

BALANCING SOVEREIGNTY AND INTERNATIONAL LAW: THE DOMESTIC IMPACT OF INTERNATIONAL LAW IN AUSTRALIA

At present legal theory and practice, with their roots in another and more "nationalistic" age, struggle with the problems created by the ever more strongly perceived requirements for the internationalization of political, social and legal realities.¹

THIS statement perfectly encapsulates the current position in Australia. As Sir Anthony Mason commented in a speech in 1992: "The authoritative statements by our judges [on the relationship between national and international law] date back to a time when legal positivism was the order of the day and notions of sovereignty were paramount."² Since then, the debate outside the courts over the 'proper' relationship between Australia and the rest of the world has moved to the centre of the political stage, with some groups claiming that Australia is sacrificing its sovereignty to international institutions, while others argue that sweeping Commonwealth legislative and executive powers are necessary for Australia to play an effective role in the international community.

It is common in this debate to hear claims that a particular view is constitutionally mandated, or that the system that regulates the relationship between international and domestic law in Australia, however that system is perceived, cannot be effectively altered. This paper aims to give an overview of the relationship between these two areas of law, analysing the historical common law position, the impact that the Commonwealth Constitution has on this position, and the underlying rationale of the law as it currently exists. This position will be compared with that which prevails in other nations, particularly those with federal parliamentary systems. It

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1 Gulmann, "Denmark" in Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987) p35.

2 Mason, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Commonwealth Law Bulletin* 750 at 750.

will be argued that Australia should adopt a system that gives Parliament an active role in the treaty ratification process, and that allows duly ratified treaties to be directly applied in municipal law.

A lack of rigour has characterised much of the literature and case law in this area.³ In particular, there is a tendency for the term 'international law' to be used when, in fact, the writer is referring specifically to customary international law or to treaty law. This is significant for, as will be seen, quite different considerations underlie the rules that regulate the use of each type of international law. This paper will first examine treaty law, discussing the scope for a system that would allow the direct application of treaties in Australia. It will then look at the steadily evolving uses being made of international norms in the system as it currently exists, both as an interpretive aid and as an influence on administrative law. This discussion will draw upon a recent decision of the High Court that significantly influences the law in this area. Finally, the examination will turn to the rules relating to customary international law, with a focus upon the current notion of customary law as a 'source' of the common law.

It is not proposed in this paper to conduct an analysis of the theories of monism and dualism,⁴ nor of the doctrines of incorporation or transformation that are the practical doctrines which emerge from these theories.⁵ This is because, as many modern authors now recognise, the doctrinal dispute is largely without practical consequence.⁶ Attempts to classify a given system under the banner of one of these theories may actually serve to distort the practice of states.⁷ This is illustrated, for

3 Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268 at 1273.

4 For an account of these theories, see Schaffer, "The Interrelationship between Public International Law and the Law of South Africa: An Overview" (1983) 32 *International and Comparative Law Quarterly* 277 at 278-283; Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* (Wilander, Helbing & Lichtenhahn, Stuttgart 1971) pp222-226; Erica-Irene Daes, *Status of the Individual and Contemporary International Law*, UN Doc E/CN.4/Sub.2/1989/40 (1989) at 4-22.

5 Holloway, *Modern Trends in Treaty Law* (Stevens & Son, London 1967).

6 Jennings & Watts, *Oppenheim's International Law* (Longman, Essex, 9th ed 1992) p54; Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p4.

7 Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* pxxvi; Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 4th ed 1990) p56.

example, by the difficulty in categorising the practice of a state in which the highest tribunal directly applies customary international law.⁸

THE DIRECT APPLICATION OF TREATIES

The Existing Law

The Common Law Position

The English common law position relating to the use that courts may make of international treaties has been established for over one hundred years. It was settled before the Commonwealth Constitution came into effect in 1901. The case often cited as giving the first clear formulation of the rule is *The Parlement Belge*,⁹ decided in 1879. The rule was restated in 1892 in *Walker v Baird*,¹⁰ but the clearest formulation is found in the judgment of the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario*.¹¹ In this case Lord Atkin, delivering the judgment of the Judicial Committee, stated that:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail an alternation of existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decided to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.¹²

8 See *Chung Chi Cheung v R* [1939] AC 160 at 168; *Young v Registrar, Court of Appeal [No 2]* (Unreported, NSW Ct of Appeal, 11 October 1993) p4.

9 (1879) 4 PD 129; see the analysis in MacDonal, "The Relationship between International Law and Domestic Law" in MacDonal, Morris & Johnston (eds), *Canadian Perspectives on International Law and Organisation* (University of Toronto Press, Toronto 1974), pp114-115.

10 [1892] AC 491.

11 [1937] AC 326.

12 At 347.

The above three cases are often cited as authority for the rule that treaties require implementing legislation before they can be internally effective.¹³ In fact this is not quite correct. Indeed there are subtle variations within the rules as formulated in the judgments themselves. For example, Sir Robert Phillimore in *The Parlement Belge* refers to treaties that affect 'private rights'¹⁴ as needing legislative implementation, while in the passage quoted above Lord Atkin considered that legislation is necessary if the treaty entails the "alteration of existing domestic law".¹⁵ Doeker, having considered the above cases, concluded that it became established that treaties which

- (i) affect the private rights of British Subjects, or (ii) involve any modification of the common or statute law by virtue of their provisions or otherwise, or (iii) require the vesting of additional powers, or (iv) impose additional financial obligations upon the Government ... must receive parliamentary assent through an enabling Act of Parliament.¹⁶

While this formulation is fairly sweeping, it leaves open the possibility that there are some treaties that can operate domestically without parliamentary sanction. This is a possibility that could assume special importance in the context of a government's responsibilities under administrative law, a topic to be explored later. Clearly, however, this specific enumeration of categories of treaties indicates that there were precise reasons why some categories of treaties should not directly apply. Later shorthand formulations of the rule have tended to obscure these categories by implying that no treaties directly apply, thereby initiating an ill-considered extension of the rule.

It is important to recall that the above cases state the common law rule. If a contrary rule were to be imposed by the Commonwealth Constitution, or even by statute, then this rule would necessarily prevail over that stated

13 McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 *Adel LR* 367 at 367.

14 (1987) 4 PD 129 at 150.

15 [1937] AC 326 at 347; see Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* (Law Book Co, Sydney, 2nd ed 1984) p88.

16 Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (Martinus Nijhoff, The Hague 1966) p170; see also Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p134.

above.¹⁷ It is therefore necessary to turn to an examination of the impact of the Commonwealth Constitution.

The Constitutional Position

Although it was clearly possible for the Commonwealth Constitution to alter the common law rule, in practice Australian courts have never properly considered the possibility that this may have occurred. Indeed it is not uncommon in the cases to find reference to "our constitutional system"¹⁸ where what is being referred to is in fact the British Constitutional system. This is perhaps not surprising given that for many years the Imperial Government entered into and to some extent implemented treaties for the entire British empire. As McGinley puts it, "In funnelling Australia's treaties through the English parliamentary system, it is not surprising that the Judicial Committee and the colonial courts would accept without question that a stricture of United Kingdom constitutional law should also apply to Australia."¹⁹

The fact that adoption of the British system was not surprising does not make it any less unfortunate. British practice evolved in a unitary state where the executive is dependent upon the confidence of a majority of one House of Parliament and where the Upper House is relatively weak.²⁰ It is not hard to see why such a system is not perfectly adapted to the operation of a federal system. As Kidwai has noted, the courts have had to struggle hard out of the "labyrinth of law, lore and tradition",²¹ and many of the difficulties could have been avoided if imperial and colonial jurists and legislators had not been inhibited by British constitutional theories and conceptual idiosyncrasies.²²

17 McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 *Adel LR* 367 at 373; Burmester, "Is International Law Part of Australian Law?" (1989) 24(6) *Australian Law News* 30 at 30; Sawyer, "Australian Constitutional Law in Relation to International Relations and International Law" in Ryan (ed), *International Law in Australia* p47.

18 *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 40 ALR 61 at 66 (hereafter *Simsek*).

19 McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 *Adel LR* 367 at 373.

20 See discussion in Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* pp294-295.

21 Kidwai, "External Affairs Power and the Constitutions of British Dominions" (1976) 9 *UQLJ* 167.

22 At 169.

In fact, the Australian Constitution very nearly did fundamentally alter the traditional interrelationship between international and municipal law. It was really only as a result of a misunderstanding that the framers of the Constitution removed a reference in what was then covering clause 7 (now covering clause 5) which would have introduced the United States model, which provides for the direct application of treaties.

Clause 7 of the Commonwealth of Australia Bill of 1891 read as follows:

The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, *and all treaties made by the Commonwealth*, shall, according to their tenor, be binding on the courts, judges, and people of every state, and of every part of the Commonwealth, anything in the laws of any state to the contrary notwithstanding; and the laws and treaties of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is the Commonwealth.²³

This provision was clearly modelled upon Article VI (2) of the United States Constitution.²⁴ In 1884, in the *Head Money Cases*,²⁵ the United States Supreme Court had held that, as a result of this provision, some treaties were 'self-executing', meaning that they could be directly applied domestically. It seems likely that, had the clause survived in this form, a similar result would have been reached in Australia.²⁶

Unfortunately, the Convention Debates are less than clear on whether or not this was a result that the framers intended to achieve. At both the Sydney Convention in 1891 and the Adelaide Convention of 1897, clause 7 was debated but the debate focussed exclusively upon the last section of the clause, relating to the law in force upon British ships.²⁷

23 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901, reprinted 1976); or *Official Record of the Debates of the Australasian Federal Convention*; (Sydney, 1891) Appendix (Legal Books Pty Ltd, Sydney 1891) p944. Emphasis added.

24 Quick & Garran, *The Annotated Constitution of The Australian Commonwealth* p353; Kidwai, "External Affairs Power and the Constitutions of British Dominions" (1976) 9 *UQLJ* 167 at 174.

25 112 US 580 (1884).

26 Doeker, *The Treaty-Making Power in the Commonwealth of Australia* p32.

27 *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1891) at 944; (Adelaide, 1897) at 626-628, 1222.

In the 1891 Draft Bill, the power to legislate with respect to 'External Affairs' now found in s51(xxix) appeared in s52(xxvi) as a power relating to 'External Affairs and Treaties'. This became s52(xxix) at the Adelaide Convention. The inclusion of the words "and Treaties" turned out to be problematic, for the New South Wales Legislative Council debated the provisions in 1897 and suggested amending s52(xxvi) and clause 7.²⁸ The concern of the New South Wales Legislative Council was not whether treaties should be directly applicable, but that Australia should not be seen to be making a claim to the power to enter into treaties on its own behalf. The prevention of this interpretation of the provisions was the announced purpose of the amendment when it was introduced by Mr Barton at the Sydney Convention in 1897. The effect of the amendment, which was adopted by the Convention,²⁹ was to strike out the words "and Treaties" from s52(xxix) and to remove the reference in clause 7 to treaties. The problem with this, as Hendry has pointed out, is that "[i]n both clauses the word 'treaties' was deleted for the same reason, although clause 7 and clause 52(xxvi) deal both with different subject matters."³⁰ While it is clear that at the time of Federation the Commonwealth did not have or want a treaty making power,³¹ this is not a valid reason for removing a provision that makes any duly made treaty domestically applicable.

The only statement made in the Convention Debates that suggests some understanding of the likely effect of clause 7 was made by Mr Reid. He stated that the provision

would be more in place in the United States Constitution, where treaties are dealt with by the President and the Senate, than in the constitution of a colony within the empire. The treaties made by Her Majesty are not binding

28 NSW, *Parl, Debates* (1897) Vol 89.

29 *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1897) p240.

30 Hendry, *Treaties and Federal Constitutions* (Public Affairs Press, Washington 1955) p33; Doeker, *The Treaty-Making Power in the Commonwealth of Australia* p34.

31 Brazil & Mitchell, *Opinions of Attorneys-General of the Commonwealth of Australia*, Vol 1 (AGPS, Canberra 1988) 2 at 134. For a discussion of the prevailing view of the Commonwealth's external competence at the time of Federation, see Lefroy, "The Commonwealth of Australia Bill" (1899) 15 *LQR* 281 at 291; Brown, "The Commonwealth of Australia Bill" (1900) 16 *LQR* 24 at 26; see generally, La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Melbourne 1972).

as laws on the people of the United Kingdom, and there is no penalty for disobeying them.³²

While this passage expresses an awareness of the difference between the United States and British systems, it does not appear to recognise the possibility of a constitutional alteration of the prevailing system. The delegates at the Conventions never addressed themselves to the question of which system was preferable. Mr Glynn, having questioned the wisdom of striking out the reference to treaties in clause 7, requested that an opportunity be provided to reconsider the matter.³³ This appears never to have been provided. As a consequence, a profound change was made to the Constitution Bill without ever considering the central issues that arose out of that change.

