. In *GCHQ* a long-standing practice of consultation by the Minister for the Civil Service with

86 Above n1, judgment of McHugh J, par 22.
87 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.
88 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.
89 (1982) 151 CLR 342.
90 [1983] 2 AC 629.
91 [1985] AC 374.

civil service unions about any change in civil servants' conditions of employment generated a legitimate expectation. In each case, the legitimate expectation founded an entitlement to a hearing prior to the administrator departing from the representation or the practice.

In 1985 *Ng Yuen Shiu* and *GCHQ* were approved by the High Court without qualification in *Kioa v West*.[92] These authorities were subsequently applied in decisions of the Federal Court and Supreme Courts around Australia. Although *Kioa* was not itself a case where a legitimate expectation was generated in this way, the acceptance of the principles reflected in the cases was reaffirmed by the High Court in *Haoucher v Minister for Immigration and Ethnic Affairs*.[93] In that case a legitimate expectation was generated by the Minister's criminal deportation policy, which stated that a recommendation by the AAT in its criminal deportation jurisdiction would be overturned by the Minister only in "exceptional circumstances" and where "strong evidence" could be produced to justify the decision. By a three to two majority, the High Court held that procedural fairness required that the deportee be afforded a hearing on the issue of the exceptional circumstances and the strong evidence referred to in this "published, considered statement of government policy",[94] before the Minister departed from the AAT's recommendation that the deportation order be revoked.

B. Eliminating the Legitimate Expectation

In *Kioa v West*[95] the High Court adopted a broad implication test for procedural fairness. Procedural fairness is generally implied where an exercise of power is apt to affect the interests of the individual alone, or to affect the individual's interest in a manner which is substantially different from the manner in which it is apt to affect the interest of the public.[96] The interests at stake include legal rights, legitimate expectations, and a range of other interests falling short of a legal right, including financial, livelihood, reputation, liberty, status, familial or social interests.

Because *Kioa* introduced a broad general test for the implication of procedural fairness, the importance of the legitimate expectation was reduced.[97] The only role left for the legitimate expectation tended to be to justify the implication of procedural fairness in the situations described in *FAI Insurances*, *Ng Yuen Shiu*, *GCHQ* and *Haoucher*. These are situations which might not immediately be understood to involve affectation of an interest. However, they ultimately amount to this and fall within the general implication test in *Kioa*. The expression "legitimate expectation" operates purely as a signal that the case falls into one of these four groups. The expression does not do any work itself. It is because the factual framework is satisfied that the individual affected has an interest which satisfies the *Kioa* implication test and hence has

92 Above n58 at 563, 567, 583, 617, 618.
93 (1990) 169 CLR 648.
94 Id at 654 per Deane J.
95 Above n58.
96 Id at 582, 584, 616–9, 632.
97 See Allars, M, "Fairness: Writ Large or Small?" (1987) 11 *Syd LR* 306 at 313–6.

a common law right to a hearing. These categories of case can be formulated, without use of the language of legitimate expectation, as follows:

(i) An interest is generated in an individual who has a legal right or liberty of a nature which suggests that in the absence of special or unusual circumstances the individual will continue to obtain or enjoy the right, or liberty, benefit, or will not be deprived of it without a hearing.[98]

(ii) Where a representation or undertaking is made by an administrator to an individual, good administration creates an interest of the individual in the representation being honoured, or in any event not departed from without giving the individual a hearing, provided that honouring the representation is not inconsistent with the administrator's statutory duty.[99]

(iii) The existence of a regular practice of government in its dealing with an individual, which the individual affected could reasonably expect to continue, generates an interest in the practice continuing, or in any event not being discontinued without the individual's being given a hearing.[100]

(iv) The existence of a published, considered statement of government policy creates an interest of an individual affected by the policy that the policy will not be departed from before giving the individual a hearing.[101]

The fifth development, in *Teoh's* case, can be formulated as follows, again without recourse to the language of legitimate expectation:

(v) Ratification by Australia of an international convention is a positive statement by the executive government of the country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention and is an adequate foundation, absent statutory or executive indications to the contrary, for an interest of individuals that administrative decision-makers will act in conformity with the convention when making decisions which affect rights or freeedoms of the individual which would have been protected

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98 *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181 at 204; *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.

99 *Attorney-General of Hong Kong v Ng Yuen Shiu* above n90; *Cole v Cunningham* (1983) 49 ALR 123; *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309 at 332; *Edelsten v Wilcox* (1988) 83 ALR 99; *Century Metals & Mining NL v Yeomans* (1989) 100 ALR 383; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 20; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 125–7. Cf *Wu v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1994) 34 ALD 350 at 355.

100 *Council of Civil Service Unions v Minister of the Civil Service (GCHQ)* above n91; *Kioa v West* above n58 at 567, 582–3, 618; *Macrae v Attorney-General (NSW)* above n98; *Attorney-General (NSW) v Quin* id at 20; *Haoucher v Minister for Immigration and Ethnic Affairs* above n93 at 659, 661, 670, 681; *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20 at 36. Cf *Wu v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* id at 355; *Waters v Acting Administrator of the Northern Territory* (1993) 46 FCR 462 at 480–1.

101 *Attorney-General (NSW) v Quin* id at 20–1; *Haoucher v Minister for Immigration and Ethnic Affairs* id at 659. Cf *Wu v Minister for Immigration, Local Government and Ethnic Affairs* (No 2) id at 355.

> by the convention, or at least not depart from the convention without giving the individual a hearing.

The emphasis in principles (i) to (v) is upon the conduct of government. None of the principles depends upon the individual's actual knowledge or expectation regarding the representation, practice, policy or international convention. These statements of principles in the cases have been hedged by warnings that procedural fairness does not provide substantive protection from non-renewal of a licence, or departure from a representation, practice, policy or ratified convention. What is delivered by procedural fairness is a common law right to a hearing before the action is taken.

