A TEOH FAQ

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Paper presented to AIAL seminar, "Signing International Treaties: What Do the Politicians Think They Are Doing?", Sydney, 16 September 1997.

What do you mean by FAQ?[1]

"FAQ" is a TLA ("three letter acronym"!). When used in computing, the three letters stand, strictly speaking, for "frequently asked question", but are usually used instead to refer to a document setting out the answers to a series of frequently asked questions about a particular topic, whether a computing topic or otherwise.

What is the topic of this FAQ?

The topic of this FAQ is the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh* ((1995) 183 CLR 273) and its aftermath. In *Teoh's case*, the Court dismissed an appeal from a decision of a Full Court of the Federal Court ((1994) 49 FCR 409). That Court had in turn allowed an appeal from a decision of a single judge (unreported) of that Court, the single judge having dismissed an application for judicial review brought by Teoh.

Teoh's case has generated considerable controversy. Will your account of the topic be trustworthy?

I hope so, but I did have some involvement in the case itself to which I should draw attention now, because you may think it has affected my answers to subsequent questions. When the case was before the High Court, I was junior counsel to Richard Kenzie QC. We appeared for the federal Human Rights and Equal Opportunity Commission, which intervened in the matter by leave of the Court. The major part of the Commission's argument (summarised at pages 277-78 of the report) was, generally speaking, accepted by the Court.

Basis of Teoh's application for judicial review

Teoh, who was a Malaysian citizen, had challenged the legality of two administrative decisions made with respect to him by delegates of the Minister for Immigration, one to reject an application which he had made for a permanent entry permit, the other to deport him from Australia.

Facts of the case as found by the High Court

On 16 January 1991, by reason of its ratification one month earlier of the Convention on the Rights of the Child, Australia became bound in international law by that Convention. Article 3, paragraph 1, of that Convention (which was crucial to the outcome of the case) provides as follows:

> 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.

About six months after Australia became bound by the Convention, a delegate of the Minister for Immigration decided to reject Teoh's application for a permanent

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entry permit. About six months after the first decision, another delegate of the minister decided to deport Teoh from Australia. At the time of both decisions, Teoh was the father of a number of young children who were Australian citizens. In making his/her decision, neither delegate treated the best interests of those children as a primary consideration. Further, neither delegate had: (1) warned Teoh in advance that he/she proposed not to treat the best interests of those children as a primary consideration in the making of the decision; (2) given his/her reasons for that proposal; and (3) invited Teoh to make submissions on that proposal.

Is Australia still bound in international law by the Convention on the Rights of the Child? If so, in choosing to be bound, is Australia one of a small number of States?

Australia still remains bound by the Convention and, in choosing to be so bound, is decidedly not among a small group of States. The Convention has come the closest to being universally binding of any international human rights agreement ever made. Of the 193 States presently existing in the world, 191 have chosen to bind themselves to give effect to the Convention. As to the two who have not, one is Somalia. Due to an ongoing civil war, Somalia has not had for some years a central government capable of binding it to give effect to the Convention.

The only other State not bound by the Convention is the USA. President Clinton signed the Convention in 1995, over four years after it first came into force, but has not yet transmitted it to the Senate for its advice and consent to his ratification of it. (The Senate's advice and consent to such ratification, by a two thirds majority, is required by Article II, clause 2, of the American Constitution.) The reason for President Clinton's failure to transmit the Convention to the Senate thus far is, no doubt, his belief that the Senate as presently constituted will not advise and consent to its ratification by the required majority, even a ratification with reservations, as is, not surprisingly, permitted by the Convention.

Such belief would be justified alone by the Senate's past attitude to the ratification by the USA of various international agreements. There are currently, for instance, over forty such agreements signed by the President for the time being and sent to the Senate for ratification, but on which the Senate has taken no final action. Among them is another important international human rights agreement, the Convention on the Elimination of All Forms of Discrimination Against Women, which was signed for the United States as long ago as 1980!

However, in the case of the Convention on the Rights of the Child, there are particular reasons for President Clinton's belief, namely, public expressions by senators such as the very powerful Senator Jesse Helms, the (Republican) chairman of the Senate's Foreign Relations Committee, of opposition to the Convention's ratification. Such opposition is said to be based, in part at least, on inconsistency between the Convention and Christian teachings regarding parents' rights with respect to their children, so it is with some amusement that I mention that among the States which have bound themselves to give effect to the Convention is the Holy See! Admittedly, it has done so with certain reservations regarding parents' rights, but at least it has done so, unlike the USA.