The only provision in the Constitution in which the word 'treaties' remains is s75(i), which gives the High Court original jurisdiction "in all matters arising under any treaty". This phrase is borrowed from Article III (2) of the United States Constitution, and it makes perfect sense in the context of a system where treaties can directly operate domestically. It is, however, very difficult to give the provision meaning in the context of the traditional British common law rules. As Mr Owen Dixon KC (as he then was) said, when giving evidence to the Royal Commission into the Constitution in 1929,

no one yet knows what is meant by the expression "matters arising under a treaty". The word "matter" refers to some claim, the subject of litigation. It must, therefore, be a claim of legal right, privilege, or immunity. Under a British system, the executive cannot, by making a treaty, regulate the rights of its subjects If a treaty is adopted by the legislature and its terms are converted into a statute, it is the statute and not the treaty which affects the rights and duties of the person.³⁴

32 *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1897) p240.

33 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 1898) p30.

34 Aust, Royal Commission on the Constitution, (Reden, Chair) *Report* (1929) at 102; see also Quick & Garran, *The Annotated Constitution of The Australian Commonwealth* p769.

Mr Glynn, at the Melbourne Convention in 1898, suggested that s75(i) should be struck out.³⁵ As was mentioned earlier, he had questioned the wisdom on deleting treaties from clause 7, and it seems that he alone of the Convention delegates understood that clause 7 and s75(i) were part of a cohesive scheme. Ironically, however, while his attempt to retain treaties in clause 7 was met with the argument that the term must be deleted for the sake of consistency, with regard to s75(i) it was replied that "[i]t cannot do any harm to leave this provision in the clause" as "[s]ome day hereafter it may be within the scope of the Commonwealth to deal with matters of this kind".³⁶

This logic is difficult to follow. As Cowen and Zines have observed, "[i]t is fairly clear that the Founding Fathers were not very sure of what they were doing here."³⁷ To omit two out of three references to treaties, but to leave in a third provision because it is deemed harmless, is a strange approach to constitutional creation. Further confusion is created by the reference to the possible future scope of the Commonwealth to deal with "matters of this kind". It seems at least possible that the framers were once again thinking about the treaty-making power, and that they considered that if the Commonwealth were to acquire a treaty-making power it would be necessary for the High Court to hear matters arising under such treaties. It is difficult to see why a similar argument could not also have prevented the amendment of clause 7.

Another complication was added with the enactment of s38 of the *Judiciary Act* 1903 (Cth), which gives the High Court exclusive jurisdiction in matters arising directly under any treaty. As should be apparent from the discussion above, there will be few, if any, matters that can be described as arising under a treaty at all, whether directly or otherwise.³⁸ Any workable interpretation of the provision must therefore distinguish between matters arising directly and indirectly, leaving scope for both to exist.

A few attempts at interpreting the provision have been made. The issue came before McLelland J in *Bluett v Fadden*,³⁹ a case relating to the

35 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 1898) p320.

36 As above (Mr Symon).

37 Cowen & Zines, *Federal Jurisdiction in Australia* (Oxford University Press, Melbourne, 2nd ed 1978) p27.

38 Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p108.

39 (1956) 56 SR (NSW) 254.

seizure of shares under the *Trading with the Enemy Act 1939-52* (Cth). His Honour considered that the words "a matter arising under a treaty" had three possible meanings. They were that a matter could so arise if the right sought to be enforced owed its existence to the treaty, if the decision in the case depends upon the interpretation of a treaty, or if either of the preceding circumstances existed.⁴⁰

McLelland J went on to state that

in Australia, a treaty does not itself have legislative effect and cannot be the subject of judicial cognisance until it has received legal sanction and has been carried into operation by appropriate legislative action.

It is the legislation which creates the rights which are justiciable and I am of the opinion that, having regard to this fact, the rights can only be said to arise under the legislation and cannot be said to arise under the treaty. Section 75 must, I think, be taken to refer to cases where the decision of the case depends upon the interpretation of the treaty. In such cases, the matter in question arises under the treaty.⁴¹

According to McLelland J, a matter would arise 'directly' under a treaty when, for example, the executive was instructed by legislation to act in accordance with a treaty, that treaty not having itself been incorporated into legislation.⁴² The case has been criticised on the basis that mere differences in drafting method have substantive jurisdictional consequences, and on the basis that it is only in a very peripheral sense that a question of treaty interpretation means that a matter 'arises' under a treaty. These critics are often content with the conclusion that the clause has no meaning, and is simply the result of foolish copying of the United States Constitution.⁴³

The real difficulty with construing s75(i) arises from the assumption that the provision does not mean what it says. It is always taken as a starting

40 At 261.

41 As above.

42 As above. A similar suggestion is made by Lumb, *The Constitution of the Commonwealth of Australia- Annotated* (Butterworths, Sydney, 4th ed 1986) p267.

43 Cowen & Zines, *Federal Jurisdiction in Australia* p29-30; Wynes, *Legislative Executive and Judicial Power in Australia* p452.

point that treaties do not apply directly in municipal law, and so commentators have striven, fairly unsuccessfully, to find a meaning that is compatible with this historical position. However, as has been stressed above, it is possible for the Constitution to override this practice, and if a Constitutional provision is inconsistent with a common law rule, the common law rule should be abandoned. Instead of taking this approach, s75(i) has been labelled meaningless in order to bring it into conformity with the common law rule.

Section 75(i) could be taken to mean (even without clause 7) that a treaty may have an independent internal effect without the need for implementing legislation. This reading is to some extent supported by ss76 and 77, which clearly distinguish between matters arising under a treaty and matters arising under legislation.⁴⁴ It is submitted that this was the meaning the section was intended to have, but that this meaning was obscured by the misconceived alteration to clause 7. Notwithstanding this, however, in so far as the Constitution provides any guidance on the relationship between treaties and municipal law, it suggests that treaties should directly apply. At a minimum, it should be clear that there is nothing in the nature of Australia's constitutional structure that would prevent the legislature giving treaties direct effect via statute.⁴⁵

That said, it must be acknowledged that it is now too late for the courts to change their approach to the municipal application of treaties without the aid of the legislature. There is now an unbroken line of authority going back at least as far as 1905⁴⁶ indicating that, for most types of treaties, legislation is required before they will be given internal effect. Thus, in the 1995 decision *Minister of State for Immigration and Ethnic Affairs v Teoh*,⁴⁷ Mason CJ and Deane J (with whose joint judgment Gaudron J concurred on this point) stated that:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless these provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties

44 McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered" (1990) 12 *Adel LR* 367 at 374-375.

45 At 372.

46 *Brown v Lizars* (1905) 2 CLR 837 at 860.

47 (1995) 128 ALR 353

fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.⁴⁸

To similar effect, Gibbs CJ stated in *Koowarta v Bjelke-Peterson* that "treaties when made are not self-executing; they do not give rights to or impose duties on members of the Australian community unless their provisions are given effect by statute."⁴⁹

There are numerous other statements of the same principle, both in the High Court and in state Supreme Courts, although the rule has tended to be formulated in a looser or broader sense than is supported by the precedents.⁵⁰ Therefore, while the central principle that many treaties do not apply directly is now well established, it is unclear whether the specific categories referred to above by Doeker still apply, or whether they have been subsumed within a sweeping rule that treaties never directly apply domestically. It is submitted that the cases are dependent upon two central considerations, and that these considerations do not support a rule that treaties can never apply directly in Australia. The considerations are, first, the constitutional principle of separation of powers and second, the need to consider the federal-state balance.⁵¹

The Rationales for the Rule Against Direct Application

The Separation of Powers Consideration

It is clear that the power to negotiate and ratify treaties is vested absolutely in the Crown as a prerogative of sovereignty. This was recognised in

48 At 361-362; see also *Dietrich v R* (1992) 117 CLR 292 at 305, per Mason CJ and McHugh J; at 321, per Brennan J; at 360, per Toohey J.

49 (1982) 153 CLR 168 at 193. See also at 212, per Stephen J; at 224, per Mason J; and at 253, per Brennan J.

50 *Simsek* (1982) 40 ALR 61 at 66; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 272-273 and 289 (hereafter *Young [No 3]*); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 580 (hereafter *Jago*); *Bradley v Commonwealth* (1973) 128 CLR 582; see also Burmester, "Is International Law Part of Australian?" (1989) 24 *Australian Law News* 30 at 30.

51 Kirby, "The Australian Use of International Human Rights Norms from Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306 at 1309.

cases as far back as *The Parlement Belge* and *Walker v Baird* as a central feature of British constitutional law. It has also been recognised by Australian courts as part of the Australian Constitutional system.⁵² Although for some years the treaty-making power was considered to reside in the Imperial Crown, it has subsequently been treated as exercisable by the Governor-General, on the advice of the Federal Executive Council, pursuant to s61 of the Constitution.⁵³ This view has been criticised, quite correctly, as "hindsight".⁵⁴ It was never envisaged that s61 would be the source of executive power to conclude treaties for the reason that it was considered that the sole treaty-making power resided in the Imperial Crown,⁵⁵ and indeed the amendments to clause 7 and s52(xxix) were inspired by a desire to avoid being seen to claim this power, an exercise that would have been useless if it was thought that s61 already contained it. Nevertheless, despite the historical inaccuracy involved, there is now no doubt that the Crown in right of the Commonwealth possesses sole competence with regard to the signing and ratification of treaties for Australia.

It should be apparent that under a system of separation of powers, with an inherent tension between the legislative and executive branches of government, that if a treaty could be directly applied in municipal law it would be possible for the executive to effectively legislate without gaining the assent of Parliament.⁵⁶ All members of the High Court in the *Teoh* decision (discussed below) were clearly concerned to avoid this result. It was taken as given that the separation of powers between legislature and executive should be upheld, notwithstanding the fact that the doctrine's major emphasis in Australia has been on separation between the judicial and other arms of government, with little separation between executive and legislative functions generally being required.

52 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 361-362 and 370; *Simsek* (1982) 40 ALR 61 at 66; *Young [No 3]* (1993) 32 NSWLR 262 at 274; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 212 and 253 (hereafter *Koowarta*); see also Doeker, *The Treaty-Making Power in the Commonwealth of Australia* p95.

53 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 per Latham CJ; see also Dept of Foreign Affairs & Trade, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (August, 1994) para 51.

54 Cowen & Zines, *Federal Jurisdiction in Australia* p27.

55 As above.

56 Brownlie, *Principles of Public International Law* pp47-48; Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 74; Starke, *Introduction to International Law* (Butterworths, London, 10th ed 1989) p82; Jennings & Watts, *Oppenheim's International Law* p60.

The rule requiring legislative implementation of treaties developed in Britain, where the executive must control a Lower House parliamentary majority, but where the Upper House is much weaker than the Australian Senate. A strong Upper House, which can vote against the government without bringing it down, significantly changes the dynamics of the interaction between the legislature and executive. This may make it much more difficult for the executive to secure municipal implementation of the international obligations it undertakes.⁵⁷ However, set against this problem is the fact that the legislature in its entirety is more democratically representative and responsive than the executive, giving the requirement for legislative implementation a democratic justification. The then Foreign Affairs Minister, Senator Gareth Evans, and the then Attorney-General, Michael Lavarch, emphasised this democratic justification for the separation of powers doctrine, and the parliamentary implementation of treaties it is said to require, in their response to the High Court's decision in *Teoh*.⁵⁸

The Federal-State Balance

The power of the legislature to carry treaties into effect is not necessarily as wide as the executive power to enter into treaties.⁵⁹ This is particularly so in a federal nation where legislative power is divided by a constitutional document between several different legislatures, while the federal executive receives exclusive international competence. For this reason courts have long recognised that to allow treaties ratified by the federal executive to have direct effect throughout the whole of the federal state allows the executive to 'legislate' in areas normally within the legislative competence of the states.⁶⁰ Direct applicability could cause a significant shift in power from the states to the federal government. The rule that legislative implementation of treaties is required helps to avoid this result, with the executive being required to obtain legislative assent not only from the Parliament to which it is responsible, but also, if state legislation is

57 Kirby, "The Australian Use of International Human Rights Norms from Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306 at 1310.

58 Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995.

59 *Koowarta* (1982) 153 CLR 168 at 193.

60 *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326 at 348; *Young [No 3]* (1993) 32 NSWLR 262 at 274.

necessary, from the Parliaments of states to whom they stand in no direct relation.⁶¹

This state of affairs obviously has the potential to make it very difficult to secure municipal implementation of international obligations.⁶² Partly for this reason, the legislative power of the Commonwealth has been interpreted in such a way as to make the validity of the federal balance objection to the direct application of treaties somewhat questionable.⁶³ It is now clear that the legislative power of the Commonwealth under s51(xxix) of the Constitution extends at least as far as implementing treaty obligations undertaken by the federal executive.⁶⁴ So, from a legal perspective, the conclusion of treaties clearly allows the Commonwealth to extend its influence into the traditional domain of the states, thereby jeopardising the so-called 'federal balance'. The question of the direct applicability of treaties does not impact upon the federal-state balance as such, but rather upon the question of whether it is the federal legislature (through the external affairs power) or the federal executive (through simple ratification of a treaty) that is responsible for extending Commonwealth power.