C. *Doctrinal Development in* Teoh's *case*

Did *Teoh's* case extend or modify principles (ii), (iii) or (iv)? In his dissenting judgment in *Teoh's* case, McHugh J adopted as an accurate statement of the law as it stood in 1995 prior to *Teoh's* case, a summary of principles set out in an article written in 1988.[102] On this basis McHugh J concluded that none of the criteria for generation of a legitimate expectation had been satisfied. However, in the intervening seven years *Haoucher's* case had been decided. McHugh J was one of the majority judges in *Haoucher*, which is authority for principle (iv), that a published, considered statement of government policy generates a legitimate expectation.

It is difficult to avoid the conclusion that *Teoh's* case was a simple application of principle (ii) or principle (iv). To apply principle (ii), ratification of a convention has to be acknowledged as a representation by government for the purposes of *Ng Yuen Shiu.* To apply principle (iv) ratification of a convention has to be acknowledged as a published, considered statement of policy. To argue that the move from principles (ii) or (iv) to principle (v) involves a doctrinal leap is to argue that ratification of a convention does not amount to a representation by government or to a published, considered statement of government policy. The reasons for rejecting that argument are compelling. Toohey J described the ratification of a convention as "a solemn undertaking to the world at large",[103] whilst Mason CJ and Deane J said:

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

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102 Above n1, judgment of McHugh J, par 27, relying upon Tate, P, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Monash ULR* 15 at 48–9.

103 Above n1, judgment of Toohey J, par 29.

> conformity with the Convention ... and treat the best interests of the children as a "primary consideration".[104]

Principles (ii), (iii) and (iv) have been described separately purely for the sake of exposing the extent of the doctrinal development in each leading case. The developments are very modest, with only marginal differences between principles (ii) and (iv). The representation made in *Ng Yuen Shiu* by a senior immigration officer on the steps of the Governor's residence in Hong Kong was a published, considered statement of policy, no less than the criminal deportation policy tabled in Parliament which was the subject of *Haoucher*. The principle in (iv) for which *Haoucher* is authority, was a logical application of (ii) and (iii). There is probably little difference between (iii) and (iv) as well. A long-standing practice of consulting a union with regard to changes in employment conditions can also be described as a settled policy of consultation with a union with regard to changes in employment conditions. It is surprising that the argument which ultimately succeeded in *Teoh's* case was not mounted in some earlier challenge to a migration decision, at the least soon after *Haoucher's* case was decided in 1990.

D. *Common Law Human Rights of Children as Citizens*

In *Teoh's* case Gaudron J made a major doctrinal leap, for three reasons. First, Gaudron J's judgment was based upon a common law human right of a child as a citizen to have his or her best interests taken into account, at least as a primary consideration, in all discretionary decisions by government directly affecting his or her welfare. According to this view, the Convention was of "subsidiary significance" because it merely gave expression to an existing common law human right of children "which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries".[105] Gaudron J derived this human right from the common law jurisdiction of the courts as *parens patriae* to protect the child citizen.[106] However, this common law right was a novel one. Whatever the duty of the courts, the duty of the executive branch of government is another issue. Creative development of an argument based on the fiduciary duties of administrators may possibly provide support for such a human right at common law.[107]

Second, basing the human right of children on their citizenship as Gaudron J does, the question arises whether other citizens, at least those who are vulnerable as children are, may also have common law human rights. And why should not other members of the community, especially children, who are not citizens but are permanent residents or aliens, have a common law human right? Perhaps citizenship is to be given a wide meaning. However, such arguments were not explored in detail by Gaudron J.

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104 Id, judgment of Mason CJ and Deane J, par 34.

105 Id, judgment of Gaudron J, pars 3, 6.

106 Id, judgment of Gaudron J, par 3, relying upon *Secretary, Department of Health and Community Services v J W B and S M B (Marion's* case) (1992) 175 CLR 218 at 258–9, 279–80.

107 See Finn, P, "The Abuse of Public Power in Australia: Making our Governors Our Servants" (1994) 5 *Pub LR* 43 at 46, referred to by Lee J in above n85 at 447.

Third, and of immediate interest for future development of the interface between procedural fairness and international human rights norms, is the suggestion in the judgment of Gaudron J that a legitimate expectation may be generated not only by a representation, practice, policy or ratified convention, but also by a human right existing at common law:

> 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. There is a want of procedural fairness if there is no opportunity to be heard on matters in issue. And there is no opportunity to be heard if the person concerned neither knows nor is in a position to anticipate what the issues are. That is also the case if it is assumed that particular matter is not in issue and the assumption is reasonable in the circumstances. In my view and for the reason already given, it is reasonable to assume that, in a case such as the present, the best interests of the children would be taken into account as a primary consideration and as a matter of course.[108]

The statement is ambiguous as to the source of the expectation in this case. However, according to Gaudron J human rights existing at common law have precedence over non-incorporated conventions. Common law human rights must therefore be a new source of legitimate expectation. If legitimate expectations conflict, their sources may be important. In a case of conflict between expectations generated by a ratified non-incorporated convention and a common law human right, it is a matter for judicial discretion as to which should prevail.[109] That discretion is to be exercised according to "community values and expectations", a criterion leaving much to judicial discretion.

E. Conclusion

Apart from the judgment of Gaudron J, the giant doctrinal leap in the arena of procedural fairness in Australia occurred in *Kioa*, not in *Teoh's* case. In *Teoh's* case Mason CJ and Deane J correctly stated that they were not concerned with the development of some existing principle of the common law.[110] The decision in *Teoh's* case was inevitable if existing principle was to be applied consistently by the High Court. Yet *Teoh's* case is a landmark decision.

5. Other Administrative Law Principles

A. Relevant Considerations

Could it be argued that an international convention is a relevant consideration the administrator is bound to take into account? It is well-established that a policy may be a relevant consideration which the administrator is bound to take into account.[111] It seems but a short step to say that a principle in an international convention is a type of policy which is a relevant consideration.

