TEOH REVISITED AFTER *LAM*

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Paper presented at an AIAL seminar, Canberra, 17 June 2003.

There are some occasions when appellate courts cannot resist the temptation to make, what at least appear at the time, as paradigm or cosmic shifts. One could identify *Mabo*[1] as one, *Political Advertising*[2] as another. *Teoh*[3] is another example where, at least in the public perception, the High Court was seen to have revolutionised our law in some way. What we saw in *Teoh* was the transformation of the Executive act of ratification of a treaty into a positive statement creating an expectation with direct domestic legal consequences. In this presentation what I propose to do is briefly recount a little of the history of *Teoh* and then analyse what I think the recent High Court decision of *Lam*[4] stands for, and then make a few observations on it.

In *Teoh*, at the same time as the High Court was giving us a new doctrine on the significance of treaty ratification for purposes of administrative law, it was emphasizing that treaties did not form part of Australian law unless validly incorporated by statute. It repeated the orthodoxy that an unincorporated treaty cannot operate as a direct source of individual rights but it may be relevant to the construction of ambiguous legislation or the development of the common law.[5]

But at the same time that it was emphasizing those orthodox doctrines it indicated that ratification of the Rights of the Child Convention gave rise to a legitimate expectation, that the best interests of children would be a primary consideration in decisions affecting children, based on the wording of an article in that Convention. Not only was this a new use for treaties, but it took legitimate expectation as a doctrine which had been around for a number of years to new lengths. There are those who said that there was nothing particularly surprising in the use made by the High Court of the treaty, but certainly I would dispute that. We will see when we come to *Lam* that a return to the more traditional notions of legitimate expectation reflected in that case suggests that the way in which the High Court used the treaty in *Teoh* to ground legitimate expectation was a rather new reach for the law.

I cannot resist first reading out one or two passages from the *Teoh* judgments. I will start with the passage from the joint judgment of Mason CJ and Deane J that starts 'junior counsel for the appellant', meaning myself. I had the good fortune that the Solicitor-General was unavailable to do the case at short notice; Jim Spigelman QC was called in to take over as Senior Counsel but the Solicitor-General insisted that I should put the treaties argument. So I was left to put this and met a very hostile High Court as is reflected in what follows in this passage.

> Junior Counsel contended that a Convention ratified by Australia but not incorporated could never give rise to legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that provisions of this Convention do not form part of our law is a less than

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> compelling reason. Legitimate expectations are not equated to rules or principles of law. Moreover the ratification is not to be dismissed as a merely platitudinous or ineffectual act.[6]

And, having given therefore treaty ratification significance, they then went on and said:

> ... the existence of legitimate expectation does not compel the decision maker to act in a particular way. That is the difference between a legitimate expectation and the binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door.[7]

But that is not what they were doing they insisted. All they were doing was recognising a procedural right which gave rise to an expectation that you had to notify the person concerned if you were not going to meet that expectation, in this case meet the expectation that the best interests of the children would be a primary consideration.

At the time *Teoh* was decided, Justice McHugh delivered a quite powerful and highly critical dissent from the majority view, as expressed particularly in the joint judgment of Mason CJ and Deane J. He said:

> ... 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 of law, 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 has no knowledge.[8]

So Justice McHugh thought that the way in which in the joint judgment a treaty not even known about by the person affected was taken to give rise to an expectation was really taking this doctrine to extraordinary, if not comical, lengths.

Now, I am sure all of you are aware of the political storm that resulted from the *Teoh* decision in relation to the use of treaties. We saw three attempts to pass legislation to overturn the decision. That never actually succeeded because the Bill was always held up in the Senate. We had an Executive statement by the Attorneys-General in two governments seeking to displace the basis for any expectation based on a treaty. And we had Gareth Evans summing up his view of the decision in these words:

> ... for practical purposes, the impact on decision-making is just about as great as if the treaty provision in question were to be treated substantively as part of the law. If they have not yet come into the house through the back door, they have certainly come through the back gate as far as the back garden.[9]

And it was really that perception, despite the High Court's protestation that they had not in fact introduced treaties through the back door, that lead to the extraordinary reaction. Most of that reaction was focussed on treaties and the particular role of treaties and perhaps people somewhat lost sight of the underlying issue. This was what sort of action in fact could be used to found a legitimate expectation. In the years after *Teoh*, without any legislation and despite the Executive Statement, there were a few cases where *Teoh* was raised successfully or challenges brought. But for the most part, I think, decision-makers in response improved their decision-making processes. It was not as if they made a point of disavowing any reliance on treaty obligations and, particularly in the immigration area, immigration instructions certainly ensured that things like the interests of children were taken into account in migration decisions.