However, it may be that from a practical perspective a change to the direct applicability of treaties would affect the federal balance, for there may be factors that would prevent the legislature from implementing a treaty obligation despite the fact that it has the legislative power to do so. These reasons could include, for example, the desire of one political party to be seen to support states' rights, or an unwillingness on the part of the government to compromise with a minor party that holds the balance of power in the Senate. A good example of a treaty that Parliament has failed to implement in domestic law is the *International Covenant on Civil and*

61 *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326 at 348; Kirby, "The Australian Use of International Human Rights Norms from Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306 at 1310-1311.

62 Although Canada has operated for many years with apparent success under this system. See Campbell, "Federalism and International Relations: The Canadian Experience" (1991) 85 *American Society of International Law Proceedings* 125 at 125.

63 See *Koowarta* (1982) 153 CLR 168; Fitzmaurice, "The General Principle of International Law" (1957) 92 *Recueil des Cours* 5 at 90.

64 *Commonwealth v Tasmania* (1983) 46 ALR 625 (hereafter "*Tasmanian Dams*"); see Byrnes & Charlesworth, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 *AJIL* 622 at 626; Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p80-81.

Political Rights (ICCPR). The Whitlam Government, having signed but not ratified the ICCPR in 1972, introduced the Human Rights Bill designed to implement the treaty domestically in November 1973. However, the Bill encountered opposition in the Senate and lapsed with the prorogation of Parliament in 1974.⁶⁵ The Fraser Government ratified, but did not attempt to domestically implement the ICCPR. A further attempt at legislative implementation occurred in 1985 with the Australian Bill of Rights Bill, but this Bill was also opposed and was withdrawn in 1986.⁶⁶ Consequently, while Federal Parliament has the power to implement the ICCPR, it has not done so for domestic political reasons.⁶⁷ Were treaties to directly apply it would be possible for the executive to circumvent likely opposition in Parliament and it would hence be easier for the Commonwealth to extend its powers into the state sphere. However, this consequence is largely avoided where, as is the case in most countries, parliamentary involvement in ratification is a prior condition to the direct applicability of treaties.

The Need For Reform

There are two major deficiencies in the system as it currently operates. The first relates to what is perceived to be the excessive power of the executive in the field of foreign affairs. This concern has been amplified by the growing realisation of the significant domestic impact that the exercise of this power can have.⁶⁸ In recent years in Australia it has become increasingly common to hear calls for greater parliamentary

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- 65 Twomey, "Strange Bedfellows: The UN Human Rights Committee and the Tasmanian Parliament" *Current Issue Brief No 6* (Commonwealth Parliamentary Research Service 1994) at 7-8.
- 66 *Young [No 3]* (1993) 32 NSWLR 262 at 274; For a more detailed account of attempts to introduce an Australian Bill of Rights, see Bailey, *Human Rights - Australia in an International Context* (Butterworths, Sydney 1990) pp50-56.
- 67 *The Human Rights (Sexual Conduct) Act 1994* (Cth), which was introduced to override the sections of the Tasmanian *Criminal Code Act* (1924) that outlaw homosexual behaviour, implements Article 17 of the ICCPR but most of the provisions of the Covenant have not been introduced into domestic law.
- 68 NZ, Law Commission, *The Making and Implementation of Treaties: Three Issues for Consideration* (August 1993); Reforms to Australia's Treaty-Making Process Proposed by Australian Industry, *A Proper Role for Parliament, Industry and the Community in Australian Treaty Making*, 1994. [The relevant groups are the National Farmers' Federation, Australian Mining Council, Council for International Business Affairs, Metal Trades Industry Association, Australian Chamber of Commerce and Industry, Business Council of Australia, Environment Management Industry Association, National Association of Forest Industries] (hereafter "Industry Statement").

involvement in decisions to undertake international obligations. An early example was provided by the dissenting reports of Professor Zines and Sir Rupert Hamer in the Final Report of the 1988 Constitutional Commission.⁶⁹ More recently, to give just a few examples, Industry groups have called for greater parliamentary involvement through the tabling of treaties before signature⁷⁰ and through subjecting treaties to the scrutiny of parliamentary committees.⁷¹ The journalist, PP McGuinness, has called for the Senate to take a hand in the process of ratification of treaties,⁷² and Senator Kemp has also called for a greater role for Parliament in the approval of multilateral treaties.⁷³ In 1994, the Australian Democrats introduced a Bill into the Senate that provides that all treaties must be tabled, and Parliament given an opportunity to disallow them.⁷⁴ The New Zealand Law Commission has also released an issues paper relating to the making and implementation of treaties that raises the possibility of legislative consultation, indicating that this debate is not confined to the Australian context.⁷⁵ In 1995, the Senate Legal and Constitutional Affairs References Committee also undertook an

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- 69 Aust, Constitutional Commission, *Final Report* (1988) 745 at 746-749. Professor Zines agreed with a view that had earlier been expressed by Lindell that there should be a statutory requirement making ratification of treaties conditional upon either the approval of both Houses of Parliament or the non-disallowance by either House within a specified period.
- 70 There is a tendency to obscure the difference between signature and ratification in a number of the proposals. Generally speaking signature of a treaty does not create significant legal obligations. For most treaties, the only obligation that results from signing is an obligation not to frustrate the objects and purposes of the treaty. See Art 18, *Vienna Convention on the Law of Treaties* (Vienna, adopted 22 May 1969, opened for signature 23 May 1969, in force 27 January 1980; UKTS 58(1980)). Additionally, as signature often occurs at the conclusion of the Conference which negotiates a treaty, it will often be impossible to delay signature until there has been Parliamentary scrutiny of the treaty.
- 71 Industry Statement; "Using Treaties to Get Round the Constitution" (1994) 1(3) *ACCI Review*.
- 72 McGuinness, "Parliament left behind in embrace of international treaties" *The Australian*, 18 May 1994.
- 73 Senator Kemp, *Submission to the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade* (1994).
- 74 Parliamentary Approval of Treaties Bill 1994 (Cth). Introduced on 28 June 1994 (Senator Bourne). Section 5 seems to make the tabling of a treaty a municipal condition of ratification. Section 6 gives each House 15 sitting days to give notice of a motion to disallow, which motion must then be voted upon within the next 15 sitting days.
- 75 NZ, Law Commission, *The Making and Implementation of Treaties: Three Issues for Consideration* (August 1993).

investigation of the role Parliament should play in the treaty ratification process. The Committee ultimately recommended the establishment of a Joint Parliamentary Committee to scrutinise treaties, not Parliamentary involvement in ratification.⁷⁶

Parliament's role in the system as it currently operates is limited. The only parliamentary participation that developed in the United Kingdom is the so-called 'Ponsonby Rule', which is a fetter that governments impose upon themselves in the form of a requirement that treaties lay upon the table in Parliament for a period of at least 21 days before the government proceeds to ratify them. This practice was first introduced in the United Kingdom in 1924, and has operated continually since 1929.⁷⁷ The rule is of limited value as the government is not required to find parliamentary time to devote to a motion attacking the decision to ratify, and in any event would be very unlikely to be defeated on any such motion.⁷⁸

Australian parliamentary practice once again closely mirrors that of Britain. In 1961, Prime Minister Menzies introduced a modified form of the Ponsonby rule, stating that treaties signed by Australia, or to which the Government was contemplating accession, would be tabled in both Houses of Parliament, and that as a general rule the Government would not proceed to ratify or accede until the treaty had lain on the table for at least twelve sitting days.⁷⁹ This rule was to apply to all treaties that would not otherwise have come before the House, because, for example, they were to be implemented by legislation. It appears that this system may have fallen into disuse during the 1970s. However Senator Evans, the then Minister for Foreign Affairs and Trade, recently reinstated and expanded the operation of this system, stating

whenever the text of a treaty is tabled we will accompany that with a short explanatory memorandum to enable

76 Aust Senate Legal and Constitutional Affairs References Committee, *Discussion Paper*, March 1995; Aust Senate Legal and Constitutional References Committee, *Trick or Treaty*, December 1995.

77 Lord Templeman, "Treaty-Making and the British Parliament" (1991) 67 *Chicago-Kent Law Review* 459 at 465-466; Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* p124; Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p28.

78 Lord Templeman, "Treaty-Making and the British Parliament" (1991) 67 *Chicago-Kent Law Review* 459 at 466.

79 Aust, *Parl, Hansard*, HR, Vol 31 (1961) at 1693; see also Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* pp33-34.

parliamentarians to quickly become familiar with the content and effect of the treaties so they can determine whether they have an interest in it. Moreover, we will publish regularly in the monthly publication *Insight* a schedule of multilateral negotiations in which Australia is involved, and with a sufficient degree of description for people to know broadly what the subject is together with a contact name ... for the departmental officer involved.⁸⁰

Even with these rules, however, the current procedures remain a fairly weak fetter on executive power, and attempts at parliamentary supervision of the executive remain subject to familiar limitations such as the effect of strict party discipline and the absence of sufficient support staff.⁸¹

The second problem with the current system is that Parliament is involved only after there is an internationally binding treaty, and is very often placed in a position where failure to pass proposed legislation will violate a treaty, leaving Australia internationally responsible.⁸² The pressure that the executive is therefore able to impose on Parliament threatens the system of separation of powers. As Wildhaber has fairly colourfully put it:

If the legislature is confronted with the fait accompli of a ratified and internationally binding treaty, the legislative decision is far from free Democratic ground rules require that a parliament should participate in treaty-making in a meaningful way and should not be reduced to an a posteriori acclamation by way of swallowing willy-nilly a strong government's lonely decisions.⁸³

Only in cases where the separation of powers has broken down completely, with total executive dominance of Parliament, is municipal implementation of treaty obligations guaranteed. The inherent tension in the system is therefore such that it is almost impossible to achieve the

80 Aust Senate Estimates Committee A, *Hansard* (24 May 1994) at 18.

81 Saunders, "International Treaties and the Constitution", Paper presented to the 1994 Australian Bar Association Conference p10 (page references to transcript).

82 Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p28; Gotlieb, *Canadian Treaty-Making* (Butterworths, Toronto 1968) p74.

83 Wildhaber, as above p76; see also Saunders, "International Treaties and the Constitution", Paper presented to the 1994 Australian Bar Association Conference p10.

mutual objectives of a genuine separation of powers and of effective implementation of international obligations.

A better approach would be to radically re-define the respective powers of the executive and legislature, removing the power to ratify treaties from the executive until approval to ratify has been granted by the legislature. Such a system would have a number of advantages. First, it would ensure that Parliament was not placed in the position of putting Australia in breach of its international obligations if it refuses to pass implementing legislation. This gives the Parliament much greater freedom to assess the merits of any particular treaty. Second, it would reduce the ability of the executive to make profound changes to Australian society without the assent of Parliament. An example of the executive's ability to do this under the current system is provided by the accession to the First Optional Protocol of the ICCPR, which did not require parliamentary involvement but which appears likely to have a significant impact on the domestic legal system.

Parliamentary involvement in ratification would also make it possible to move to a system allowing for the direct applicability of treaties without violating the separation of powers or federal-balance considerations discussed above. As Leary has commented:

A correlation appears to exist between legislative consent to ratification and automatic incorporation. In states with the system of automatic incorporation, legislative consent by at least one House of the legislature is generally required before the executive may ratify treaties. In states with the system of legislative incorporation, ratification of treaties is frequently a purely executive act not requiring prior approbation of the legislature.⁸⁴

The requirement for legislative involvement in ratification of treaties prevents the executive from 'legislating' by using directly applicable treaties, and, to the extent that there is any weight in the federal balance objection, it is met by the requirement for parliamentary involvement. There are also a number of positive advantages to direct incorporation. The first is that a change to direct incorporation would bring Australia into line with the vast majority of other nations. Particularly since the Second World War, other nations have been choosing to adopt a system of

84 Leary, *International Labour Conventions and National Law* (Martinus Nijhoff Publishers, The Hague 1982) p37.

automatic incorporation, apparently because it guarantees the implementation of treaties in national law more effectively than the system of legislative incorporation.⁸⁵ Indeed Lord Templeman, of the House of Lords, recently wrote that it may be that the United Kingdom should provide by statute for self-executing treaties, in order to help give proper effect to its international obligations.⁸⁶

The second advantage is that when treaties are domestically applicable, distortions that can result from legislative implementation are avoided.⁸⁷ These distortions result from the difficulties that can be associated with trying to transform a text negotiated among states with political, economic and cultural differences into a domestic legal instrument which complies with domestic drafting conventions and interpretive rules.⁸⁸ With directly applicable treaties, courts directly interpret the international instrument, in accordance with international interpretive rules,⁸⁹ and may openly seek guidance from the international jurisprudence which gradually builds up around any given treaty.

It also becomes unnecessary to address the question of whether legislation is in sufficiently close conformity with the text of a treaty. This is an issue that has caused the High Court some difficulty, for while there is agreement that legislation that is dependent for its constitutional validity upon s51(xxix) "must conform to the treaty and carry its provisions into effect",⁹⁰ there are often significant divergences between the judges as to exactly what this formulation means. This is illustrated by the difference in the conclusions reached by Mason J on the one hand, and Brennan and Deane JJ on the other, in the *Tasmanian Dams Case*.⁹¹ The issue also divided the Court in *R v Burgess; Ex parte Henry*.⁹²

85 As above at p156.

86 Lord Templeman, "Treaty-Making and the British Parliament" (1991) 67 *Chicago-Kent Law Review* 459 at 484.

87 Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* pxxv.