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108 Above n1, judgment of Gaudron J, pars 6–7.

109 For discussion of conflict between legislation or policy and a legitimate expectation generated by a convention, see text accompanying notes 141–2.

110 Above n1, judgment of Mason CJ and Deane J, par 29.

111 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Nikac v Minis-*

In the Full Federal Court in *Teoh's* case, counsel for Teoh did not contend that the United Nations Convention on the Rights of the Child was a relevant consideration which administrators are bound to take into account when making decisions which might affect children.[112] There was a leading case indicating that such an argument was hopeless: *Kioa v West.*[113] In *Kioa* it was argued that deportation of the parents of a child who was an Australian citizen would contravene the ICCPR and the Declaration of the Rights of the Child, since the preamble to the *Human Rights Commission Act* 1981 stated that it was desirable that administrators conform to these scheduled conventions. Gibbs CJ held that the ICCPR and the Declaration of the Rights of the Child do not have the force of law in Australia and in any event "to deport the parents of a child with the natural expectation that the child will accompany them is not in any way depriving the family or the child of the protection to which the Covenant refers".[114]

In *Kioa* Wilson J, in referring to the same issue, said that on the facts of that case "[t]here is no question of the family unit being broken up",[115] but also said that there was no conflict between the Declaration and the decision to deport the child's parents. Brennan J was more explicit in holding that the scheduling of the ICCPR and the Declaration did not create a duty of administrators to take the conventions into account.[116] The decision-maker was entitled, but not bound, to take the ICCPR and the Declaration into account.

In *Teoh's* case Black CJ accepted as correctly made the concession of counsel for the Minister that the breaking up of a family unit was a relevant consideration of major significance which the decision-maker was bound to take into account.[117] He then proceeded to base his judgment on failure to consider the merits and failure to make adequate inquiries, but linked both of these types of abuse of power to this one relevant consideration.[118] Without referring to *Kioa*, Black CJ made it clear that failure to take into account the Convention as a relevant consideration was not the ground of review argued for. However, the argument about expecting due consideration to be given was poorly framed and dangerously close to a submission that the Convention was a relevant consideration the decision-maker was bound to take into account. In the central statement of principle that the Convention forms part of the general background against which decisions affecting children are made,[119] Black CJ came close to saying that the Convention either was a relevant consideration which the panel and delegate were bound to take into account, or was an indicator of the correct amount of weight to be given to the breaking up of the family unit.

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ter for Immigration, Local Government and Ethnic Affairs (1988) 92 ALR 167.

112 Above n85 at 443.

113 (1985) 159 CLR 550.

114 Id at 571.

115 Id at 604.

116 Id at 630.

117 Above n85 at 440–1.

118 See discussion in text accompanying notes 124–32.

119 See text accompanying note 14.

In the High Court, in *Teoh's* case, Mason CJ and Deane J reaffirmed the position stated in *Kioa* that the Immigration Review Panel and the Minister's delegate were entitled to take into account the provisions of the Convention, provided they were relevant to the issues for determination.[120] They reinforced the point that there is nothing in the *Migration Act* or its proper construction to render the Convention an irrelevant consideration which an administrator must not take into account.[121] However, later in their judgment there is a passing reference to the relevant considerations ground of review:

> It may also entail, though this was not argued, a failure to apply a relevant principle in that the principle enshrined in Art 3.1 may possibly have a counterpart in the common law as it applies to cases where the welfare of a child is a matter relevant to the determination to be made.[122]

Could this be a suggestion that non-incorporated treaties may be relevant considerations which an administrator is bound to take into account? That interpretation would be inconsistent with the treatment of this ground of review earlier in the judgment. The passage can be understood as a recognition that on a proper construction of the statute conferring the power exercised, the welfare of a child may be a relevant consideration which an administrator is bound to take into account, irrespective of ratification of international treaties.

If non-incorporated conventions were relevant considerations the decision-maker was bound to take into account, their provisions could operate as very powerful determinants of the ultimate decision, particularly if they impose an absolute obligation or claim primacy over other principles or factors the administrator is bound or free to take into account. The principle in Article 3.1 of the Convention provides a good example. It provides that in all actions concerning children "the best interests of the child shall be a primary consideration". The courts claim to review only the legality, not the merits, of administrative decisions in judicial review. The weight to be given to a relevant principle or policy is a matter for the administrator rather than for the court. Of course there are cases where a court's finding of failure to take into account a relevant consideration leaves an impression that in reality the court believed the administrator should have given more weight to a particular consideration. This impression is likely to arise frequently if international conventions are relevant considerations which administrators are bound to take into account and they contain principles expressed in absolute terms or which lay claim to being "a primary consideration" and hence being given primary weight. Without endorsing the proposition that conventions are relevant considerations, Mason CJ, Deane and Toohey JJ pointed out in their judgments that Article 3.1 of the Convention simply makes the interests of the child of first importance along with other considerations which require equal, but not paramount, weight.[123]

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120 Above n1, judgment of Mason CJ and Deane J, par 22.
121 Ibid.
122 Id, judgment of Mason CJ and Deane J, par 40.
123 Id, judgment of Mason CJ and Deane J, par 31; judgment of Toohey J, par 30.

It is ironic that in *Kioa* the High Court rejected the proposition that non-incorporated conventions are relevant considerations which the administrator is bound to take into account, but approved *Ng Yuen Shiu*. It was only 10 years later that *Teoh's* case demonstrated that approval of *Ng Yuen Shiu* means that non-incorporated conventions must be taken into account in a practical sense. For if the legitimate expectation generated by ratification requires the administrator to warn the individual if a departure from the convention is intended, in a practical sense the administrator has to take the convention into account. Some sort of mental activity will have to be directed at the convention when the administrator decides whether or not to depart from it. Of course, a decision can lawfully be made that the convention is an irrelevant consideration. But that must be done in each case rather than for all purposes. There must be a procedural policy of warning the individual of the proposed departure and hearing submissions on the matter before putting the convention to one side. If this is a genuine process rather than a charade, it becomes difficult to maintain that the convention was treated as an irrelevant consideration.