There did remain some concern I know in, for instance, an area like the sentencing of prisoners who had children that this might provide considerable scope for argument based on *Teoh* and the best interests of children, but again little sign of this emerged. The one clear reaction following *Teoh*, was that, when it did arise, the Federal Court certainly did not think much of the attempt to oust any legitimate expectation by general declaration by the

Attorney-General to the effect that no treaties would give rise to an expectation. This was regarded as probably not effective as a means of displacing any expectations.[10]

So that was where we were left after *Teoh*. The concerns were certainly well and strongly felt, but the perception as to the effect of the decision in terms of introducing treaties through the back door began perhaps to be recognised as perhaps an overreaction. We did not see the tumbling down of the world some had expected. The cosmic shift that people thought had occurred perhaps had not occurred.

When the emotion of the moment passes, often the fact an unattractive policy that prompted the decision is taken away, and a few years have passed, we often see the courts being willing once again to look at the theoretical foundation of an earlier 'cosmic' decision and at rejigging what had been said before, and perhaps even retreating. And I think that is essentially what we have seen in the *Lam* decision. Just as in the native title area and implied freedom areas we have seen some rearticulation and perhaps back-tracking in cases some years after *Mabo* and *Political Advertising*, so with *Lam* I think we are beginning to see a new approach, if not in fact a return to an earlier approach, to legitimate expectation. This is a recognition, I believe, that there were some significant weaknesses in the theoretical underpinning of the *Teoh* judgments.

So what has *Lam* done to *Teoh*?

What *Lam* seems to me to have done to *Teoh* is essentially to pick up many of the criticisms Justice McHugh made in his powerful dissent. *Lam* was not directly concerned with treaties, and in fact those arguing *Lam* made a point of saying they did not require the court directly to address whether *Teoh* was right or wrong, so far as it dealt with reliance on treaties. But what *Lam* does say about legitimate expectations will, I think, have a major impact on both legitimate expectations *per se* and in particular on the use of treaties to found legitimate expectations.

Lam concerned a resident of Australia of Vietnamese origin, convicted of drug trafficking. He had only two children, both Australian citizens. But the issue was not the interests of the children as such, their interests had clearly been considered and taken into account by the decision-maker. So there was no separate claim based directly on the *Teoh* case in relation to the interests of the children. Rather the case was concerned with the visa cancellation process and the expectation which was said to have arisen because the Department had asked Mr Lam for information in order to contact the children's guardian. He said that the fact that the Department had asked for the information created an expectation that they would in fact contact the children's guardian. It turned out that they did not contact the children's guardian; they in fact found they had more than enough information and material about the children and their predicament without the need to go off and contact the guardian. But because they had said in a letter we want this information in order to contact the guardian, and the information had then been provided, Mr Lam said this was sufficient to found an expectation that the Department would do what it said it would do - contact the guardian. That had not occurred and that therefore, it was said, invalidated the decision.

The High Court bench made short work of this argument although it did not prevent them from writing quite a few pages on the issue. They unanimously dismissed the application. There was no dissent this time. All five judges thought that there was no basis to say that this particular expectation was a legitimate expectation and certainly not one which would, by failing to follow it, invalidate the administrative decision.

Now before turning to the detail, remember that when we are talking about legitimate expectation we are talking about areas of discretionary decision – namely, where a decision-maker has a discretion. In that sense the argument is that the expectation in some way

affects the way in which the decision-maker exercises that discretion. In another recent migration case the Full Federal Court emphasised that legitimate expectation is not relevant where there is a statutory duty.[11] In that case the Court was concerned with the duty in section 196 of the Migration Act to deport or to remove a person as soon as reasonably practicable. The argument was that the existence of the Refugees Convention and non-refoulement obligations meant that one should not remove a person to a country if there was a risk of persecution. It was argued that in some way the decision-maker was inhibited by the treaty as to the way in which they could exercise their duty to remove as soon as reasonably practicable. The Court rejected that. They said that as there was this duty to remove, one could not rely on expectations or import administrative law doctrines which depended on the existence of a discretion. So, when we are talking about legitimate expectations, we are concerned with discretionary areas.

In *Lam* there were separate judgments by the Chief Justice, Hayne J and Callinan J, and a joint judgment by McHugh and Gummow JJ. Justice McHugh is the only survivor from the *Teoh* bench and he, with Justice Gummow, wrote quite a lengthy essay on legitimate expectation and what it all means. Justice Hayne avoided many of the difficult issues but says in this case there was no basis for legitimate expectation. The other two judges agree but make some interesting observations.

It is always difficult to try and summarise a lengthy High Court judgment but it does seem to me that three principal propositions can be extracted from the *Lam* judgment.