88 Mendis, "The Legislative Transformation of Treaties" (1992) 13 *Statute Law Review* 216 at 227; Bergsten, *Community Law in the French Courts* (Nijhoff Publishers, The Hague 1973) p48.

89 *Young [No 3]* (1993) 32 NSWLR 262 at 276-277.

90 *Tasmanian Dams* (1983) 46 ALR 625 at 782-783, per Brennan J; at 805-806, per Deane J; at 744, per Wilson J; *Gerhardy v Brown* (1985) 159 CLR 70 at 119.

91 (1983) 46 ALR 625; see the discussion in Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p100.

92 (1936) 55 CLR 608.

A Comparative Perspective

As mentioned above, a great many nations already operate under a system that requires some parliamentary involvement in the ratification process, and provides that treaties are directly applicable once such ratification has occurred.⁹³ The choice of constitutional system regulating the application of treaties in municipal law is in no way dependent upon whether the country has a 'common law' or 'civil law' system.⁹⁴ This is illustrated by the divergent approaches taken by two major common law countries, the United Kingdom and United States. It is proposed to briefly examine the systems that apply in a range of different nations in order to develop a better understanding of how the direct applicability of treaties would be likely to operate in Australia. Other federal nations will be examined first, as both of the arguments against direct application are applicable to them. A range of other nations who have a system of separation of powers will also be considered, in roughly descending order of their willingness to apply international law. The main group of countries that will not be examined are those in the British Commonwealth, for they tend to operate under a system very similar to that currently prevailing in Australia.⁹⁵ The United States system, which has been mentioned above, will also not be further discussed, for the basic precepts of the system are well known and have been the subject of exhaustive analysis elsewhere.⁹⁶

Turning first to Germany, a federal nation, Article 59 of the Grundgesetz (or Basic Law) requires in certain circumstances that the Federal President (executive) obtain from the Bundestag (Lower House) and, in some circumstances, from the Bundesrat (strongly federal Upper House) an 'act of consent' in the form of a federal statute before the President may ratify a treaty.⁹⁷ Parliamentary assent to ratification is required in two cases. First, where the treaty affects the "political relations of the Federation", which has been interpreted as relating to the survival of the country, its

93 For a brief summary see Brownlie, *Principles of Public International Law* pp50-51.

94 Leary, *International Labour Conventions and National Law* p2-3.

95 Jennings & Watts, *Oppenheim's International Law* p78 (discussing India, New Zealand, Kenya and South Africa).

96 For example, see Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties" (1991) 67 *Chicago-Kent Law Review* 515; Riesenfeld and Abbott, "The Scope of US Senate Control Over the Conclusion and Operation of Treaties" (1991) 67 *Chicago-Kent Law Review* 571.

97 Frowein and Hahn, "The Participation of Parliament in the Treaty Process in the Federal Republic of Germany" (1991) 67 *Chicago-Kent Law Review* 363.

territory and independence, and its position and relative weight in the international community.⁹⁸ Second, where the treaty obligation can only be fulfilled by an Act of Parliament.⁹⁹ This requirement is equally necessary in the Australian context as it is designed to prevent the bypassing of the law-making legislative organ of government. Once an act of consent is adopted by the Bundestag it has the double effect of allowing ratification, and ensuring that following ratification, the treaty can be directly applied in the German legal system,¹⁰⁰ provided it is capable of direct application.

In Switzerland, another Federal nation, the Constitution assigns interdependent and overlapping powers to the legislature (Federal Assembly) and executive (Federal Council) in the field of foreign policy and treaty-making required.¹⁰¹

Legislative approval is not always required, but it is once the obligation reaches a certain level of importance.¹⁰² The approval of the Assembly is usually sought between signature and ratification. Legislative approval is a municipal condition of ratification, not a substitute for it.¹⁰³ Under Article 89 of the Constitution, compulsory or optional referenda may occasionally be required. Once ratification occurs the treaty is an integral part of Swiss law without formal transformation, provided it has been duly published.¹⁰⁴ This approach is supported by Article 113 of the Constitution, which requires the Swiss Federal Tribunal to act in accordance with treaties approved by the Federal Assembly. It appears, however, that Swiss courts directly applied treaty law even before this approach was supported by Article 113.¹⁰⁵

98 At 367.

99 At 367-368.

100 At 374; Jennings & Watts, *Oppenheim's International Law* p64.

101 Wildhaber, "Parliamentary Participation in Treaty-Making - Report on Swiss Law" (1991) 67 *Chicago-Kent Law Review* 442.

102 At 441.

103 At 444.

104 At 450; *Verleye v Conseil d'Etat du Canton du Genève* (1967) 72 ILR 668; *Rossier v Court of Justice in the Canton of Geneva* (1962) 32 ILR 348 at 349.

105 For further information, see Leary, *International Labour Conventions and National Law* p49; Rice, "The Position of International Treaties in Swiss Law" (1952) 46 *AJIL* 641; see the translation of the message from the Swiss Federal Assembly on 10 December 1920 concerning the resolutions of the First Session of the International Labour Conference, found in Secretan, "Swiss Constitutional Problems and the International Labour Organisation" (1947) 56 *Int Lab Rev* 1 at 4.

Two other federal nations, Mexico and Argentina, both modelled their system upon the United States system. Article 31 of the Argentine Constitution of 1975, and Article 133 of the Mexican Constitution of 1917 (as amended in 1934) are both modelled on Article VI (2) of the United States Constitution. They provide that treaties will prevail over state constitutions and state laws.¹⁰⁶ In Mexico, the executive must obtain the approval of the federal Senate prior to ratification, while in Argentina the approval of both Houses of Congress is required. Once ratified, treaties will be directly applied by the courts,¹⁰⁷ and they prevail over state laws and constitutions and over prior federal laws.

There is a great divergence in the strength of the federal units of the nations just examined, with some of these nations having weaker federal systems than that which exists in Australia. It is nevertheless clear from the above survey that the existence of a federal system is not an insurmountable barrier to the direct application of treaties in municipal law, and indeed that direct applicability of treaties is common in federal systems (even, as the United States of America demonstrates, where the federal units are quite strong). The practice of non-federal states should now also be considered, to demonstrate the ability of parliamentary involvement in ratification to prevent infringement of the separation of powers doctrine.

Article 93 of the Netherlands Constitution of 1983 contains the most sweeping acceptance of international law, providing that treaties and resolutions of international institutions, which by reason of their contents are capable of applying to individuals, shall have this effect after they have been published.¹⁰⁸ Article 94 gives these international treaties and resolutions priority over all other domestic law, including constitutional law.¹⁰⁹ Article 91 requires parliamentary (Staten-Generaal) approval of treaties prior to ratification. Parliament may by statute waive the requirement for a category of treaties if it wishes, and may specify the form of approval that is required. Tacit approval of treaties is possible, in order to reduce Parliament's workload, and it operates in a manner that is similar to that proposed in the Australian Democrats' Bill mentioned

106 Jennings & Watts, *Oppenheim's International Law* p80; Leary, *International Labour Conventions and National Law* p45.

107 Leary, *International Labour Conventions and National Law* p45.

108 Van Dijk and Bahiyiyih Tahzib, "Parliamentary Participation in the Treaty-Making Process of the Netherlands" (1991) 67 *Chicago-Kent Law Review* 413 at 418-419.

109 At 422.

above. Parliament has 30 days after it is given notice of the treaty to indicate that express approval is required, after which time the treaty is tacitly approved and may be ratified.¹¹⁰

In Belgium, Article 68 of the Constitution provides that the assent of the Belgian Parliament must be obtained before treaties of commerce or treaties that may impose obligations upon the state or upon individuals may take municipal effect. Those treaties that are capable of direct application may be invoked by individuals and such treaties prevail over conflicting national laws, whether passed before or after ratification, provided the treaty has been published.¹¹¹ Belgium is unusual in having achieved this result without the aid of a constitutional provision explicitly giving treaties primacy.¹¹²

In France, Article 53 of the Constitution of 1958 provides that most treaties¹¹³ require legislative consent prior to ratification. Article 55 then provides for the automatic municipal application of duly ratified treaty provisions, which are given superiority over legislation,¹¹⁴ even if that legislation is passed subsequent to the treaty's ratification,¹¹⁵ subject to reciprocal application of the treaty by the other party.¹¹⁶ However, while the French Constitution has been said to embody the 'monist' theory,¹¹⁷ the absence of effective judicial review¹¹⁸ has led to the French legal practice of incorporating the provisions of a treaty by means of a formal amendment of internal law. "This practice, which combines dualism with monism, has the advantage of calling the attention of public authorities, courts, and the general public to the law applicable."¹¹⁹ Article 32 of the Constitution of Tunisia, Article 72 of the Constitution of Chad, and Article 64 of the Constitution of Mali, introduce systems that are very similar to the French system described above.

110 At 426-428.

111 *X v Y* (1966) 47 ILR 333.

112 Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* pxxix.

113 The categories are enumerated in the Article, eg, commercial treaties etc.

114 The text of Article 55 reads, in part, "Treaties shall ... have an authority superior to that of laws". See *Croissant* (1978) 74 ILR 505.

115 *Kamolpraimpna* (1971) 72 ILR 670.

116 French Constitution, Article 55; Jennings & Watts, *Oppenheim's International Law* p66.

117 Leary, *International Labour Conventions and National Law* p47-48.

118 As above at p48.

119 Morellet, "The Influence of the International Labour Conventions on French Legislation" (1970) 101 *Int Lab Rev* 331 at 333.

In Austria, Article 50 of the Constitution provides that treaties modifying or complementing existing laws require for validity the approval of the National Assembly, which has the power to determine how the treaty is to be implemented. Treaties must be published and, according to Article 49(1), they become directly effective the day after their publication unless there is an express provision to the contrary. Published treaties will be directly applied by Austrian courts if such application is possible¹²⁰ and they have the same legal standing as statutes.¹²¹

In Italy, Article 80 of the Constitution requires parliamentary authorisation of any treaty that will involve changes to Italian law. This legislative approval is usually sufficient to have the effect of incorporating the treaty into Italian law.¹²² Similarly, in Luxembourg, Article 37 of the Constitution requires parliamentary approval of all treaties before they can take domestic effect, and treaties must also be published.¹²³ Once these conditions are fulfilled, the treaty can be directly applied and it prevails over any inconsistent legislation.¹²⁴

The system existing in Denmark, which is broadly representative of the general approach in Scandinavia, is interesting as an example of the minimum position to which Australia should move. Section 19 of the Danish Constitution gives the executive authority to act in international affairs, but imposes wide-ranging parliamentary controls on this authority. Parliamentary consent to the ratification of treaties is required if, inter alia, an obligation is undertaken "which for its fulfilment requires the concurrence of Parliament" or "which is otherwise of major importance".¹²⁵ It is clear that the executive requires parliamentary consent prior to the ratification of any treaty that contains provisions which, if they were of domestic origin, would need to be adopted by Parliament.¹²⁶ The Danish system is not one of automatic incorporation. Specific legislation is required to implement each treaty, just as is currently the case in Australia. The main difference is that the Danish Parliament is involved in the process prior to ratification, greatly reducing

120 Jennings & Watts, *Oppenheim's International Law* p63.

121 *Pokorny v Republic of Austria* (1952) 19 ILR 98.

122 *Re Masini* (1957) 24 ILR 11; *Treasury Ministry v Di Raffaele* (1974) 77 ILR 562.

123 Jennings & Watts, *Oppenheim's International Law* p68.

124 *Huberty v Public Prosecutor* (1950) 17 ILR 3.

125 Gulmann, "Denmark" in Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* p29.

126 As above, at pp29-30.

the chance of the country breaching its international obligations as a result of legislative failure to implement any given treaty.

A system requiring the direct applicability of treaties is also found in the Republic of Korea,¹²⁷ Japan¹²⁸ and Brazil.¹²⁹

Reforming the Australian System

The above survey of the practice in a number of different countries serves to highlight the variety of options available to Australia if Parliament were to seek to adopt some role in the treaty process. The current system, not being constitutionally mandated, can probably be changed by a simple Act of Parliament, although there is some doubt about the matter. Professor Sawyer has stated the conventional position that "[i]t would be within the competence of the Commonwealth Parliament, pursuant of s51(xxix), to restrict the powers which the executive obtains from s61 and the prerogative, for example by requiring legislative ratification of treaties."¹³⁰ There is, therefore, unlikely to be any constitutional difficulty with the adoption of an alternative scheme. The difficulty arises in identifying the appropriate content of such a scheme. Six major issues arise.

The first is identifying the most appropriate time for parliamentary involvement. Every nation discussed above recognised that the best time for parliamentary approval is after signature but prior to ratification. After negotiation and signature, the treaty project is complete without being legally binding, except for the obligation under Article 18 of the *Vienna Convention on the Law of Treaties* not to frustrate the objects and purposes of a treaty a state has signed.¹³¹ Ratification is the step that

127 Republic of Korea, Constitution, Art 5(1).

128 Japan, Constitution, Art 98(2); see also *Ryuichi Shimoda v The State* (1963) 32 ILR 626.

129 *Federal Government v Companhia de Radio Internacional do Brazil* (1953) 20 ILR 1.