Could the obligations imposed by the Convention, especially those imposed by Article 3, paragraph 1, be described as radical in character?

I would not consider that to be an appropriate description of them.

First, many provisions of the Convention simply mirror those expressed in earlier widely accepted international human

rights agreements to be applicable to all persons, but are repeated in the Convention with specific application to children. To give merely one example, parties to the International Covenant on Economic, Social and Cultural Rights (including, since 1975, Australia) recognise, in Article 13, paragraph 1, thereof, the right of "everyone" to education. Article 28, paragraph 1, of the Convention on the Rights of the Child contains an equivalent recognition, limited, however, to the right of "the child". (Perhaps I should add here that, for the purpose of the Convention on the Rights of the Child, a child is someone under eighteen, unless under the law applicable to that person majority is attained earlier.)

Secondly, the almost universal adherence to the Convention itself tells against the Convention being a radical document.

Finally, focussing specifically on the obligations imposed by Article 3, paragraph 1, of the Convention, Gaudron J, a member of the High Court in *Teoh*, stated in her reasons for judgment that Article 3, paragraph 1, "gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected ..." (at 304-05). Her Honour taking that view, she is unlikely to have thought that the obligations imposed by Article 3, paragraph 1, were radical in character.

Apart from Gaudron J, who were the members of the High Court in *Teoh* and how did each of them vote to determine the matter?

The Court consisted on five Justices for the purpose of determining the appeal (no doubt, because it did not sit in Canberra to hear it, but in Perth). McHugh J dissented and, for that reason, I will say nothing else of his reasons for judgment. The four majority Justices were Mason CJ and Deane, Toohey and Gaudron JJ. Although she was one of the four majority Justices, Gaudron J gave reasons for judgment differing from those of the other three majority Justices and, for that reason, I will say nothing further of her reasons. Finally, Mason CJ and Deane J gave joint reasons for judgment, whilst Toohey J gave separate reasons for judgment. There does not appear to me to be any particular difference in approach between the joint reasons, on the one hand, and the reasons of Toohey J, on the other, which it is necessary for me to mention for the purpose of this FAQ.

What were the reasons for judgment of Mason CJ and Deane and Toohey JJ and what orders were made?

In brief, the reasons can be divided into two parts, first, propositions of a general character and, secondly, propositions specific to the facts of the case.

First, it was said that Australia's act of ratification of the Convention, including, as the Convention did, Article 3, paragraph 1, had been a representation by Australia to all persons who might be adversely affected in the future by federal administrative decisions concerning children that, in making such decisions, the decision-makers involved would treat as a primary consideration the best interests of such children. Such persons therefore had a legitimate expectation that federal decision-makers would so act. A federal decision-maker could choose to defeat such expectations, but, before deciding to do so, was obliged to: (1) warn the person(s) whose legitimate expectations he/she was contemplating defeating that he/she proposed not to treat the best interests of the relevant child or children as a primary consideration in making the decision; (2) give his/her reasons for that proposal; and (3) invite the person(s) whose legitimate expectations he/she was contemplating defeating to make submissions on that proposal.

I should add that the reasons I have just set out, although given in the context of the Convention on the Rights of the Child,

were not restricted to that particular international agreement. The reasons extended to any international agreement by which Australia had chosen to bind itself, the nature of any legitimate expectation concerning the future conduct of federal administrative decision-makers generated by Australia's ratification of such agreement depending on the terms of the particular agreement.

Secondly, it was said that both administrative decisions under challenge in the present case, the decision to refuse a father a permanent entry permit and the decision to deport him, were "actions concerning [his] children" within the meaning of Article 3, paragraph 1, of the Convention. Since neither delegate had made the best interests of Teoh's children a primary consideration in making his/her decision and since neither delegate had taken the necessary procedural steps before making a decision in which the best interests of those children were not made a primary consideration, each decision had been unlawful.