B. *Duty of Inquiry*

A secondary issue in *Teoh's* case was whether the Convention created a duty of the delegate to inquire about the welfare of the children. The common law duty of administrators to inquire developed in Australia as an extended aspect of *Wednesbury* unreasonableness.[124] The duty is carefully circumscribed, arising where there occurs a failure to obtain information which it is obvious is readily available and which is centrally relevant to the decision to be made, so that the procedure is so unreasonable no reasonable administrator would have made it.[125]

In *Teoh's* case the Full Federal Court judges treated the duty of inquiry as a floating requirement of the common law, capable of supplementing other grounds of review. Black CJ appeared to regard the duty of inquiry as capable of being linked to the ground of review of failure to consider the merits. The position is not entirely clear, since Black CJ did not express the error of law in the formula which has become familiar in Federal Court decisions under section 5(2)(f) of the *ADJR Act*, namely as a failure to give "proper, genuine and realistic" consideration to the merits of the individual case. Lee J described the duty of inquiry as linked with the failure to comply with the duty of good administration (a feature of procedural fairness), and also probably with a failure to consider the merits of the case.[126] Carr J was aware that in the existing case-law the duty of inquiry had arisen in relation to abuse of power and had never been a requirement of procedural fairness.[127] However, he took the view that there was "no reason in principle" why the duty of inquiry could not

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124 The principle has not developed in English administrative law.

125 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284, *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4, *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167, *Lek v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455, *Tickner v Bropho* (1993) 114 ALR 409.

126 Above n85 at 451.

127 Id at 463.

be raised in the context of denial of procedural fairness and he worked on the assumption that it could.

To attach the duty of inquiry to any ground of review other than *Wednesbury* unreasonableness would be a doctrinal leap. Such a development appears particularly inappropriate in the context of procedural fairness, where it is clear that it is not for the administrator to make out an applicant's case for him or her.[128]

Probably because the matter was raised only inferentially in the grounds of appeal, the High Court failed in *Teoh's* case to take the opportunity to provide a complete clarification of the scope of the duty of inquiry, which has developed in Federal Court cases. Mason CJ and Deane J gave their implicit approval to the principle provided it remains linked with *Wednesbury* unreasonableness.[129] However, Toohey J gave some credence to the existence of a duty of the delegate to make inquiries, at least of the institution where the children were in care, although *Wednesbury* unreasonableness had not been argued.[130] The duty did not flow from the Convention but was apparently a common sense duty, compliance with which might have indicated that the welfare of the children was a primary consideration, consistent with Article 3.1. However, Toohey J did not base his judgment upon the duty of inquiry. Gaudron J expressly rejected any notion of a duty as suggested by Toohey J, agreeing with Mason CJ and Deane J that the delegate had no duty to initiate inquiries or obtain reports about the future welfare of the children.[131] McHugh J in dissent held that the case did not fall within existing principles regarding the duty of inquiry and was concerned that the Court should not intrude into the weight given to a particular factor.[132]

6. Impact of Teoh's *Case*

A. Blurring the Distinction between Non-incorporated and Incorporated Treaties?

Does *Teoh's* case create an unacceptable blurring of the distinction between conventions which are not incorporated into domestic law and those which are? The answer to this question should be in the negative. If the argument in Section 3 is accepted, namely that the doctrinal development in *Teoh's* case was modest, it is unlikely that a blurring of principle could have occurred. Whilst the legal principles have remained unchanged, *Teoh's* case has transformed the practical importance of non-incorporated conventions in administrative decision-making.

The High Court in *Teoh's* case affirmed three principles concerning the legal effect of ratification of treaties. First, all members of the Court affirmed

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128 *Sullivan v Department of Transport* (1978) 20 ALR 323. This principle has been weakened a little in recent Federal Court cases where procedural fairness has encompassed particular regard for unrepresented and non English speaking applicants.

129 Above n1, judgment of Mason CJ and Deane J, par 33.

130 Id, judgment of Toohey J, par 33.

131 Id, judgment of Gaudron J, par 7.

132 Id, judgment of McHugh J, par 50–1.

the well-established principle that the provisions of an international treaty to which Australia is a party do not form part of Australia's municipal law unless those provisions have been validly incorporated into Australia's municipal law by statute.[133] The making of a declaration pursuant to section 47 of the *Human Rights and Equal Opportunity Act* 1986 (Cth) that the treaty was an instrument relating to human rights and freedoms for the purposes of that Act, did not alter the position. Second, Mason CJ and Deane J affirmed the principle of statutory interpretation that in a case of ambiguity the courts favour an interpretation consistent with a non-incorporated convention.[134] Mason CJ and Deane J strengthened this principle by rejecting "a narrow conception of ambiguity", allowing the interpretive influence of the convention to apply in a broad range of hard cases. Third, Mason CJ and Deane J placed on a firm basis the principle that an international convention may have a "legitimate influence" upon the development of the common law, a principle flowing from dicta of Brennan J in *Mabo* and *Dietrich*. Mason CJ and Deane J emphasised the caution which must accompany reliance upon this principle, because it has the potential to undermine the first principle:

> 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. 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. ... 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.[135]

Like non-incorporated conventions, published considered statements of government policy do not have the force of municipal law. Yet policies may generate legitimate expectations. There is no logical reason why non-incorporated conventions may not also generate legitimate expectations.