130 Sawyer, "Australian Constitutional Law in Relation to International Relations and International Law" in Ryan (ed), *International Law in Australia* p37; Mr Tony Morris QC also gave advice to the Australian Democrats to this effect. See Aust, Parl, *Hansard*, S (29 June 1994).

131 Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p74; Aust Senate Estimates Committee A, *Hansard* (24 May 1994) at 13; see Aust Dept of Foreign Affairs & Trade, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (August, 1994). Multi-lateral treaties almost always require ratification. There are some minor treaties that do not require a second step such as ratification.

renders the treaty internationally binding in a substantive way. Legislative approval should therefore be made a municipal precondition of ratification.

Senator Evans recently described the current ratification process, stating that:

It is a matter of relevant ministerial approval followed by Executive Council determination. It invariably involves the Minister for Foreign Affairs and Trade and such other subject ministers as are associated with that particular issue ... On occasions there may be a formal Cabinet decision, but far more often than not it is dealt with at the ministerial level, but with the formal ratification being a matter for Executive Council approval.¹³²

When parliaments are involved in ratification, the process becomes more formal, as ratification assumes greater significance if the treaty is thereafter to apply directly. The standard procedure in most countries is that parliament must vote on the a treaty as a whole, en bloc.¹³³ It may not discuss the treaty article by article, as occurs in legislative incorporation states, for the legislature is confined to either approving or disapproving ratification. This is one of the crucial differences between the system that currently exists in Australia and the direct application system. As Wildhaber has commented:

Legislative approval and the concept of transformation are not inescapably interconnected. In so far as the concept of transformation legitimately endeavours to preserve parliamentary prerogatives against executive encroachments, it must surely be welcomed. However, mere approval is absolutely sufficient to achieve this aim. To grant a legislature room for obstructionism (and transformation with its emphasis on national sovereignty

132 Aust Senate Estimates Committee A, *Hansard* (24 May 1994) at 12. Since 1 January 1990, the final consent to be bound has been given by Cabinet in 49 cases and by the relevant Ministers in 186 cases.

133 This is the case in, for example, France, Belgium, Germany, the Netherlands, Austria and Switzerland. See Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p77.

brings with it such an eventuality) leads only to simplified procedures evading the legislature.¹³⁴

The second issue is whether the consent of one or both Houses of Parliament should be required. Most federal states require at least the involvement of the Senate or Upper House and some, for example Argentina and Switzerland, also require Lower House consent to ratification. The notable exception to this is Germany, which usually requires Lower House consent and only in more limited circumstances involves the Upper House. In Australia, in light of the very strict party discipline that prevails, House of Representative review would be likely to be a fairly meaningless process, although it is unlikely to do any harm and may be desirable from a democratic perspective. Senate review is likely to have much greater impact, particularly as in recent years minority parties have tended to hold the balance of power in the Senate so neither major party will be able to control the debate. It is suggested, therefore, that a system that makes ratification of a treaty conditional upon the prior approval of both Houses of Parliament should be introduced in Australia.

The third issue is whether this approval of ratification should also have the effect of making the treaty directly applicable in domestic law. Of all the countries surveyed above, the only one in which the decision to approve ratification fails to incorporate the treaty is Denmark. For the reasons stated above, relating to the desirability of more effectively securing municipal implementation of treaties and of avoiding distortions, the act of approval of ratification should make the treaty directly applicable in domestic law.

The fourth issue is in what circumstances should legislative approval of ratification be required. Most countries allow the executive to ratify minor treaties, or on occasion those that can be implemented by the government at an administrative level, without approval. There is then a significant divergence of approach with some countries, for example Belgium, identifying specific categories of treaties that require legislative approval, some, such as the Netherlands, allowing Parliament itself to decide, while others use more sweeping criteria. At a minimum, Australia should adopt the requirement of countries such as Germany, Austria and Italy that any treaty effecting a change to municipal law must be approved by the legislature prior to ratification. This requirement is necessary in order to avoid infringing the separation of powers doctrine.

134 Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p81.

Fifth, the status to be accorded to treaties that apply directly in domestic law must be determined. It is probable that the preference in the Australian context will be to consider treaties equivalent to statutes, so they will be able to be overridden by subsequent legislation (although this may entail international responsibility for violating the treaty). It is unlikely that Australia would adopt a rule that allows international treaties to dramatically circumvent legislative power by giving treaties priority over subsequently enacted legislation. It should also be noted that in almost all countries with directly applicable treaties, this applicability is contingent upon the treaty being officially published. This requirement should be adopted by Australia, for the chance of treaty norms effectively penetrating into the domestic legal culture is greatly increased if they are readily accessible.

One final complication remains. It relates to a requirement that applies in every nation that allows for the direct applicability of treaties. It is that a treaty will only be directly applied if it is capable of direct application or if it is, to use the United States terminology, 'self-executing'. Most authors now prefer to avoid this term, for its ill-considered use has given rise to a great deal of confusion. Properly used, the term refers to a treaty that can be applied immediately by domestic courts to individuals without the need for any further implementing acts.¹³⁵ Unfortunately, the term is sometimes also used to refer to systems of national law, such as those described above, where certain rules of international law do not need specific incorporation in order to have direct effect.¹³⁶

The terminological confusion in this area is further compounded by the fact that even when authors are using the term 'self-executing' in its correct sense, as a term referring to the character of a particular treaty, there is no agreement as to what criteria determine whether or not a treaty is 'self-executing'. For example, the Swiss Federal Tribunal treats as the main criterion for the self-executing character of a treaty its justiciability.¹³⁷ United States courts, on the other hand, have tended to view intention as

135 Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* p227; Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis" (1985-6) 26 *Virginia Journal of International Law* 627 at 632.

136 Brownlie, *Principles of Public International Law* p52 (noting the dual usage) Crawford & Edson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p86.

137 Wildhaber, "Parliamentary Participation in Treaty-Making- Report on Swiss Law" (1991) 67 *Chicago-Kent Law Review* 442 at 450.

the decisive factor,¹³⁸ and they find this intention evidenced by the language of the treaty, the circumstance of its execution, the nature of the obligations undertaken, the ability of the judiciary to resolve the dispute, and the availability of alternative enforcement mechanisms.¹³⁹ European Courts, basing themselves on an Advisory Opinion of the Permanent Court of International Justice,¹⁴⁰ have held that self-executing treaties are those that create individual rights that are enforceable in national courts.¹⁴¹

The above controversy is almost entirely unknown to Australian courts. They will be required to come to some position on the issue if a system of direct applicability of treaties is introduced. This will no doubt be a difficult task. An illustration is provided by Justice Dawson in *Gerhardy v Brown*¹⁴² who, when discussing the *Convention on the Elimination of All Forms of Racial Discrimination*¹⁴³ (which on most criteria would probably be considered self-executing), said

it is not an instrument in such a form that its implementation is possible by the simple enactment of its provisions as domestic law. To a large extent it is a statement of policy requiring specific measures to be devised and taken by the State parties in order to give effect to the declared policy.¹⁴⁴

Of course, under a direct application system, the possibility of domestic reformulation of the treaty is removed and so the Court would be forced to apply the Convention itself. While some judges may not find this prospect attractive, it must be remembered that it is a least possible, as the practice of the majority of other nations demonstrates. As Leary has pointed out:

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- 138 Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis" (1985-6) 26 *Virginia Journal of International Law* 627 at 654 (citing a list of cases); De La Vega, "Comment" (1984) 18 *International Lawyer* 69 at 70.
- 139 See, eg, *Frolova v USSR*, 761 F 2d 370 (7th Cir 1985) at 373.
- 140 *Jurisdiction of the Courts of Danzig* (Adv Op), [1928] PCIJ, ser B, No 15, 17-18.
- 141 Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis" (1985-6) 26 *Virginia Journal of International Law* 627 at 629.
- 142 (1985) 159 CLR 70.
- 143 *International Convention on the Elimination of all forms of Racial Discrimination*, 7 March 1966, *UN Treaty Series*, Vol 660 p195.
- 144 (1985) 159 CLR 70 at 157.

Although the provisions of the treaty may be no more vague or imprecise than national constitutional or statutory provision, judges are more familiar with the language used in their own legal systems and may hesitate to apply vague and imprecise terms contained in treaties.¹⁴⁵

If this is correct, it can be assumed that the reluctance will diminish with time, as judges become more experienced in their new role.

The analysis conducted to this point has related to the desirability of directly applying treaties in Australian municipal law as binding law. The traditional common law position has been discussed, the impact of the Commonwealth Constitution on this position noted, and the considerations that underlie the current position explored. It has been suggested, with the aid of a comparative analysis, that the purposes of the current rules can be fulfilled while improving Australia's ability to fulfil its international obligations by adopting a system in which treaties directly apply.

The remainder of this paper is devoted to analysing the use that may be made of international norms within the strictures of the current system, without the aid of the reforms discussed above. This will take three parts, the first relating to the use of international law as an interpretive aid, the second to the relevance of international norms to administrative decision making, and the third to the use of customary international law.

INTERNATIONAL LAW AS AN INTERPRETIVE AID

It is now clear in Australia that international norms may be used as an interpretive aid by the courts, at least to help resolve statutory ambiguity or to fill lacuna in the common law.¹⁴⁶ This use of international law has been strongly encouraged by a series of judicial colloquia that began in Bangalore in 1988.¹⁴⁷ Senior judges from throughout the Commonwealth attended these colloquia and at the conclusion of each stated that

145 Leary, *International Labour Conventions and National Law* p164.

146 Dietrich (1992) 117 CLR 292 at 306, 349, 360; *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (hereafter *Lim*); For an overview of Kirby P's (as he then was) use of this rule see Kirby, "The Australian Use of International Human Rights Norms from Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306 at 1309, 1313-1321.

147 See the Harare Declaration 1989, the Banjul Affirmation 1990, the Balliol Statement 1992, and the Bloemfontein Statement 1993. A conference was also held in Abuja, Nigeria, in 1991.

international principles are "of particular importance as aids to interpretation and in helping courts to make choices between competing interests".¹⁴⁸ They also reaffirmed the importance of the judiciary "interpreting and applying national constitutions, ordinary legislation, and the common law in the light of those principles".¹⁴⁹

This use of international norms has a number of attractions. The first is that the precise juridical status of the international norm in question will not be as important as it is when the norm is sought to be established as binding law.¹⁵⁰ This may mean that it is possible to devote more time to the substance of the relevant issue without being distracted by arguments relating to the binding force of a norm, although the stronger the norm, the greater its persuasive force.¹⁵¹

A second attraction of this approach is that modern international law is a better and more relevant source for filling statutory or common law gaps than is ancient common law. As Kirby P (as he then was) commented in *Jago v District Court of New South Wales*,¹⁵² in the context of deciding whether or not there is a common law 'right' to a speedy trial:

I do not find it useful ... to attempt to find and declare the common law of this State in 1988 by raking over the coals of English legal procedure of hundreds of years ago.

A more relevant source of guidance in the statement of the common law of this State may be the modern statement of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law.¹⁵³

This approach is in many respects similar to the use made of treaties as a source of 'public policy', a practice that has given rise to longstanding judicial controversy in Canada.¹⁵⁴ It may be that much of this controversy

148 Balliol Statement (1993) 67 *ALJ* 67, 68 (point five).

149 As above (point four).

150 Hoffman, "The Application of International Human Rights Law in State Courts: A View from California" (1984) 18 *International Lawyer* 61.

151 Linde, "Comment" (1984) 18 *International Lawyer* 77 at 78.

152 (1988) 12 *NSWLR* 558.

153 At 569.

154 *Re Drummond Wren* [1945] 4 *DLR* 674; *Re Noble and Wolf* [1948] 4 *DLR* 123, *affd* [1949] 4 *DLR* 375; Brudner, "The Domestic Enforcement of International

could be avoided by confining 'public policy' to that set of background rights and principles, such as basic human rights, that form the substrata of both the common and statute law.¹⁵⁵

It might be thought that this use of international norms is relatively limited, in light of the fact that it now appears fairly well established that ambiguity is required before international law may be invoked as an aid to statutory interpretation,¹⁵⁶ notwithstanding the contrary comments made by the Family Court in the *Marriage of Murray and Tam*.¹⁵⁷ For example, in *Minister of State for Immigration and Ethnic Affairs v Teoh* Mason CJ and Deane J state that:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, the relevant international instrument.¹⁵⁸

It is, however, unlikely that the ambiguity requirement is a very great limitation, for as their Honours go on to state:

In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.¹⁵⁹

The rule of construction arises from an assumption made by the courts that the Parliament does not intend to violate Australia's international

Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219 at 240-242.