First, legitimate expectation is not a free standing administrative law doctrine but really ought to be considered as simply an aspect of procedural fairness. As McHugh and Gummow JJ say 'the notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in a particular case'.[12] This picks up earlier statements by both McHugh J in *Teoh* and Brennan J in *Quinn*[13] to similar effect, that one can only understand legitimate expectation, and one really ought to treat it, simply as an aspect of procedural fairness in that it helps to give content to what procedural fairness demands in a particular case. There is no need, on this approach, to consider the existence of an expectation in determining whether procedural fairness applies in the first place.[14]

The second broad proposition is that there is again a requirement for some *subjective* basis for there to be an expectation or at least that there is a basis for a reasonable inference that an expectation has been created. A general action such as ratifying a treaty, which no-one prior to *Teoh* would ever have considered equivalent to the types of conduct that had in past cases given rise to an expectation, seems unlikely now to be regarded as giving rise to a legitimate expectation. What the majority of the Court seems to be emphasizing is that you need at least to be able to show the person was aware of a particular promise, statement or expectation, or that there is some long established practice or some deliberate Ministerial statement. There must be something which would enable you to say that having regard to the ordinary expectations of people you might have thought that the conduct was intended to mean that something would in fact happen in terms of procedure or consideration. A general action like ratifying a treaty is unlikely to meet that test. And so in that area at least it seems to me that the Court has reverted very much to the cases prior to *Teoh*.

The third proposition that comes through quite strongly in the *Lam* decision is that there is no place in Australian administrative law for some notion of 'substantive fairness' or 'substantive expectation'. This is an area which the English courts have readily embraced in recent years, sometimes under the guise of an abuse of process. But certainly the High Court is emphasizing that legitimate expectation, whatever it is, is not one that can create substantive expectations and outcomes. It does no more than impose procedural requirements.

Justices McHugh and Gummow dealt with these three broad conclusions under what they posed as three questions.

(i) Who entertains the expectation?
(ii) How does it come to arise?
(iii) To what outcome is it addressed?[15]

As to the first question, who entertains the expectation, if one sees legitimate expectation as seeking to give content to procedural fairness in a particular case, what the question does is highlight that those whose rights are not directly affected may nevertheless have some entitlement to have their interests considered in some particular way. So just as in *Teoh* it was the interests of the children who were entitled to be considered, there may be other instances where other people's interests are required to be considered as a matter of natural justice because of a particular expectation. In this area it does not seem to me that McHugh and Gummow JJ are saying anything particularly new, but they are certainly emphasizing again that it is really all part of answering the question of what does procedural fairness require?

As to the second issue, how does an expectation come to arise, I have said that it is not confined to instances of *subjective* knowledge. Courses of conduct, or particular types of statements may be able to give rise to a *reasonable* expectation – based on what is usual in human affairs. And so, McHugh and Gummow JJ distinguish a long standing expectation that people presenting themselves at a football ground will be admitted, as in the *Heatley v Tasmanian Racing Commission* case[16], or a statement by a Minister in Parliament about a particular proposed course of action as in *Haoucher.*[17] One can say that those sorts of expectations, arising from that sort of conduct, can give rise to legitimate expectations. In the ordinary course one can infer that it was intended that people could rely on that statement or that action to mean something, because it was long established conduct or a specific statement with some clear serious intent.

In *Teoh* one only had general actions like ratifying a treaty and no specific expression of intention by the Executive that was directed at any particular area of decision-making. In that situation, that will not be sufficient to found a legitimate expectation. In *Teoh*, as I have indicated, the court was concerned to say that ratifying a treaty was a serious act and that it must be intended to signal some commitment by the Executive to behave in a certain way. But it seems to me that in *Lam*, what McHugh and Gummow JJ and probably Callinan J[18] are certainly saying is that they do not think ratifying a treaty is likely to fall into that particular category. Gleeson CJ seems to take a slightly narrower view as to what can amount to an expectation. He seems to put more emphasis on a subjective expectation as a consequence of which the person acted or omitted to do something.[19] In other words he looks at it more as almost an estoppel situation, where because of someone saying something another person acted in a certain way. It seems to me that the majority of the five judges go beyond an actual or subjective expectation, to allow an expectation on the basis of action or conduct from which one can draw a reasonable inference that an expectation was intended to be engendered. However, I consider we have clearly seen a pulling back of *Teoh* in this area.

The third issue is what outcome is addressed. As I have said, the Court again emphasised that legitimate expectation gave rise to no substantive rights, it was only a procedural right. They emphasised this also in *Teoh.* After *Teoh,* some commentators thought that, in a sense, if you are not careful the line between procedural and substantive may get easily blurred. The Chief Justice in *Lam*, for instance, emphasized that if by stating an intention a person becomes bound to that course of action, regardless of whether any disadvantage to a person results, then you in a sense turn that expectation into a substantive right. This he considered clearly cannot be correct.[20] So if, despite having said something, and not acting in accordance with it means the person does not actually suffer any disadvantage in a

procedural fairness sense, or certainly in terms of the ultimate outcome, it is very hard to see why that ought to be an expectation that gives rise to any particular legal remedy. If it does, you, as it were, have turned it into a substantive right.