In consequence of the reasons set out above, the minister's appeal from the decision of the Full Court of the Federal Court, (which had also held both decisions unlawful, but for different reasons than those of the High Court) was therefore dismissed. That meant that the orders made by the Full Court of the Federal Court, first, setting aside the decision on Teoh's application for a permanent entry permit and requiring that application to be reconsidered according to law and, secondly, staying the deportation decision until such reconsideration had occurred, remained in place.

As a matter of interest, what was the eventual fate of Teoh's application for a permanent entry permit when it was reconsidered as required?

I asked one of Teoh's legal representatives that question for the purpose of preparing this FAQ, and was told that, in July 1996, Teoh's application for a permanent entry permit was finally determined by granting him the permit he had sought.

The controversy generated by the High Court's decision in *Teoh's case* centred on the view of Mason CJ and Deane and Toohey JJ that the act of ratification of an international obligation by Australia was an act capable of giving rise within Australia to "legitimate expectations", as that term is used in administrative law. Do you regard that view as a radical one?

On an earlier occasion, the view had been expressed in the High Court that the issue of a series of news releases by a minister could give rise to a legitimate expectation (*Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 440). Subsequently, the view had been expressed that a statement made by a minister to the House of Representatives could have the same effect (*Haoucher's case* (1990) 169 CLR 648, 655, 682). It is even possible to construe certain remarks in another case (*Simsek v McPhee* (1982) 148 CLR 636, 644) as directly foreshadowing, in the context of international agreements, the view ultimately expressed in *Teoh's case* by Mason CJ and Deane and Toohey JJ. Given that background, I find it difficult to see why the conclusion that a statement by the executive ratifying an international agreement was an act capable of giving rise within Australia to legitimate expectations would be thought to be a radical one.

It was said, however, that, although the ratification of an international agreement by Australia might have a promissory character internationally, it was incapable of having that character domestically. What do you say to that criticism which was made of the reasoning in *Teoh's case*?

I am unable to improve on the answer given to it by Sir Anthony Mason, after he had been freed from the restraints of

judicial office. In "The Influence of International and Transnational Law on Australian Municipal Law", (1996) 7 *Public Law Review* 20, 23, Sir Anthony quoted a statement about *Teoh's case* made by Senator Evans, then Foreign Minister, the statement having been made at a seminar held on "the Mason Court". Senator Evans had said (emphasis in original) that "ratification is a statement to the *international* community to [*sic*] observe the treaty measures in question; it is not a statement to the *national* community—that is the job of the Legislature, not the Executive". Sir Anthony's response to that statement, which statement he described as "breathtaking", was as follows:

> So, when an Australian convention ratification is announced, they may dance with joy in the Halmaheras, while here in Australia, we, the citizens of Australia, must meekly await a signal from the legislature, a signal which may never come. Of course, this concept of ratification involving a statement to the international community, but no statement to the national community, is quite insupportable.

Australia is a party to many international agreements (said to have been about 900 significant ones when *Teoh's case* was argued in October 1994 and, no doubt, more by now). Another criticism of the reasoning in *Teoh's case* was that it was difficult, if not impossible, for federal administrative decision-makers to be aware of the content of the obligations imposed by every international agreement. Accordingly, in many instances they might fail to give effect to an international obligation and not accord procedural fairness before such failure, not even being aware that, in so doing, they had acted unlawfully. What do you say about that criticism?

I consider that the task of alerting federal administrative decision-makers to the international obligations relevant to their particular decision-making functions is not as difficult as is implied by the number of international agreements involved. Many such agreements, by their nature, will not even purport to impose obligations on individual decision-makers. Others will purport to impose obligations on individual decision-makers, but the purported obligations will be expressed in a way which makes them "duties of imperfect obligation", ones which are in any event incapable of giving rise to expectations as to performance which would properly be described as legitimate. (An analogy is to be found in domestic statutes which purport to impose duties, which "duties" are subsequently held to be unenforceable because of their character.) As to those agreements which do impose obligations capable of giving rise to legitimate expectations as to performance, I cannot see any reason why it is more difficult to make decision-makers aware of such obligations than it is to make them aware of their obligations arising under domestic statutes. All that is required is the political will to perform the necessary educative function.