- 155 Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) pp81-130.
- 156 *Dietrich* (1992) 177 CLR 292 at 306, 349, 360; *Lim* (1992) 176 CLR 1 at 38; *Young [No 3]* (1993) 32 NSWLR 262 at 273; *Jago* (1988) 12 NSWLR 558 at 582; *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 All ER 65 at 77-78, 93; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 760 (hereafter *Brind*); *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 534 (hereafter *Magno*).
- 157 (1993) 16 Fam LR 982 at 999.
- 158 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 362.
- 159 As above.

obligations.¹⁶⁰ It therefore reflects the adoption of the customary international law requirement that state parties will bring their domestic laws into conformity with their external obligations.¹⁶¹ Implicit within this formulation is the fact that Parliament is able to legislate in violation of international law if it wishes, provided its intention to do so is sufficiently clear, and indeed this capacity has been affirmed by the courts on numerous occasions.¹⁶² However, as Lauterpacht has commented,

this has been a theoretical affirmation having the probably not unintended effect of stressing the duty of judges to do their utmost to interpret statutes so as not to impute to the legislature the intention of disregarding international law. It is easier to interpret away a provision of an Act of Parliament on the face of it inconsistent with international law if previously due obeisance has been made to the supremacy of the legislature.¹⁶³

It is therefore probable that the requirement that there be statutory ambiguity is just another way of saying that if the legislative intention to violate international law is sufficiently clear, it is possible for such a violation to occur. It remains for the courts to do their utmost to avoid this result. A rule of interpretation in very much this form is common to all Commonwealth countries,¹⁶⁴ and it has the very sensible effect of preventing unintended violations of international law. It is possible that

160 As above.

161 Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219 at 232.

162 *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 75-76. For an emphatic recent reaffirmation of this rule see *Horta v Commonwealth* (1994) 123 ALR 1. In *Horta*, what was attempted was a restriction not upon the general legislative power of the Commonwealth by reason of international law but just upon s51(xxix) of the Constitution, and even this more limited restriction was rejected by the Court.

163 Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 58.

164 UK: *Brind* [1991] 1 AC 696 at 748, 760; Canada: *Daniels v R* (1968) 2 DLR (3d) 1 at 23; see also Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985) 23 *University of Western Ontario Law Review* 9 at 10; India: *Birma v State* (1950) 17 ILR 5.

Australia will soon be legislating to put the rule on a more formal basis, which may clarify the operation of the ambiguity requirement.¹⁶⁵

When using international law as an aid to the development of the common law it is probable that there is no ambiguity requirement, although the cases are not entirely clear.¹⁶⁶ As there is no need in this context to accommodate the parliamentary sovereignty considerations discussed above, it is suggested that no ambiguity requirement should apply. As Sir Anthony Mason stated, "the existence of an inconsistent international rule presents an invitation to re-examine the common law principle".¹⁶⁷

There would appear to be a very great, although as yet unrealised, scope for judicial creativity arising out of the Commonwealth Government's stated position that it never enters into a treaty when Australian law is not already in conformity with the treaty obligations. Department of Foreign Affairs and Trade guidelines clearly state that:

The Minister for Foreign Affairs and Trade cannot recommend to the Executive Council that Australia become party to a treaty where the Australian federal or state legal position would be at variance with obligations to be assumed under the proposed treaty when it enters into force for Australia. Any legislation required for Australia to meet its treaty obligations must be in place by the time Australia consents to be bound by the treaty.¹⁶⁸

165 Aust Dept of Foreign Affairs & Trade, *National Action Plan - Australia* (1994) 74.

166 *Jago* (1988) 12 NSWLR 558 at 569; *Dietrich* (1992) 117 CLR 292 at 349; *Derbyshire County Council v Times Newspapers* [1992] 3 All ER 65 at 77-78 (CA); [1993] AC 534 at 551 (HL). The Court of Appeal in *Derbyshire* suggested that ambiguity was required, but that when such ambiguity existed international norms must be invoked. This House of Lords reached its conclusion based solely upon the common law, so the status of the Court of Appeal's view is unclear.

167 Mason, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Commonwealth Law Bulletin* 750 at 751; Brownlie, *Principles of Public International Law* p50.

168 Dept of Foreign Affairs & Trade, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (August, 1994) para 55; see also Aust, Joint Committee on Foreign Affairs, Defence & Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (1992) p30; Dept of Foreign Affairs & Trade, *National Action Plan - Australia* (1994) p74.

The process is that when treaties are under negotiation, a legislation certificate must be sought from the Attorney-General's department stating that Australian law complies with the treaty or that no legislation is necessary.

This policy position has huge implications for a judge faced with, for instance, an attempt to invoke one of the provisions of the ICCPR, for it suggests that it is the government's view that somewhere in Australian municipal law the rights guaranteed by the Covenant are already protected. Judges may therefore feel justified in developing the common law in accordance with the notion that such rights are protected in Australia. This appears to be the approach adopted by Einfield J (in dissent) in *Minister for Foreign Affairs & Trade v Magno*¹⁶⁹ when, having also considered the Principles and Procedures for Commonwealth-State Consultation on Treaties,¹⁷⁰ he declared;

the existence of a wide consensual acceptance in Australian society that the provisions of the treaties concerned are intended to have application in Australia Without accepting the existence of this consensus and what is now a very considerable body of legislation as providing an underpinning for enforceability of fundamental human rights in Australia, Australians must be taken to have no constitutional or legislative guarantee of most of the rights in the ICCPR Such uncertainty about the ability of citizens to have their fundamental rights implemented in law, as opposed to loudly trumpeted and supposedly understood and accepted, may be unique for any people in the world. In my opinion, it is not or is unlikely to be the parliamentary intention.¹⁷¹

This passage demonstrates the dilemma facing judges given the absence of express incorporation of treaties such as the ICCPR, combined with a governmental policy that Australian law already complies with the treaty. It explains why, contrary to the decision in *Dietrich*, some courts are still striving to find an intention to incorporate a treaty from the fact that it is

169 (1992) 112 ALR 529.

170 Dept of Foreign Affairs & Trade, *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1992).

171 (1992) 112 ALR 529 at 572.

included in the schedule to an Act.¹⁷² There are limits to the extent that interpretive rules and presumption are able to resolve these dilemmas, and it is for this reason that the direct applicability of treaties was advocated in the earlier part of this paper. A third approach however, through administrative law, may have much more far-reaching consequences than the interpretive rule.

INTERNATIONAL LAW AND ADMINISTRATIVE DISCRETIONS

Recent cases have raised the possibility that the executive may be bound to give effect to a validly concluded treaty even though that treaty has not been incorporated into municipal law. This is attractive in that there seems an inherent reasonableness about requiring the executive, the organ that has undertaken a given obligation, to itself comply with that obligation even if it lacks the constitutional competence to force others to comply.¹⁷³ There are a number of different ways in which international norms can impact upon administrative discretions. The most straightforward case is where a statute specifically refers to a treaty and instructs the decision maker to exercise their discretion in accordance with the treaty.¹⁷⁴ Failure to do so in such cases will amount to a reviewable error.¹⁷⁵ It is cases of this type that McLelland J in *Bluett v Fadden*¹⁷⁶ considered to arise "directly under a treaty" within the meaning of s75(i) of the Constitution and s38 of the *Judiciary Act* 1903 (Cth). The more controversial and interesting situation arises when there are relevant treaty provisions, but the statute conferring the discretionary power fails to mention them. The question upon which some recent cases have turned is whether a failure to consider the treaty in these circumstances gives rise to a reviewable error.

172 *Re Marion* (1990) 14 Fam LR 427 at 451; *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 at 999; *Magno* (1992) 112 ALR 529 at 573.

173 Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p120; This rule is applied in Denmark. See Danish Report to the UN Human Rights Committee - UN Doc CCPR/C/1/ Add 51.

174 *Eg Antarctica Marine Living Resources Act* 1981 (Cth) s9; *Migration Act* 1958 (Cth) s6A(1)(c).

175 Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p118; But see *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 263 at 281 (which leaves this point open).

176 (1956) 56 SR (NSW) 254 at 261.

The most important of these decisions, *Minister of State for Immigration and Ethnic Affairs v Teoh*,¹⁷⁷ was decided in April 1995. In this case the High Court was faced with an attempt to deport a Malaysian citizen in circumstances where that deportation was likely to have an adverse effect upon a number of children. This effect may have contravened Australia's obligations under the United Nations *Convention on the Rights of the Child* (the Convention).¹⁷⁸ An application was brought claiming that the applicant had been denied procedural fairness, although it was fairly clear that procedural fairness had been granted unless ratification of the Convention had altered the traditional position. The Full Court of the Federal Court found that the Convention had changed the position, despite the fact that it had not been incorporated into domestic law.¹⁷⁹ Lee and Carr JJ held that ratification of the Convention created a legitimate expectation that the Commonwealth decision-maker would apply its broad principles in so far as this was consistent with the national interest and there were no statutory provisions to the contrary.¹⁸⁰ They considered that the consequence of this legitimate expectation was that the decision-maker was required to actively seek out more information about the likely effect of the deportation on the children, and her failure to do so amounted to an error of law.¹⁸¹

The appeal to the High Court focused almost exclusively upon the impact of an unincorporated international treaty on administrative decision making. The Court was unimpressed with the Commonwealth's argument that an unincorporated treaty could never give rise to a legitimate expectation, Mason CJ and Deane J stating that:

The fact that the provisions of the Convention do not form part of our law are a less than compelling reason [for accepting this argument] - legitimate expectations are not equated to rules or principles of law. Moreover, *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

177 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 (hereafter *Teoh*).

178 At 363.

179 (1994) 121 ALR 436 at 448, per Lee J; at 462, per Carr J.

180 At 450, per Lee J; at 446, per Carr J.

181 At 436, 452.

rights affecting the family and children. *Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.* That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention. ... It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.¹⁸²

However, they did not fully adopt the reasoning of the Full Federal Court, stating:

the existence of a legitimate expectation that a decision maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring a 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.¹⁸³

The Full Federal Court was considered to have fallen into error in requiring the decision-maker, as a result of the legitimate expectation, to initiate inquiries into the likely effect of the deportation on the children. Instead, the majority of the High Court found that if a decision-maker proposes to make a decision that is inconsistent with the legitimate expectation that the principles in a treaty will be applied, then procedural fairness requires that the person should be given notice and an opportunity to present a case against the taking of such a course.¹⁸⁴ This is an important conceptual change, for the Federal Court decision effectively treated the convention as a binding rule of law. The High Court decision still requires regard to be had to the terms of a relevant treaty, but its

182 *Teoh* (1995) 128 ALR 353 at 365. Emphasis added.

183 As above.

184 As above.

approach ultimately leaves a decision-maker free to depart from the terms of the treaty once the relevant steps have been taken to ensure that this is procedurally fair.

The passages quoted above from the judgment of Mason CJ and Deane J were adopted by Gaudron J, and Toohey J took a similar approach. The fifth member of the Court, McHugh J, dissented in vigorous terms. This dissent warrants detailed examination, for the composition of the five member Court in *Teoh*, combined with the departure of Mason CJ and Deane J and the elevation to the High Court of Gummow J, may mean that the decision is reopened in the future by the Full Court. This possibility is raised by the fact that Gummow and Kirby JJ declined to lend their support to the wide role for international law advocated by Einfeld J in *Minister for Foreign Affairs & Trade v Magno*,¹⁸⁵ while Dawson J is traditionally unsympathetic to the domestic use of international law. Brennan CJ is the most technical of the Court's administrative lawyers, and may object to a broadening in the notion of 'legitimate expectations', if this is indeed what the majority have undertaken in *Teoh*. By contrast, in recent years, when on the Court of Appeal, Kirby J has been a vocal advocate of the importance of international law. He can be expected to develop and expand upon the approach that was taken by Deane J, whom he replaces on the Court.

McHugh J's initial criticism of the majority arose out of a historical examination of the concept of "legitimate expectations". Having stated that his preferred approach was to look not at whether there is an obligation of procedural fairness (which is the point at which legitimate expectations are relevant) but at the content of that obligation, he accepted that the argument was based on the former question and undertook to deal with it.¹⁸⁶ He then cited the following passage:

Our analysis of the cases suggests that there are four principle sources which the courts recognise as capable of rendering expectations legitimate or reasonable: (1) a regular course of conduct which has not been altered by the adoption of a new policy; (2) *express or implied assurances made clearly on behalf of the decision-making authority within the limits of the power exercised*; (3) the possible consequences or effects of the expectation being defeated especially where these consequences include economic loss

185 *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 535.
186 *Teoh* (1995) 128 ALR 353 at 381.

and damage to reputation, providing that the severity of the consequences are a function of justified reliance generated from substantial continuity in the possession of a benefit or a failure to be told that renewal cannot be expected; and (4) the satisfaction of statutory criteria.¹⁸⁷

Having adopted this as an accurate statement of the law, McHugh J asserted that none of these criteria applied to the case before the Court, the Convention not being an instrument the delegate was required to consider (presumably meaning that there was no express requirement to consider it) and the delegate not having undertaken to consider or apply its provisions.¹⁸⁸

By focusing on the actions of the individual delegate, McHugh J failed at this point to grapple with the argument of the majority, which was in essence that the ratification of the Convention itself amounted to an undertaking by the executive, to both the national and international community, that it would comply with that instrument's terms. Such an undertaking would obviously bind an individual delegate of the Minister. Later in his judgment, McHugh J was prepared to accept that "Australia's ratification of the Convention is a positive statement to other signatory nations that it intends to fulfil its obligations under that convention", but immediately went on to state that:

The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive government does not give undertakings to its citizens or residents.¹⁸⁹

The difficulty with this argument is that it is by no means clear why it matters, from the point of view of giving rise to a legitimate expectation, to whom the commitment to comply with the treaty is given. Once it is accepted that the executive has made a commitment to comply with a treaty, it is reasonable to expect it to do so. This is the case whether the commitment was made to the international community alone or in

187 At 382, citing Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Mon UL Rev* 15 at 48-49. Emphasis added.

188 *Teoh* (1995) 128 ALR 353 at 382.