It is important that the legitimate expectation not be misunderstood to confer a substantive protection, thereby infringing the first principle — that non-incorporated conventions do not have the force of municipal law. The High Court has explained at length in previous decisions that the protection provided by procedural fairness is only procedural and does not compel an administrator to reach a particular substantive outcome.[136] Mason CJ and Deane J were critical in *Teoh's* case of the suggestion in the judgments of Lee and Carr JJ that the Minister was in some way bound to apply Article 3.1 of the Convention and hence had an obligation to initiate inquiries.[137] Toohey J touched very briefly upon a distinction between legitimate expectations related to obtaining a

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133 Id, judgment of Mason CJ and Deane J, par 25; judgment of Toohey J, pars 21, 32; judgment of Gaudron J, par 3; judgment of McHugh J, par 35.

134 Id, judgment of Mason CJ and Deane J, par 27.

135 Id, judgment of Mason CJ and Deane J, par 28.

136 See especially *Attorney-General (NSW) v Quin* (1990) 176 CLR 1.

137 Above n1, judgment of Mason CJ and Deane J, par 36.

benefit and legitimate expectations directed to a certain kind of hearing.[138] *Ng Yuen Shiu* and *GCHQ* were concerned with legitimate expectations directed to a certain kind of hearing. It is a matter for debate whether the policy statement in *Haoucher* was concerned with a substantive benefit or a procedure. Similarly, in *Teoh's* case the principle in Article 3.1 could be categorised as a promise of a benefit or of a procedure. The idea of a substance/procedure distinction raises fundamental questions about whether a fair hearing delivers a benefit of inherent value, or is only instrumental to other substantive outcomes. There is a real question as to whether any substance/procedure distinction between types of representations or policies can be maintained. What is clear is that the common law right known as an entitlement to procedural fairness is a right to a procedure whose detailed content is determined at common law. Where the legitimate expectation is directed to a certain kind of procedure, the common law need not confer an entitlement to the exact procedure expected.

B. *Identifying a Possible Departure from International Human Rights Norms*

The weak point in the judgment of the majority is the finding that the Minister's delegate did depart from the Convention. McHugh J in dissent found that the welfare of the family and the children was a primary consideration.[139] The majority did not insist upon a reference to the Convention in the statement of reasons as proof that the welfare of the child was a primary consideration in the delegate's reasoning. It would be enough if it was apparent that Article 3.1 was applied. The delegate did balance the "very difficult and bleak future" of the children against the seriousness of the offence. Yet the majority found that the delegate had departed from Article 3.1 because she had not balanced the welfare of the children as a primary consideration against the seriousness of the offence as a primary consideration.[140] This appears to be a rather technical distinction, dependent upon the failure to use the language of "primary consideration" in the delegate's statement of reasons. This critical step in the reasoning of the majority turned upon which considerations were "primary" and which were not. It took the majority close to, if not into, the territory of the merits of what weight is to be given to various factors, a matter which is for the delegate, not for the court.

C. *Practical Ramifications*

The executive branch is able to avoid the inconvenience of the combined effect of *Teoh's* case and earlier ratification of a convention in two ways. The core statement of principle by Mason CJ and Deane J is qualified by the words "absent statutory or executive indications to the contrary".[141] Similarly, Toohey J emphasised that non-incorporated conventions are not a source of enforceable obligations, but only of legitimate expectations, which cannot

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138 Id, judgment of Toohey J, par 26.
139 Id, judgment of McHugh J, par 48.
140 Id, judgment of Mason CJ and Deane J, par 39.
141 Id, judgment of Mason CJ and Deane J, par 34.

arise if the actions of the legislature or the executive are inconsistent with such an expectation.[142]

Enactment of legislation inconsistent with the ratified convention will prevent the generation of any legitimate expectation. The legislation must of course be constitutionally valid, and international conventions have a "legitimate influence" upon common law interpretation of the Commonwealth Constitution. Second, the executive branch may evade the implications of *Teoh's* case by making a published, considered statement of policy which is contrary to the ratified convention. There are, no doubt, many government policies which are inconsistent with non-incorporated conventions. It is unlikely that an implied inconsistency would be sufficient to remove the effect of *Teoh's* case. If it were, in *Teoh's* case itself the migration policy, including its character requirements, would have impliedly overridden any legitimate expectation generated by the Convention. To override the legitimate expectation, an explicit indication to the contrary will need to be given in the policy.

One course open to administrators is to conduct detailed examinations of all policies with regard to their departure from relevant non-incorporated conventions and to amend them so that they are consistent with the conventions. Another alternative is to conduct the examinations and then amend the policies so as to state expressly that the intention is to depart from specified provisions of conventions. A combination of the two alternatives could be adopted, on a policy by policy basis. Any of these courses presents the unpalatable prospect of a significant demand upon resources, the making of very difficult expert judgments as to compliance with conventions, and the political embarrassment of public admissions that policies infringe international obligations, especially if these are human rights norms.

Of the majority judges, only Toohey J responded to concerns raised by counsel for the Commonwealth about the ramifications of a decision that non-incorporated conventions generate legitimate expectations. Toohey J said that "particular conventions will generally have an impact on particular decision-makers and often no great practical difficulties will arise in giving effect to the principles which they acknowledge".[143] However, legitimate expectations generated just by the Convention and the Declaration in issue in *Teoh's* case will have an impact across much of migration, health, welfare, education and juvenile justice administration. Among the many non-incorporated conventions, the ICCPR above appears to have the potential to impact upon numerous areas of federal and state public administration. In adjudicative decision-making administrators are faced with the immediate task of examining policies for inconsistency with the ICCPR, and then dealing with the issue of whether they are about to depart from the ICCPR. This question may present a particular problem when a principle of the ICCPR imposes an absolute obligation or attempts to settle one factor as a primary consideration or even the primary consideration.