I am comforted in my view that the task of alerting federal administrative decision-makers to the relevant international obligations is not as difficult as some critics sought to make out after *Teoh* by knowing that the federal parliament has obviously not in the past thought the task to be too difficult. One may find a number of federal statutes in recent years in which parliament has both created an instrumentality and then placed that instrumentality under a duty to act so as not to bring Australia into breach of any of its international obligations.

Is *Teoh's case* likely to have important consequences in future for Australian law or was it a "one-off"?

My view is that it falls into the latter category. I hold that view for two reasons. First, there have occurred and are continuing to occur in response to the case a number of developments, both of an executive and of a legislative character, for the purpose of nullifying its

effect. Secondly, even if those developments should not achieve or have achieved their desired outcome, a real question must obviously arise as to the attitude of the High Court in the future to the majority reasoning in the case if a similar case were to come before it.

What are those executive developments?

It is probably best to begin answering that question by referring to *Teoh's case* itself. In their joint reasons for judgment, Mason CJ and Deane J said (at 291; my emphasis):

> [R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, *absent* statutory or *executive indications to the contrary*, that administrative decision-makers will act in conformity with the Convention ...

By their use of the words which I have emphasised, their Honours were expressly acknowledging the ability of (relevantly) the executive to nullify a legitimate expectation which the Convention's ratification would otherwise have engendered by indicating to those in whom that expectation would otherwise have been engendered that they were not entitled to expect that administrative decision-makers would act in conformity with the Convention, in spite of the executive's ratification of it.

Toohey J spoke similarly, saying (at 302; my emphasis):

> [T]here can be no legitimate expectation if *the actions of* the legislature or *the executive are inconsistent* with such an expectation.

Attempting expressly to rely on the judicial statements just referred to on 10 May 1995, about a month after the High Court's decision in *Teoh*, Senator Evans, then Foreign Minister, and Mr Lavarch, then Attorney-General, made a joint statement entitled, *International Treaties and the High Court decision in Teoh.* (Interestingly, the statement was not made to Parliament, or incorporated in Hansard or published in the Commonwealth Gazette. It seems solely to have taken the form of a news release.) The essence of the joint statement was as follows:

> We state, on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. 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 statement from which I have just quoted was not, however, the end of executive action in the matter. Not only was there subsequent Commonwealth executive action, to which I refer below, but, following the joint statement, ministers of at least two states (South Australia and Western Australia) and the Northern Territory also made similar statements during 1995.

When I describe statements by South Australian, Western Australian and Northern Territory ministers as "similar" to the joint statement, I should elaborate. Like the joint statement, each of them was directed to the act of ratification of an international agreement by the federal government. Where each of them differed from the joint statement was that it denied that that act by the federal government could give rise to a legitimate expectation regarding the future conduct of its own state or territory administrative decision-makers.

Returning now to the subsequent Commonwealth executive action just mentioned, on 25 February 1997 a further joint statement by the Foreign Minister (now Mr Downer) and the Attorney-General (now Mr Williams QC) was made. (Unlike the earlier statement, this statement did appear in the Commonwealth Gazette.) This second statement was said to replace the first one in relation to administrative decisions made from 25 February 1997. Its essence was as follows (although I have omitted the numbering of the quoted paragraphs):

> [W]e indicate on behalf of the Government that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the *Teoh* Case.
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> Subject to the next paragraph, the executive indication in this joint statement applies to both Commonwealth and State and Territory administrative decisions and to the entry into any treaty by Australia in the future as well as to treaties to which Australia is already a party. In relation to administrative decisions made in the period between 10 May 1995 and today reliance will continue to be placed on the joint statement made by the then Minister for Foreign Affairs and the then Attorney-General on 10 May 1995.
>
> Where a State or Territory government or parliament takes, or has taken, action to displace legitimate expectations arising out of entry into treaties in relation to State or Territory administrative decisions this statement will have no operation in relation to those decisions.

It appears to me that the only substantial difference between the two Commonwealth joint statements is that the second of them sought to deal with the position of state and territory administrative decision-makers, as well as with the position of Commonwealth administrative decision-makers.

Are the Commonwealth statements, as they purport to apply to federal administrative decision-makers, effective in nullifying *Teoh*?