189 At 385.

combination with the people of Australia, for in either case failure to comply with the treaty will give rise to international responsibility. Only if the view is taken that international commitments are meaningless, and that Australia's participation in these instruments is "merely platitudinous or ineffectual",¹⁹⁰ is it possible to avoid the conclusion that the Commonwealth has given an "express or implied assurance" that it will act in a particular way. On McHugh J's own terms, such an assurance is sufficient to give rise to a legitimate expectation.

It is unlikely that McHugh J intended to dismiss the entirety of international law in such an offhand manner, although his suggestion that government officials are at "liberty to disobey"¹⁹¹ provisions of the Convention does little to promote respect for international law, and indeed appears to deny its validity as law at all, for disregard of a treaty by such officials constitutes a breach of Australia's international obligations. The better view, which promotes the international development of the rule of law, is that an international commitment can provide a sufficient basis for an individual to expect the executive to behave in a certain way.

McHugh J also disagreed with the conclusion of the majority that an individual can get the benefit of this legitimate expectation even if they did not in fact have it, or indeed, even if they were totally unaware of the existence of the treaty.¹⁹² His reasoning in this regard was based upon the view that the decision-maker need not inform the affected individual of their intention to depart from the treaty provided that they have not led the person to believe that it would be applied. However, as Toohey J pointed out, "the matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by *any undertaking that the authority in question has given, whether itself or, as in the present case, by the government of which it is a part*".¹⁹³ Once it is accepted that the act of ratification by the government can objectively give rise to a legitimate expectation, the ratification constituting an express or implied assurance, a decision-maker who intends to depart from a relevant treaty must give notice of their intention to do so. This result flows from treating a legitimate expectation as something that resides in society generally and that confers a right that is worthy of protection irrespective of the subjective state of mind of the individual affected.

190 At 365.

191 At 387.

192 At 365, per Mason CJ and Deane J; at 373 per Toohey J.

193 At 373. *Emphasis added.*

It may be, as McHugh J suggested, that this total disregard for subjective state of mind is a distortion of the natural meaning of the phrase "legitimate expectation", and indeed renders the notion of an "expectation" wholly fictional.¹⁹⁴ However, this result seems unavoidable if the Court is to avoid creating a system that unfairly favours the well-educated or wealthy. For example, assume the Minister for Immigration announced that certain personal characteristics would be viewed very favourably by the department (the sort of announcement that could give rise to a legitimate expectation that these characteristics would be taken into account, but not give rise to a legal 'right' to have them taken into account). It would be an absurd result to say that an educated person, or a person who could afford good legal advice, who knew of their right to have this characteristic considered, has an enforceable right to have it considered by virtue of the fact that they expect such consideration, while somebody without access to this knowledge does not have a right to have the same characteristic considered simply because their disadvantaged circumstances prevent them from forming the expectation. Such a rule denies applicants equality before the law, and must therefore be rejected.

Towards the end of his judgment, McHugh J made an argument that, were the majority approach to be correct, the consequences for administrative decision-making would be enormous, given that Australia is party to about nine hundred treaties.¹⁹⁵ However, the number of treaties quoted is misleading, for only around three hundred of these are multilateral treaties (which are generally speaking the broadest in scope), and an even smaller proportion have the potential to be relevant to decisions of the executive that directly affect private rights. Of these, the subject matter of most would make it relatively easy for a department to identify the small number of treaties specifically relevant to its work. Indeed, if relevant treaties are not already in the consciousness of the relevant departments, Australia is in danger of breaching its commitments under these treaties. An obligation to take account of treaties in decision making should provide a useful further mechanism for ensuring Australian compliance with treaty obligations undertaken, thereby protecting Australia from the consequences of breaching of these obligations. It should also be noted that it is possible that the majority will in future cases confine their

194 At 382-383. However, the focus on ascertaining an expectation based on what is objectively reasonable, rather than on subjective state of mind, is supported by the cases; eg *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 670, per Toohey J. McHugh J expressly disagrees with this approach in *Teoh* at 383.

195 *Teoh* (1995) 128 ALR 353 at 385.

approach to human rights treaties,¹⁹⁶ which would totally undermine the objection that the implications of the decision are administratively unworkable. However, it is difficult to see the theoretical justification for so confining the decision, although it may be from a practical perspective that only 'rights' treaties, such as ILO conventions and human rights instruments, would be sufficiently relevant to individuals to be used by the courts in this way.

The position ultimately reached by the Court is that ratification of a treaty gives rise to a legitimate expectation that the Commonwealth executive will comply with the commitment thus undertaken, and a failure to comply with the treaty, if not preceded by notice of the intention not to comply, gives rise to a reviewable error. While this does not give rise to protection of the substantive rights contained in a treaty,¹⁹⁷ it will have the effect of raising consciousness of treaty provisions and, more importantly, of forcing the government to admit that it is not complying with a treaty in every case where there is non-compliance.¹⁹⁸

It is worth reflecting on how this outcome sits with the cases discussed earlier that deny treaties direct application in domestic law. It may be that the direct applicability of treaties is, according to the old common law cases, acceptable in this context as it may not fall within the categories outlined above by Doeker where legislative involvement is required. This position can be justified on the established authorities¹⁹⁹ relating to the transformation doctrine if they apply only to cases where an obligation is imposed upon an individual by a treaty,²⁰⁰ not to situations where a right is conferred upon an individual by a treaty, the Commonwealth being subject to a corresponding obligation. While most of the authorities are consistent with this proposition, a submission precisely to this effect was rejected by Stephen J, sitting in chambers, in *Simsek v Minister for Immigration and Ethnic Affairs*.²⁰¹ Interestingly, the only acknowledgment this aspect of that decision receives in *Teoh* is a footnote

196 As above at 365. Also note the emphasis given to human rights in *Mabo v Queensland (no 2)* (1992) 175 CLR 1 at 41-42.

197 At 365, 382. McHugh J and the majority are agreed on this point.

198 This may act as a disincentive in very much the same way as s85 of the *Constitution Act 1975* (Vic) operates with respect to decisions to reduce the jurisdiction of the Supreme Court of Victoria.

199 Eg, *Chow Hung Ching v R* (1948) 77 CLR 449; *Bradley v Commonwealth* (1973) 128 CLR 582.

200 See above n4; Holdsworth, "The Treaty-Making Power of the Crown" (1942) 58 *LQR* 175 at 183.

201 (1982) 40 ALR 61 at 66, 68.

indicating that it should be "compared with" the decision reached by the majority. In *Teoh*, the majority deny that they are infringing the doctrine that treaties do not apply in domestic law, and they point to the separation of powers rationale for this rule.²⁰² In fact, the decision in *Teoh* is really a recognition by the High Court that, as was pointed out earlier in this discussion, specific reasons underlie the rule against direct application, and when these reasons are not relevant, there is no rule against direct application.

The Commonwealth government reacted very unfavourably to the *Teoh* decision, and immediately began to take steps intended to override it. The first of these steps was a joint statement by two senior ministers, who said, in part

that entering into an international treaty is not a 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.²⁰³

It is unclear how the courts will deal with this statement, which is clearly intended to have legal effect, or with the legislation that the statement indicates will eventually be introduced to further clarify the existing position.²⁰⁴ It may be that a joint ministerial statement is unable to override the contrary expectations which arise from the actions of the Federal Executive Council in approving ratification a treaty, given that the Executive Council is, constitutionally speaking, the highest organ of executive government. The *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth) may, however, remove much of the impact of *Teoh*.

202 *Teoh* (1995) 128 ALR 353 at 361-362, 365.

203 Joint Statement by the then Minister for Foreign Affairs, Senator Gareth Evans, and the then Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995.

204 See Walker & Matthew, "Case Note: *Minister for Immigration v Ah Hin Teoh*" (1995) 20 *MULR* 236.

Teoh is nevertheless indicative of a trend in Australian courts towards taking international law, or at least international human rights law, more seriously. This trend has been evident since Australia's accession to the Optional Protocol of the ICCPR. The High Court has previously seen fit to refer to the significance of the Protocol.²⁰⁵ Professor Higgins has attributed the familiarity of United Kingdom courts to the provisions of the European Convention on Human Rights, and their relative ignorance of the ICCPR, to the fact that the United Kingdom accepts the right of an individual to complain under the Convention, but not under the ICCPR.²⁰⁶ The spur to the application of human rights norms that has been provided by the possibility of critical external review of the courts should not be discounted. The decision of the High Court in *Teoh* provides further evidence of this trend, and is likely to give rise to litigation to test the limits of the new principle, which puts the onus very much on the executive to treat the international obligations it chooses to undertake very seriously. It is now appropriate to consider the position of customary international law, or law that the executive does not expressly choose to accept, but by which Australia is nevertheless bound.

CUSTOMARY INTERNATIONAL LAW

Customary international law is law created by the general and consistent practice of states that is followed by them from a sense of legal obligation.²⁰⁷ The classic formulation of the interrelationship between customary international law and the common law was given by Blackstone in 1809, when he declared "the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land".²⁰⁸ It is unclear whether at the time this claim was made it was intended to give expression to an existing rule of English law or to be a formulation of principle to be proclaimed regardless of historical

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- 205 *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42, per Brennan J (*Mabo*).
- 206 Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268 at 1273, 1269.
- 207 American Law Institute, Restatement of the Law (Third), *Foreign Relations Law of the United States* (1987) 102(2); Klein, "A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts" (1988) 13 *Yale Journal of International Law* 332 at 350; Statute of the International Court of Justice, Art 38(1)(b).
- 208 Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, Chicago 1809, reprinted 1982), Bk 4, Ch 5.

accuracy.²⁰⁹ This is now a moot point, for there is a long line of cases that adopt this statement as correct,²¹⁰ and it appears that it still represents the common law of the United Kingdom.²¹¹ It is, however, subject to the qualification that the international rule so adopted must not be inconsistent with statute nor with the law as finally declared by municipal tribunals, whatever this last qualification may mean.²¹² As a number of excellent case by case analyses have been carried out elsewhere,²¹³ it is not proposed to conduct any such analysis here. It is sufficient to note that, with the possible exception of *R v Keyn*,²¹⁴ the cases and commentators cited clearly demonstrate that customary law is to be directly applied in

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- 209 Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 53.
- 210 *Barbuit's Case* (1737) Cas temp Talb 281; *Triquet v Bath* (1734) 3 Burr 1478; *Heathfield v Chilton* (1767) 4 Burr 1478; *Dolder v Huntingfield* (1805) 11 Ves 283; *Wolff v Oxholm* (1817) 6 M & S 93 at 100-6; *Novello v Toogood* (1823) 1 B & C 554; *De Wutz v Hendricks* (1824) 2 Bing 314; *Emperor of Austria v Day and Kassith* (1861) 30 LJ Ch 690 at 700; *R v Keyn* (1876) 2 Ex D 63 at 207; *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at 401; *Mortensen v Peters* (1906) 8 F(J) 93; *Chung Chi Cheung v R* [1939] AC 160 at 168; *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 at 889, 910; *Maclaine Watson v Department of Trade* [1988] 3 All ER 257 at 324-326.
- 211 Jennings & Watts, *Oppenheim's International Law* p56-57; Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219 at 222; Crawford & Edson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p73; Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268 at 1268; Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation" (1986) *Saskatchewan Law Review* 3 at 8; MacDonald, "The Relationship between International Law and Domestic Law" in MacDonald, Morris & Johnston (eds), *Canadian Perspectives on International Law and Organisation* p88; Lumb, *The Constitution of the Commonwealth of Australia (Annotated)* p267.
- 212 Mason, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Commonwealth Law Bulletin* 750 at 751-752.
- 213 Brownlie, *Principles of International Law* pp43-7; Starke, *Introduction to International Law* pp7-8; MacDonald, "The Relationship between International Law and Domestic Law" in MacDonald, Morris & Johnston (eds), *Canadian Perspectives on International Law and Organisation* pp93-9; Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 55-8; Harris, *Cases and Materials on International Law* (Sweet & Maxwell, London, 4th ed 1991) pp75-84.
- 214 (1876) 2 Ex D 63.

the United Kingdom. As will be seen, the position in Australia may be different, although the reasons for the divergence are unclear.