In the absence of overriding legislation or an express policy statement indicating departure from the relevant convention in a particular area of public admini-

142 Id, judgment of Toohey J, par 32.
143 Id, judgment of Toohey J, par 30.

stration, the ramifications of *Teoh's* case are enormous. McHugh J correctly pointed out that the terms of a ratified convention may simply have represented goals which government intended to pursue over a long period of time.[144] Effort, training and resources are required to implement a decision such as *Teoh's* case, like new legislation. It must be remembered, however, that *Teoh's* case does not require immediate compliance but immediate awareness. Administrators at all levels of government need to acquaint themselves with the ICCPR and other non-incorporated conventions and consider whether their policies are inconsistent with them. The most immediate pressure will be upon tribunal members, particularly at the federal level, as they seek to meet their obligations to warn parties of proposed departures from conventions.

A raft of new questions will emerge in this process. If warnings of departure occur on a regular basis in a particular area of administrative decision-making, especially at a senior level, can the non-incorporated convention truly continue to generate a legitimate expectation? When does a policy inconsistent with the convention become sufficiently explicit to override it? What is the position if in some areas of public administration policies are adapted to comply with a principle in a convention whilst in other areas a consistent departure from the principle is announced? Does a prior warning of a departure from the ICCPR, followed by an adverse decision and the individual's exhaustion of remedies, provide a stronger case for a successful communication to the Human Rights Committee?

Administrative decision-making affected by *Teoh's* case will be a more cautious and prolonged process. Should an adminisrator only warn of a departure from a convention if it will mean an adverse decision for an applicant? Should the administrator warn of a departure if the decision will in any event be favourable to the applicant? How is the decision-maker to know in advance which policy he or she is likely to depart from? Facts which emerge at a late stage may change the whole complexion of the decision in the light of the convention. The circumstances of the case may lead a delegate to change his or her mind on hearing the argument. Abuse of power principles require decision-makers who have a discretion to exercise it independently and not apply policy inflexibly. If an applicant has something exceptional to say about why the policy should not be applied in this case, or why the convention should be applied, then the delegate should be ready to give genuine, proper and realistic consideration to that argument. If the decision-maker misinterprets the convention, this may constitute an error of law or render the decision *Wednesbury* unreasonable.[145] In adjudicative proceedings of tribunals, once a provisional view on departure from the convention has been expressed, it may be necessary to adjourn to allow full argument at a later time.

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144 Id, judgment of McHugh J, par 39.

145 See text accompanying notes 59–61. For a recent discussion see *Todea v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, Sackville J, 22 December 1994).

D. Integrity in Government

The issue of integrity in government lies at the core of the majority judgments. The issue is highlighted by the debate raised by McHugh J in dissent, which flows from a central rhetorical observation:

> It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision has no knowledge.[146]

Each element of that observation merits attention. First, procedural fairness has no concern with what is requested by individuals affected by administrative decisions, except in the limited sense that refusal of a request for a certain content of a hearing may prepare the ground for a procedural fairness challenge.

Second, it is true that individual administrators do not undertake to apply the principles in a non-incorporated convention. Nor do they need to undertake to apply any of the principles of administrative law. According to McHugh J, "undertaking" to comply with a rule occurs only by enactment of domestic legislation. McHugh J relied by analogy upon the idea of privity of the agreement between Australia and other States when ratification occurs. Members of the Australian community are not privy to this agreement.

The argument needs to explain in what sense members of the community are privy to government policy, since according to *Haoucher's* case policy does generate legitimate expectations. To whom does the government speak when it publishes a policy or ratifies a convention? Is a criminal deportation policy, tabled in Parliament, a statement to the Australian community, whilst an act of ratification of a convention carried out by Australia's leaders on the international stage is not? Perhaps members of the community accept that no benefits will flow to them from ratification of any international instrument. Yet Australia is now becoming more sensitive to the danger of hypocrisy in failure to protect human rights, environmental or other standards at a domestic level whilst endorsing those standards in the international arena. *Haoucher* required honesty in domestic policy making. *Teoh's* case requires honesty in international policy-making by at least giving consideration to honouring that policy at the domestic level. The question is whether Australia can have one policy about its domestic administration for international consumption when in reality its domestic policy is very different. The majority judges impliedly rejected this view as incompatible with integrity in government.

If the stability of the source of a legitimate expectation is scrutinised, it is clear that policies such as those in *Ng Yuen Shiu*, *GCHQ* and *Haoucher* could be departed from at any time. The government remains free in the exercise of its discretion to adopt a new policy. If anything, there is a stronger implication in the case of an international convention as compared with a policy, that the government will endeavour to comply, rather than repudiate the ratification with ease. There is greater stability in the source of the legitimate expectation because it is more difficult to resile from it.

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146 Above n1, judgment of McHugh J, par 33.

The third aspect of McHugh J's observation concerned an individual's knowledge of the representation, practice, or policy which generates the legitimate expectation. Knowledge has always been regarded as immaterial. This reflects one of the important respects in which procedural fairness differs from estoppel. The existence of a published, considered statement of government policy is sufficient, avoiding a slide into having to test the expectations of parties entering an agreement or persons owing a duty of care, as in a private law context. The different approach of public law is evident in the disclosure rule of procedural fairness, which requires disclosure to an affected person of adverse allegations which are significant, relevant and credible and which are from a source other than the affected person. This obligation of the administrator arises even though the affected person does not know of the allegations. Indeed that is the whole point — that the person does not know of them and ought to be given an opportunity to respond to them.

On this basis it cannot with respect be correct to state as a general principle that "[f]airness does not require that a person be informed about something to which the person has no right or about which that person has no expectation".[147] The common law right of fair procedure is a right to know more about the decision-making process and to participate in it. *Teoh's* case requires administrators to be conscious of implications of their decisions for human rights and to permit the individuals whose human rights are affected to have a say with regard to that aspect of the decision.

Principles (ii) to (v), set out in Section 3, reflect an evolution of the common law which has begun to place adverse policy on the same basis as adverse factual allegations. It may not be appropriate for this evolutionary process to be fully completed.[148] To extend the process to a general principle that administrators must warn affected members of the public before changing a policy would be burdensome.[149] For the purposes of *Teoh's* case, however, integrity in government will be well served by a decision which precludes a secret or unarticulated application of a policy involving non-compliance with international obligations which the Australian government has publicly undertaken to respect.