I must say I doubt their effectiveness. In giving one of my reasons for saying so, I adopt the language of Hill J of the Federal Court in *Department of Immigration v Ram* (1996) 41 ALD 517, 522-23, dealing with the earlier of the two statements:

> When in *Teoh*, Mason CJ and Deane J refer to "executive indications to the contrary", it may well be that their Honours intended to refer to statements made at the time the treaty was entered into, rather than to statements made years after the treaty came into force.
>
> When initially referring to executive comments, their Honours do so in the context of an act of ratification, an act that speaks both to the other parties to the Convention and to the people of Australia as well as to the world. I doubt their Honours contemplated a case where at the time of ratification, Australia had expressed to the world and to its people an intention to be bound by a treaty protecting the rights of children, but subsequently, one or more ministers made statements suggesting that they at least had decided otherwise.

(I should add here that the remarks of Hill J I have just quoted were avowedly *obiter*. I know of no Australian case in which the effectiveness of any of the executive statements I have referred to above has been authoritatively determined.)

It might also be argued that, even if the statements from *Teoh*, quoted above, did contemplate executive indications to the contrary given subsequent to ratification, it also contemplated that such indications would be specific in their character, referring to a particular international agreement or to particular international agreements, rather than being expressed globally.

The reasons I have just given for doubting the effectiveness of the statements are directed to international agreements

already ratified at the time of the making of a statement like either of the joint statements. A further reason for doubting the effectiveness of the statements relates to their intended effect on international agreements ratified *after* the making of the statements. Could a statement like either of the joint statements prevent a later ratification from giving rise to a legitimate expectation or would the later statement by the executive implicit in the act of ratification of a particular international agreement supersede the earlier general statement by two members of the ministry? I suspect that, if the issue were to arise, the courts would take the latter, rather than the former, view.

Before leaving this matter, there are two further points I should make.

First, I have referred above to developments of a legislative character, as well as of an executive character, intended to nullify *Teoh's case*. Among those developments (see below), is a Commonwealth Bill which, if enacted, will, it appears to me, make it unnecessary to worry about the effectiveness of the two ministerial statements, so far as they concern federal administrative decision-makers.

The second point is this: I am unaware of any particular international reaction to the making of the two ministerial statements. However, to the extent to which they are effective, a question arises whether other States might take the view that they amount to a breach by Australia of international agreements already entered into before the statements were made or to a bar to the effectiveness of Australia's purported ratification of any subsequent international agreement. The same question will also arise in connection with the Commonwealth Bill, assuming it is enacted. That other States might take the view I have just mentioned would not surprise me.

What is the effectiveness of the second Commonwealth statement, as it purports to apply to state and territory administrative decision-makers, and of the state and territory statements themselves?

I have even greater doubts than those just expressed about the effectiveness of the two Commonwealth statements, as they purport to apply to federal administrative decision-makers. Even assuming that the two Commonwealth statements, as they purport to apply to federal administrative decision-makers, are fully effective, there seems to me to be a complete misconception underlying both the second Commonwealth statement, as it purports to apply to state and territory decision-makers, and the state and territory statements. That misconception is that the act of ratification of an international agreement by the federal government *could* give rise to a legitimate expectation about the future conduct, not of *federal* administrative decision-makers, but of *state* and *territory* administrative decision-makers.

There appears to be no warrant for such a conclusion in the reasoning of Mason CJ and Deane and Toohey JJ in *Teoh*.

I have already quoted for another purpose what Mason CJ and Deane said jointly at 291 of the report, but it is worth quoting part of it again for present purposes. They said (my emphasis):

> [R]atification 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 [of this country] and its agencies* will act in accordance with the Convention.

Toohey J spoke similarly at 302, saying (my emphasis) that:

> ... Australia's ratification of the Convention ... does have consequences for *agencies of the executive government of the Commonwealth.*

Not only is there no warrant in what was said in *Teoh* for a conclusion that the act of ratification of an international agreement by the federal government could give rise to a legitimate expectation about the future conduct, not of federal administrative decision-makers, but of state and territory administrative decision-makers, but such a conclusion would also be contrary to principle. Where procedural obligations arise as a result of a representation by a person, those obligations should only be imposed on the representor and his/her/its servants and agents, not on others.

Thus, both for reasons of authority and principle, the second Commonwealth statement, so far as it purports to apply to state and territory administrative decision-makers. and the state and territory statements appear to me to have been unnecessary and therefore ineffective.