It should be apparent that the factors that militate against the direct application of treaties have no application to customary law. In particular, as customary law is not generally viewed as an expression of executive will, but instead as a product of the common consensus of states, there is no reason to fear executive manipulation of custom as a mechanism for circumventing parliament.²¹⁵ Indeed the executive has very little scope to avoid being bound by customary international law, or to influence the content of customary obligations.²¹⁶ Additionally, there is no reason to think that direct judicial use of international customary norms infringes upon the domain of the legislature, as there is no fundamental reason why incorporating international law into municipal law should be regarded as an legislative rather than a judicial function.²¹⁷

The main argument against the direct incorporation of customary law seems to be its uncertainty, as it can be very difficult for domestic courts to identify exactly what the customary rule is. Burmester, implicitly attaching decisive importance to this consideration, suggests that the more certain the customary rule, the more likely it is to be incorporated by the courts.²¹⁸ It is suggested, however, that uncertainty cannot be a fatal obstacle, for almost every country in the world directly applies customary law.²¹⁹ When faced with the task of ascertaining the content of a rule of

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- 215 Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219 at 222; MacDonald, "The Relationship between International Law and Domestic Law" in MacDonald, Morris & Johnston (eds), *Canadian Perspectives on International Law and Organisation* p115; Schwartz and MacKintosh, "The Charter and the Domestic Enforcement of International Law" (1986-7) 16 *Manitoba Law Journal* 149 at 168.
- 216 While there is a 'persistent objector' doctrine at international law that allows a state to avoid customary obligations, the doctrine has limited practical application. See *Anglo-Norwegian Fisheries Case* [1951] ICJ Reports 191.
- 217 Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation" (1986) *Saskatchewan Law Review* 3 at 9; Quincy Wright, "National Courts and Human Rights - The Fujii Case" (1951) 45 *AJIL* 62 at 80.
- 218 Burmester, "Is International Law Part of Australian Law?" (1989) 24(6) *Australian Law News* 30 at 31-32; see also Dugard, "The Application of Customary International Law Affecting Human Rights by National Tribunals" (1982) 76 *American Society of International Law Proceedings* 245 at 246.
- 219 Brownlie, *Principles of International Law* pp50-51; Starke, *Introduction to International Law* p86; See, eg, the practice in the following states; USA: *The Paquete Habana*, 175 US 677 (1900) 700 at 708; Canada: *The Ship "North" v R*

customary law, courts tend to look to textbooks, digests, judicial decisions, treaties, and the municipal legislation of other states.²²⁰ The ascertainment of customary international law may become easier following the decision of the International Court of Justice in the *Nicaragua Case*,²²¹ where it was held that certain types of General Assembly resolutions may become customary international law. Indeed, even before the *Nicaragua* decision, United States courts had begun to make use of a similar approach.²²²

Additionally, it should be realised that treaties can be useful in identifying customary international law. This is the case as treaties often codify customary law,²²³ and because in certain circumstance they can become customary law.²²⁴ It is important that courts do not assume that there is no customary international law just because there is a treaty in an area. There may be a customary norm that has identical content to a treaty norm, which can be directly applied as part of the common law.²²⁵ This possibility is particularly important in the human rights context, for many basic human rights norms may now be part of customary international

[1906] 37 SCR 385; India: *Virendra Singh v State of Uttar Pradesh* (1985) 22 ILR 131; Austria: Art 9 Constitution; Germany: Art 25 Basic Law; France: Preamble of Constitution of 1958, Jennings & Watts, *Oppenheim's International Law* p65; Greece: Art 28(1) Constitution; Italy: Art 10 Constitution, *Colorni v Ministry of War* (1950) 17 ILR 138; Netherlands: *The Nyuget* (1957) 24 ILR 916; Switzerland: *Kingdom of Greece v Julius Bar and Co* (1956) 23 ILR 195; South Africa: *Kaffraria Property Co v Government of the Republic of Zambia* (1980) 64 ILR 708; Argentina: *Re Bianchi* (1957) 24 ILR 173.

220 Eg, *Polites* (1945) 70 CLR 60 at 70, 80; *Maclaine Watson and Co v Department of Trade* [1988] 3 WLR 1033 at 1118; Brownlie, *Principles of International Law* p56.

221 *Case Concerning Military and Paramilitary Activities in and around Nicaragua (US v Nicaragua)* [1986] ICJ Rep 14.

222 *Filartiga v Pena-Irala*, 630 F 2d 876 (1980) at 882-3; see Lillich, "Invoking International Human Rights Law in Domestic Courts" (1985) 54 *University of Cincinnati Law Review* 367 at 398-399.

223 Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268 at 1272; Damrosch, "Application of Customary Law by United States Domestic Tribunals" (1982) 76 *American Society of International Law Proceedings* 251 at 254.

224 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3 at 42-43; Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219 at 223, 247-248; *Filartiga v Pena-Irala*, 630 F 2d 876 (1980); *Fernandez v Wilkinson*, 505 F Supp 787 (D Kan 1980) 798.

225 *Nicaragua* [1986] ICJ Rep 14; *Gradidge v Grace Brothers Pty Ltd* (1988) 93 FLR 414 (indicating that Art 14 ICCPR has become customary law).

law.²²⁶ This means that they are binding even on states who have not become parties to the major human rights treaties. It also raises the possibility that such norms form part of the common law and so are directly applicable even in the absence of incorporated treaty provisions.

As foreshadowed above, there is some doubt as to the rules that regulate the use of customary international law in Australia.²²⁷ It is unclear whether or not Australian courts may apply customary law directly as part of the common law, or whether some act of transformation into municipal law is required. There have been no Australian cases where the differences between these approaches would have been decisive and so the issues have not been closely analysed by the courts.²²⁸ However, the dicta in the cases diverge markedly. For example, Williams J in *Polites* held that:

It is clear that a rule [of public international law] when it has been established to the satisfaction of the courts, is recognised and acted upon as part of English municipal law so far as it is not inconsistent with rules enacted by statute or finally declared by the courts.²²⁹

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- 226 There is a huge body of writing in this area. See, eg, Restatement, American Law Institute, Restatement of the Law (Third), *Foreign Relations Law of the United States* (1987) 102(2) at 161-2, 167; Williams and de Mestral, *An Introduction to International Law* (2nd ed 1987); Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation" (1986) *Saskatchewan Law Review* 3 at 7; Lillich and Hannum, "Linkages between International Human Rights Law and US Constitutional Law" (1985) 79 *AJIL* 158 at 160-1; Klein, "A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts" (1988) 13 *Yale Journal of International Law* 332 at 347; Lillich, "Invoking International Human Rights Law in Domestic Courts" (1985) 54 *University of Cincinnati Law Review* 367 at 394-5; McDougal, Lasswell & Chen, *Human Rights and World Public Order* (1980) pp274, 325, 338; Sohn, "The Human Rights Law of the Charter" (1977) 12 *Texas International Law Journal* 129 at 133; *Declaration of Teheran*, Final Act of the International Conference on Human Rights 3 at 4, para 2, 23 UN GAOR, UN Doc A/CONF 32/41 (1968); Memorial for the USA, *Case Concerning US Diplomatic and Consular Staff in Teheran (US v Iran)* [1980] ICJ Rep 3 at 71.
- 227 Burmester, "Is International Law Part of Australian?" (1989) 24 *Australian Law News* 30 at 31; *Jago* (1988) 12 NSWLR 558 at 569.
- 228 Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p77.
- 229 *Polites* (1945) 70 CLR 60 at 80-81.

This position is the same as that which prevails in the United Kingdom. It is supported by the long line of cases cited above, which presumably form part of Australia's inherited law.

However, the situation began to change with *Chow Hung Ching v R*.²³⁰ In that case Latham CJ stated, somewhat ambiguously, that, "[i]nternational law is not as such part of the law of Australia ... but a universally recognised principle of international law would be applied by our courts."²³¹ However, in what has proved to be the most influential statement, Dixon J said

the theory of Blackstone ... that "the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land" is now regarded as without foundation. The true view, it is held, is "that international law is not a part, but is one of the sources, of English law."²³²

Dixon J did not cite any cases in support of this proposition, despite the multitude of cases that contradict it. Instead he cited two articles, one that makes an unsupported assertion of the "source" view,²³³ and the other that bases itself entirely upon a much disputed analysis of one of the old cases.²³⁴ It is unfortunate that Dixon J made such a sweeping statement without a proper analysis of the authorities, for it appears that his influence was such that his view now represents the law in Australia.²³⁵ This seemed to have been confirmed in *Mabo* when Brennan J, with Mason CJ and McHugh J in agreement, stated that:

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

230 (1949) 77 CLR 449.

231 At 462.

232 At 477.

233 Brierly, "International Law in England" (1935) 51 *LQR* 24 at 31.

234 Holdsworth, "The Relation of English Law to International Law" (1941-2) 26 *Minnesota Law Review* 141 at 147. The case discussed is *R v Keyn* (1876) 2 Ex D 63. For a totally different interpretation of this case see Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 60-61.

235 Kirby, "The Australian Use of International Human Rights Norms from Bangalore to Balliol - A View from the Antipodes" (1992) 18 *Commonwealth Law Bulletin* 1306.

law, especially when international law declares the existence of universal human rights.²³⁶

If this statement is, as it appears to be, an adoption of the view that international law is not a part of the common law, but instead a "source" of such law, then the question that arises is exactly what is meant by the word "source" in this context. There are two possibilities. The first is that the distinction between a source of law and a part of law is meaningless. As Lauterpacht has stated "[t]here is, in practice, no substantial difference between the two statements. A source of law is more than a potential part of the law; it is actually part of it. Acts of Parliament are both part of the law of the land and a source of it."²³⁷ However, if the word "source" was intended to be used in this sense, there would have been no point in Dixon J contradicting Blackstone.

The other possible meaning is that international law is only a historical or persuasive source for a rule.²³⁸ If this is the case, then there must be a judicial discretion not to apply an established rule of customary law in some cases.²³⁹ The difficulty is that the cases provide no guidance whatsoever upon the criteria to be applied in exercising this discretion.²⁴⁰ Additionally, if Australian judges do have such a discretion, then Australia is one of the only countries in the world where custom does not directly apply.²⁴¹

The question cannot be regarded as totally settled, particularly in the light of some of the language used in *Mabo*. For example Brennan J stated that "[i]f the international law notion ... [*of terra nullius*]... no longer commands general support, the doctrines of the common law which depend upon the notion ... *can hardly be retained*."²⁴² Later he said "[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and

236 *Mabo* (1992) 175 CLR 1 at 42. Once again, no cases were cited.

237 Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *The Grotius Society* 51 at 85; see also Jennings & Watts, *Oppenheim's International Law* p23; Gulmann, "Denmark" in Jacobs & Roberts (eds), *The Effect of Treaties in Domestic Law* p33-34.

238 Sawyer, "Australian Constitutional Law in Relation to International Relations and International Law" in Ryan (ed), *International Law in Australia* p50.

239 As above at pp50-51.

240 Crawford & Edeson, "International Law and Australian Law" in Ryan (ed), *International Law in Australia* p73; Mason, "The Relationship Between International Law and National Law, and its Application in National Courts" (1992) 18 *Commonwealth Law Bulletin* 750 at 751-752.

241 Starke, *Introduction to International Law* p80.

242 *Mabo* (1992) 175 CLR 1 at 41. Emphasis added.

political rights *demands reconsideration*."²⁴³ This use of mandatory language suggests that the judicial discretion not to adopt customary international rules may be very limited. If the discretion can be confined to the case where a contrary statute exists, then Australian law will broadly conform to that in force elsewhere. This position is also preferable in principle, for no reasons have been given for abandoning the traditional common law position, and it is very difficult to isolate the factors that should guide the discretion as to whether or not to adopt international norms.

CONCLUSION

This paper has attempted to provide an overview of the current impact of international law within Australia, in light of the growing public concern with the constitutional mechanisms that govern Australia's participation in the international community. The task of these mechanisms is twofold. Their internal function is to allow for the proper expression of the desires of the Australian people through their elected representatives, while their external function is to ensure that Australia is in a position to comply with its international obligations.

Much of this paper has focussed upon options for reforming the current mechanisms in order to allow them to better perform these two functions. It is becoming increasingly obvious that the Australian community desires greater parliamentary involvement in the treaty-making process. This is probably a consequence of the growing realisation of the impact that international agreements can have, combined with a desire on the part of a range of interest groups to be able to influence this impact in a way that furthers their own interests. Parliament seems more accessible to this type of lobbying than is the executive, particularly in light of its more public processes and the wider range of interests represented in Parliament. As there is probably no constitutional prohibition on such parliamentary involvement, it seems only a matter of time before it occurs in some form.

Strengthening the role of Parliament in this context provides an excellent opportunity to improve the mechanisms that relate to Australia's international compliance with treaties, for once Parliament is involved in ratification there is no reason why treaties should not be directly applied by the courts. A system of direct application should therefore be introduced, producing the result that very nearly was achieved constitutionally almost one hundred years ago.

243 At 42. Emphasis added.

All of the above relates to change in the future. Even without this reform, however, there is significant evolution apparent in the relationship between international and domestic law. This is to be seen both in the interpretive rules and, more dramatically, in administrative law. Even the "source" view of custom, representing something of a regression from the traditional common law rules, may have an increasingly significant practical impact, especially in the human rights area. The law regulating the interface between the international and the domestic is far from settled. International law will continue to be relevant in a wide range of domestic areas, be it as a possible future constitutional limitation on power (as in the Netherlands) or as an issue relevant to administrative discretions. A great deal of guidance on these issues must still be sought from the High Court.