F. Conclusion

The decision in *Teoh's* case reflects a distinctively Australian jurisprudence. The decision paid little or no regard to the way in which related issues had been decided by the House of Lords,[150] and owed more to a dictum of the New Zealand Court of Appeal expressing disapproval of the view that ratification of an international instrument is mere "window-dressing".[151] *Teoh's*

147 Id, judgment of McHugh J, par 31.

148 It was a worrying aspect of *State of South Australia v O'Shea* (1987) 163 CLR 378 that a policy did not have to be disclosed, resulting in the dissent of Deane J and some reservations on the part of Mason CJ.

149 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Peninsula Anglican Boys' School v Ryan* (1985) 69 ALR 555.

150 See *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696, a decision referred to only by Toohey J, par 27.

151 *Tavita v Minister for Immigration* (1994) 2 NZLR 257, referred to by Toohey J, pars 27, 29.

case is a giant leap towards improved integrity in public administration and towards internationalisation of administrative law, achieved through a modest doctrinal step. Australian administrators must now be well informed as to Australia's international human rights obligations. Australian administrative lawyers must now also be international human rights lawyers.

Had it not been for the extensive power of the executive branch to ratify treaties, exercised on more than 900 occasions, the impact of *Teoh's* case would be small. Arguably the control over an executive power should be commensurate with the extent of that power. The exercise of the treaty making power is not justiciable.[152] Nor is there executive or parliamentary review of such an exercise of power. *Teoh's* case has introduced an indirect but effective measure of accountability, and will assist in forcing the issue of comprehensive domestic legislation for human rights in Australia.

POSTSCRIPT

A. The Joint Statement

On 10 May 1995 a *Joint Statement* was issued by the Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch, "to clarify the Government's position following the High Court's recent decision in the *Teoh* case".[153] The purpose of the statement was described as being "to restore the position to what it was understood to be prior to the *Teoh* case". The core passage in the statement was as follows:

> We state, on behalf of the Government, that entering into an international treaty is no reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. This is so both for existing treaties and for future treaties that Australia may join.

The *Joint Statement* raises a number of important issues which deserve close consideration. For the purposes of this postscript, a brief comment is made with regard to the governmental perception of the significance of *Teoh's* case, and the governmental expectation that the *Joint Statement* will restore the position existing prior to *Teoh's* case.

B. Governmental Perception of Significance of Teoh's *case*

In describing the High Court's decision, the *Joint Statement* emphasised, as if it were a matter of note, that as a result of *Teoh's* case a legitimate expectation could arise "even where the person affected by the decision did not raise — or even know about — the treaty in question". This echo of the judgment of

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152 *Koowarta v Bjelke-Petersen* (1981–82) 153 CLR 168 at 229.

153 *Joint Statement* by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch (10 May 1995).

McHugh J in dissent in *Teoh's* case is itself surprising. It was clear law prior to *Teoh's* case that a policy statement could generate a legitimate expectation, founding an entitlement of a person affected by the policy to a hearing, irrespective of that person's knowledge of the policy.[154] In *Haoucher v Minister for Immigration and Ethnic Affairs*,[155] McHugh J said that "[t]he justice and wisdom of extending procedural fairness to legitimate expectations as well as to existing rights and interests seem obvious"[156] and did not require that the person affected have knowledge of the policy. Toohey J explicitly stated in the same case that a "[l]egitimate expectation does not depend upon the knowledge and state of mind of the individual concerned"[157] except when it is generated by an undertaking made to an individual.

The *Joint Statement* also emphasised that the High Court's decision introduced "a great deal of uncertainty ... into government activity. It is not in anybody's interests to allow such uncertainty to continue". A wide range of administrative decisions were potentially affected by treaties and the High Court's decison gave "little if any guidance" as to how decision-makers should determine the relevance of treaty provisions to particular decisions. If intended as a criticism, this comment is not justified. Of course the High Court could not give guidance on the requirements of procedural fairness in other factual circumstances which were not before it. That is an inescapable aspect of the nature of adjudication by courts in judicial review of individual cases, and of the flexible content of procedural fairness which depends upon the circumstances of the case.

The guidance needed in the aftermath of *Teoh's* case ought to have been provided by the executive branch responsible for ratification of conventions. The advice of human rights lawyers and other experts in international standards could have been sought, with a view to the rapid commencement of intensive training programs for all officers making decisions affecting human rights or decisions associated with ratified treaties. Providing such guidance would have have required significant resources, including rapid deployment of skilled trainers, combined with a preparedness to be receptive to major institutional change.

Instead of embracing the giant leap forward offered by *Teoh's* case, towards injection of a greater sensitivity for human rights into public administration, the *Joint Statement* caricatured the decision as presenting a doubtful principle and a source of uncertainty. The government's response was therefore confined to the removal of the principle and the uncertainty. And the only means considered for achieving this end was to attempt to nullify the effect of the High Court's decision. This response is very different from the response to the High Court's decision in *Mabo v Queensland (No 2)*.[158] That decision was recognised as offering an opportunity to advance integrity in the government's relationship with Aboriginal people.

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154 See text accompanying notes 86–104 .
155 Above n93.
156 Id at 680.
157 Id at 670.
158 Above n79.

C. *Governmental Expectations Regarding the Effect of the* Joint Statement

There are some serious questions as to whether the *Joint Statement* has the legal effect to which it lays claim. First, a policy statement that "any expectation that may arise does not provide a ground for review of a decision" cannot remove the existing jurisdiction of courts to hear judicial review actions. Nor can a policy statement restrict the general availability of procedural fairness as an arguable ground of review, in the event that a legitimate expectation is indeed generated in spite of the *Joint Statement*.