(I have deliberately refrained from discussing the question of the power of Messrs Downer and Williams QC to make a statement dealing with legitimate expectations as to the future conduct of state administrative decision-makers.)

What are the legislative steps to nullify *Teoh* to which you referred and are you less dismissive of their (potential) effectiveness than you are of the effectiveness of the executive steps taken?

I was referring, first, to a 1995 Act of the South Australian parliament and, secondly, to a 1997 Commonwealth Bill which has passed the House of Representatives, but not yet passed the Senate.

I will discuss first the South Australian Act, the *Administrative Decisions (Effect of International Instruments) Act 1995.*

That Act has two core provisions, subsections 3(1) and (2). They provide as follows:

> (1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.
>
> (2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that-
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> (a) administrative decisions will conform with the terms of the instrument; or
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> (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument.

In so far as these provisions are an attempt to ensure that the act of ratification of an international agreement by the federal government gives rise to no legitimate expectation as to the future conduct of South Australian administrative decision-makers, they are, in my view, unnecessary and therefore ineffective for the reasons I have already given.

However, that does not necessarily mean that the South Australian Act was a complete exercise in futility.

Whilst the act of ratification of an international agreement by the federal government can give rise to no legitimate expectation as to the future conduct of South Australian administrative decision-makers, it is possible to conceive of acts done by the state government *itself* in connection with the federal government's act of ratification, which state acts could arguably give rise to a legitimate expectation that state administrative decision-makers would act in accordance with the ratified international agreement. For instance, the state government might publicly announce its approval of the federal government's act of ratification of an international agreement. It may be that

the provisions I have quoted above would have the effect that such an announcement would be deprived of any "legitimate expectation-generating" characteristics regarding the future conduct of South Australian administrative decision-makers which it would otherwise have had.

In deciding whether the provisions did have that effect, it appears to me that a court considering the matter should approach their construction in a particular way. In *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 252, the High Court said (footnotes omitted):

> There are certain matters in relation to which legislative provisions will be construed as effecting no more than is strictly required by clear words or as a matter of necessary implication. They include important common law rights, procedural and other safeguards of individual rights and freedoms and the jurisdiction of superior courts.

It appears to me that that approach should be held to be applicable to the provisions I am now discussing (and to those of the Commonwealth Bill I am about to discuss, if that Bill is enacted), because in so far as the provisions seek to prevent the arising of a legitimate expectation which would otherwise have arisen, which expectation would have conferred procedural rights on persons, they seek to deprive those persons of those procedural rights.

The Commonwealth Bill is also called the Administrative Decisions (Effect of International Instruments) Bill 1997 It does not, however, have the same core provisions as the South Australian Act, opting instead for a different formulation of its "anti-*Teoh*" provisions.

Its core provision is clause 5, which provides relevantly that:

> The fact that ... Australia is bound by ... a particular international instrument ... does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating ... an administrative decision.

Significantly, "administrative decision" is defined in clause 4 of the Bill as including, not only decisions by or on behalf of the Commonwealth or an authority or office holder of the Commonwealth, but also decisions by or on behalf of a state or territory or an authority or office holder of a state or territory. At the same time, however, clause 6 provides:

> Section 5 does not apply to an administrative decision by or on behalf of:
> (a) a State or Territory; or
> (b) an authority of, or office holder of, a State or Territory;
> if provision having the same effect as, or similar effect to that which, section 5 would otherwise have in relation to the decision is made by an Act passed by the Parliament of the State or Legislative Assembly of the Territory.

As to whether the Bill, if enacted, will effectively overrule *Teoh's case*, I assume that, even applying the approach of the High Court in the *Wentworth case* quoted above, it will be held to do so.

When I say "effectively overrule *Teoh's case*", I am, of course, referring to the Bill's preventing the act of ratification of an international agreement by the federal government giving rise to a legitimate expectation as to the future conduct of *federal* administrative decision-makers. In so far as the Bill goes further and deals with the position of the states and territories, it is not, for reasons I have already given, seeking to overrule *Teoh's case*.