The Court is very conscious of this distinction between substantive expectations or rights and procedural rights. This concern to emphasise that Australia is not going down the path of the English courts prompts an interesting excursus by McHugh and Gummow JJ into this whole area of why the English courts may have gone the way they have, no doubt influenced by the European tradition. They quote from some of the Canadian and New Zealand cases which have clearly rejected this approach. I will quote a short passage from a Canadian judge which they commend as applicable here. Justice Binnie in this Canadian case says:[21]

> It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief and procedural fairness at the low end through enhanced procedural fairness based on conduct thence onward to estoppel (though it is not to be called that) including substantive relief at the high end, ie is the end representing the greatest intrusion by the courts into public administration. .... In ranging over such a vast territory under the banner of 'fairness' it is inevitable that subclassifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations at the low end would fit comfortably with our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate.

McHugh and Gummow JJ endorsed that statement.

It is interesting to see where the English courts have got to. I saw in a very recent English report a case called *Rowland v Environment Agency.*[22] This concerned whether there was a legitimate expectation as a result of statements made by a public authority concerning public rights of access over a part of the Thames. A person had been led to believe there were no public rights of access and bought the piece of land beside the Thames on this basis. The court found in fact that there was not sufficient evidence to give rise to a legitimate expectation to that effect and it was clearly wrong as a matter of law anyway. There clearly were public rights.

Having decided that there was not a sufficient basis for an expectation, nevertheless the judge in that case went on to consider, what I found a quite extraordinary proposition, that a legitimate expectation might be regarded as 'property', within the meaning of the European Convention on Human Rights, and that the 1998 Human Rights Act would give some protection to this property interest. This was in order to meet the obligation to respect property interests imposed by Article 1 of the Convention. The judge said that based on European jurisprudence it seemed that a legitimate expectation relating to property may be protected by Article 1. A legitimate expectation could arise notwithstanding the fact that it was beyond the powers of the public body which fostered the expectation, such as making a promise or a statement which clearly was *ultra vires* and could not be made. While the legitimate expectation could not entitle a party to realisation of the expectation which was beyond the powers of the public body to give, nevertheless it may entitle them to other relief, eg the benevolent exercise of a discretion or the payment of compensation. So in England one has seen legitimate expectation go so much further than it has ever been suggested it could go here. They are now seeing it tied up with protection of human rights under the Bill of Rights.

It is against the background of that sort of development that I think the High Court in *Lam* was sending a strong message that in Australia there were not to be any substantive rights associated with the doctrine. It is at most a procedural right that cannot go any further, and even as a procedural right there has to be a basis for it in the first place. Ultimately one comes back to asking has procedural fairness been accorded? If one accords procedural fairness in all the circumstances then even if there is a basis for legitimate expectation it will

not get you very far. This is perhaps best summed up in the Full Federal Court case after the *Lam* decision of *Untan*[23] where they said 'disappointing an expectation, however reasonable, will not amount to procedural unfairness unless some unfairness is involved in the disappointment'. And so in Mr Lam's case he might have had an expectation, even a reasonable expectation, but it did not lead to any injustice as all the issues concerning his children and their best interests were clearly before the decision-maker. There was more than adequate material in relation to that and so his claim failed.

What a contrast to 1995 when, faced with an unpopular policy that they did not like, the High Court in *Teoh* were prepared to turn treaties into significant instruments in administrative law. I think with *Lam* we have come a long way since then, for the best, although not everyone will agree.

Endnotes

1 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.
2 *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106.
3 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
4 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] HCA 6; 77 ALJR 699.
5 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1994) 183 CLR 273 at 287.
6 Ibid at 290-291.
7 Ibid at 291.
8 Ibid at 314.
9 Gareth Evans, 'The Impact of Internationalisation on Australian Law: A Commentary' in Cheryl Saunders ed, *Courts of Final Jurisdiction: the Mason Court in Australia* (1996).
10 *Department of Immigration v Ram* (1996) 69 FCR 431, 437; *Davey Browne v Minister for Immigration* [1998] FCA 566; *Tien v Minister for Immigration and Multicultural Affairs* [1998] FCA 1552.
11 *Applicant M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 458.
12 *Lam* at [105]. See also Gleeson CJ at [33].
13 Quoted in *Lam* at [81] and [82].
14 Ibid at [63].
15 Id.
16 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 509.
17 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 681.
18 *Lam* at [147].
19 Ibid at [36] – [38].
20 Ibid at [28].
21 *Mount Sinai Hospital Center v Quebec (Minister for Health)* [2001] 2 SCR 281, quoted in *Lam* at [80].
22 [2003] 2 WLR 1233.
23 *Untan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 69 at [99].