Second, the *Joint Statement* does not remove the effect of Gaudron J's judgment with regard to human rights of children as citizens.[159] Even if the *Joint Statement* had claimed also to defeat legitimate expectations generated in this way, it is unlikely that it would be effective. Legislation would be necessary to alter the common law position.

Third, the *Joint Statement* wrongly claims that a policy statement of the kind it contains is "action ... of the kind foreshadowed by the High Court itself".[160] Mason CJ, Deane and Toohey JJ regarded the generation of a legitimate expectation as capable of being defeated by statutory or executive indications to the contrary of the ratified convention.[161] It is to be doubted whether it can be inferred from the majority's inclusion of this qualification that the *Joint Statement* was contemplated by the High Court. Toohey J clearly expected that the decision in *Teoh's* case would be implemented by government.[162] Mason CJ and Deane J proceeded on the assumption that ratification of an international convention is not "a merely platitudinous or ineffectual act" but 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". The *Joint Statement* makes it clear that Mason CJ and Deane J were mistaken in making this assumption. Contrary to the claim made in the *Joint Statement*, the majority judges never contemplated that government would publicly expose a lack of integrity in its approach to the ratification of an international convention. For the *Joint Statement* plainly states that ratification of a convention gives no reason to expect that government decision-makers will comply with the convention if it is not incorporated into municipal law.

Later in the *Joint Statement* there appears the reassurance that

> [w]e should emphasise that the Government remains fully committed to observing its treaty obligations. ... Ratification is a message sent by the government to the international community that it intends to observe the provisions of a treaty.

This is inconsistent with the earlier statement about expectations on the part of Australians regarding observance of ratified treaties. These internal inconsistencies in the *Joint Statement* reflect a hopeless struggle to evade the effects of *Teoh's* case without loss of integrity. How can a message be sent to

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159 See text accompanying notes 105–9.
160 *Joint Statement*.
161 See discussion accompanying notes 141–2 .
162 See text accompanying note 143.

the international community without raising expectations within the domestic community? Of course those expectations are something short of the legal rights created by incorporation. Reiteration towards the end of the *Joint Statement* of the distinction between non-incorporated and incorporated conventions does not assist in skirting the issue of what message the government intends to convey at the international and domestic levels when it ratifies a convention. The general import of the *Joint Statement* remains that ratification does not signify a governmental intention to comply with the convention on the domestic front and hence ratification is incapable of generating any legitimate expectation. The implication is that ratification from Australia's perspective is purely about the human rights and international standards which Australia expects other ratifying States to achieve. Such a statement can do little to enhance the international standing of Australia.

Fourth, there is no direct indication in *Teoh's* case that the *Joint Statement* will have the effect of restoring the position to what it was understood to be prior to *Teoh's* case. Does the *Joint Statement* fall within the qualification made by Mason CJ, Deane and Toohey JJ, as "an executive indication to the contrary"? On one interpretation of the qualification, these judges could have had in mind only one sort of executive action — reversal of the ratification of the convention. Nevertheless, I argued earlier in this article for another interpretation: that a published, considered statement of policy contrary to a ratified convention could remove the effect of *Teoh's* case.[163] Doubt arises as to whether a statement of policy at the level of generality of the *Joint Statement* can be equally effective as one which is directed at a particular convention. The *Joint Statement* does not even attempt to list the treaties and conventions to which it purports to apply. And of course it does not identify the policy statements, made at the time of ratification and later, which it is intended to override. Its claim to override earlier policy raises an issue which has barely been explored in administrative law, as to how one policy might "impliedly repeal" an earlier inconsistent policy.

Fifth, the *Joint Statement* also purports to apply with future effect — "for future treaties Australia may join". However, it is not possible for the *Joint Statement* to override inconsistent policy statements made after 10 May 1995. No policy can fetter the future lawful exercise of discretion by government to make new policy.[164] The act of ratification reflects policy, is accompanied by a policy statement and is an exercise of executive power which could itself be described as a statement of policy. The *Joint Statement* itself may be impliedly overriden to the extent of its inconsistency with later policy statements. This may occur not only by ratification of a convention (in the absence of an accompanying statment denying Australia's intention to comply with the convention), but also by a published considered statement of policy re-affirming Australia's commitment to a convention. A policy statement inconsistent with the *Joint Statement* may have already been made since 10 May 1995, say in the course of Australia's agreement, within a matter of days after the issue of

163 See text following note 139.

164 *Re Findlay* [1985] AC 318; *Attorney-General (NSW) v Quin* above n136.

the *Joint Statement*, with other State parties to indefinite renewal of the Nuclear Non-Proliferation Treaty.

Sixth, the final irony of the claimed legal effect of the *Joint Statement* is the manner of its publication. The *Joint Statement* expressed surprise at the notion that a legitimate expectation may be generated by a convention of which a person had no knowledge. Yet the *Joint Statement* itself was no more than a media release, which gained no exposure on national television and only minor reports in the print media. The *Joint Statement* claimed to defeat legitimate expectations generated by all ratified non-incorporated conventions, regardless of individual knowledge of the existence and intent of the *Joint Statement* or comparative knowledge of the convention so affected. This purports to include legitimate expectations generated by international instruments published as schedules to the *Human Rights and Equal Opportunity Act* 1986 (Cth): the Convention Concerning Discrimination in respect of Employment and Occupation, the ICCPR, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons. Is the *Joint Statement* capable of defeating a legitimate expectation when it is conveyed in a form which is not commensurate with the means by which the legitimate expectation was initially generated, in terms of its formality, public dissemination, tabling in Parliament, or close connection with municipal legislation by inclusion in a schedule or indeed declaration pursuant to section 47 of the *Human Rights and Equal Opportunity Act*?

These complex questions may be replaced by others in the near future if, as promised in the *Joint Statement,* legislation is introduced to reinforce the position regarding the status of non-incorporated conventions. It is to be hoped that before that time, closer examination of the judgments in *Teoh's* case will prompt the regard for integrity in government which the majority judges expected to prevail.