As to the effectiveness of the Bill, assuming it is enacted, so far as state and territory administrative decision-makers are concerned, my comments are similar to those already made regarding the South Australian Act. The Bill may be construed as applying to acts done by state and territory governments themselves in connection with the federal government's act of ratification of international agreements. If so, and

assuming legislative power in that respect (a matter as to which I refrain from making any comment), then the Bill will be effective so far as state and territory administrative decision-makers are concerned; otherwise not.

Do you have any doubts as to whether the Senate will pass the Bill?

None. The issue is one as to which, as I understand it, the Coalition and the ALP take the same view, as appears from the fact that the first of the two Commonwealth joint statements I have referred to above was issued by ALP ministers, whilst the second was issued by Coalition ministers. Further, I should mention that the Bill currently before the Commonwealth parliament is similar to one introduced by the former ALP government in 1995, but not enacted before the last federal election. All in all, I am reminded of a French jibe from the 1930s: "There is more in common between two Deputies, one of whom is a Communist, than there is between two Communists, one of whom is a Deputy".

If the Commonwealth Bill should not be enacted or, if enacted, be held ineffective for some reason, to overrule *Teoh*, the attitude of the High Court in the future to the majority reasoning in *Teoh's case* if a similar case were to come before it, arises. What do you say about that question?

I can't speak on it with any real confidence. By the time such a case came before the Court, there would, at most, be only two Justices on the Bench who had participated in *Teoh's case*, namely Gaudron and McHugh JJ. Further, as I have already mentioned, although Gaudron J formed part of the majority in the case, she did so for different reasons than did Mason CJ and Deane and Toohey JJ. Also, as I have already mentioned, McHugh J dissented.

Whilst it is true that it has been said by the High Court that a change in its composition is not, of itself, a reason for that Court to review the correctness of its own earlier decisions, it is also true that it has also been said by the High Court that it is "not constrained to accept a view which commended itself to three members only of this Court": see *The Queen v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 233; see also the same case at 209 and *Cullen v Trappell* (1980) 146 CLR 1, 10. In those circumstances, it is not clear to me that the reasoning of Mason CJ and Deane and Toohey JJ in *Teoh* would be given any particular deference at all in a case which raised the question of ratification of an international agreement as giving rise to legitimate expectations as to the future conduct of federal administrative decision-makers.

If, as you think, *Teoh's case* was a "one-off" in Australian law, was it a waste of time?

Certainly not, at least not from the point of view of Mr Teoh and his children, as I have already explained. However, even if the case has no lasting significance in Australian law as a precedent, it may still be persuasive in the courts of other countries with legal systems similar to our own. By way of illustration, I will conclude this FAQ by mentioning two cases in other countries in which reference has been made to *Teoh's case*, although I hasten to say that in neither of the cases was the fundamental reasoning in the case applied.

First, I mention *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, a decision of the New Zealand Court of Appeal.

By Art 2 of the Treaty of Waitangi, the Crown guaranteed to Maori undisturbed possession of (relevantly) their language. However, the Crown's obligations under the Treaty are not directly enforceable at law. Accordingly, when the Crown took and proposed to take certain steps in

connection with the privatisation of certain broadcasting assets, steps which Maori interests considered were and would be in breach of Art 2, it was not possible for them to bring proceedings directly relying upon such alleged breach and threatened breach. Instead, they brought proceedings merely alleging (relevantly) that the Crown's entry into the Treaty had given them a legitimate expectation that they would have undisturbed possession of their language, that the Crown's taking of the steps and proposed steps had defeated and would defeat that legitimate expectation and (relevantly) that they had not been and were not being accorded procedural fairness in connection with the taking of the steps and proposed steps.

In joint reasons, six of the seven members of the Court held, for various reasons, that the lawfulness of the taking of the steps and proposed steps was not reviewable and so summarily dismissed the proceedings. In doing so, however, they found it unnecessary to deal directly with the legitimate expectation argument referred to above.

Thomas J alone dissented and, in doing so, he did deal directly with that argument. He said (at 184-85) that *Teoh's case* provided the "strongest support" for it. Having set out the majority reasoning in that case he then said:

> If an international treaty which has been signed and ratified but not passed into law can found a legitimate expectation, it is almost automatic that this country's recognised fundamental constitutional document, the Treaty of Waitangi, can also found a legitimate expectation ...
>
> ...
>
> I find the High Court of Australia's decision compelling in respect of a legitimate expectation giving rise to a procedural benefit, which Maori claim ...

The second decision is that of the Supreme Court of India in *Vishaka v Rajasthan* (unreported, 13 August 1997).

Article 32, clause (2), of the Constitution of India, contained in Part III, (which deals with "fundamental rights"), confers on the Supreme Court of India the power to issue writs, including writs in the nature of mandamus, for the enforcement of any of the rights conferred by Part III. The clause also confers on the Court a power, to be exercised for the same purpose, to issue "directions".

In *Vishaka's case*, application was made under Article 32 both for a writ of mandamus and or directions for the enforcement of a certain fundamental right alleged to be impliedly conferred on women by Part III of the Constitution, namely a right to be free of sexual harassment in employment. Sexual harassment in employment was not itself specifically dealt with by legislation in India and it was, in part at least, the absence of such legislation which had led to the application under Article 32.

The Articles in Part III primarily relied upon as the source of the alleged implied right included Article 14, which in terms prohibited the State from denying equality before the law or the equal protection of the laws, Article 19(1)(g), which in terms guaranteed the right to practise any profession or carry on any occupation, trade or business, and Article 21, which prohibited in terms deprivation of life or personal liberty except according to procedure established by law.

A crucial question for the Court was obviously whether there was implied by those express provisions a fundamental right of the kind alleged. The Court held that there was, considering itself a liberty to look to "international conventions and norms" applicable to India in order properly to construe the express provisions (at pages 6-7).

It was in that context that Verma CJI, delivering the reasons of the Court, said (at pages 14-15):

> The meaning and content of the fundamental rights guaranteed in the

> Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse ... The international conventions and norms are to be read into them ... when there is no inconsistency between them [*viz*, between the constitutional provisions guaranteeing fundamental rights, on the one hand, and the international conventions and norms, on the other] ... The High Court of Australia in ... *Teoh* ... has recognised the concept of legitimate expectation of its observance [*viz*, the observance of international conventions and norms] ...

Although my reason for referring to *Vishaka's case* is its reference to *Teoh's case*, I should not leave the case before saying something also as to its remedial aspects. Dealing with those aspects, Verma CJI pointed out (at pages 3-4):

> A *writ of mandamus* in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

In substance, what was in contemplation was the use of the Court's "direction issuing" power under Article 32 to make, in effect, temporary sexual harassment legislation and that was exactly what occurred. The Court laid down a set of twelve "guidelines and norms" (at pages 16-23), which it directed should "be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women" (at page 23). It also said that the directed guidelines and norms were "binding and enforceable in law until suitable legislation is enacted to occupy the field" (at page 24), an event which it recognised would take "considerable time" (at page 17).

It will be obvious from all that I have said about *Vishaka's case* that the Court's reference to *Teoh's case* which I have set out above was made in a context far removed from that of the latter case. The Indian Supreme Court was not concerned in the case before it with any question of a denial of procedural fairness, but with another question entirely, namely, the extent to which India's international obligations could be used to construe its Constitution.

(Indeed, it might be thought that, if the Court had wished to rely on decisions from other countries in order to provide support for its use of international agreements to which India was a party as an aid to the construction of the fundamental rights provisions of the Indian Constitution, there were countries other than Australia to which the Court might more appropriately have looked for judicial support. For instance, reference might have been made to *Slaight Communications Inc v Davidson* (1989) 59 DLR (4^{th}) 416, 427, in which the Supreme Court of Canada had held that the content of the rights guaranteed by the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution Act, should be informed by Canada's international human rights obligations. Reference might also have been made to *DPP v Pete* [1991] LRC (Const) 553, 565, in which the Tanzanian Court of Appeal construed the Bill of Rights and Duties enshrined in the Tanzanian Constitution by reference to the provisions of the African Charter of Human and Peoples' Rights, to which Tanzania was a party.)

Nevertheless, I consider it a matter of no little significance that the Indian Supreme Court did in *Vishaka's case* focus on and make approving reference to *Teoh's*

case. Its doing so suggests to me that the fundamental reasoning in *Teoh* may well come to be relied upon on some other occasion in Indian courts.

Endnotes

[1] This question is included only for the benefit of those not familiar with computing jargon.