APPLICANT A V MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS (1997) 142 ALR 331: PRINCIPLES OF INTERPRETATION APPLICABLE TO LEGISLATION ADOPTING TREATIES

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INTRODUCTION

The question of the status of international law in Australian law has recently been the subject of close examination in a number of contexts. Following the important decision of the High Court in *Teoh v Minister for Immigration and Ethnic Affairs*,[1] the process of treaty adoption and implementation was the subject of review by the Senate,[2] resulting in the creation of the Joint Parliamentary Committee on Treaties and a new focus on Australia's international obligations.

The decision of the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs*[3] provided an opportunity for the Court to clarify the interpretative rules to be used when construing legislation which adopts the provisions of multilateral treaties. This examination is to be welcomed in view of the dualistic relationship in Australia between international law (as evidenced by bilateral or multilateral treaties) and Australian law.

The fundamental principles of the relationship between international treaty-based law and domestic Australian law are clear. Numerous judicial statements attest to the general principle that provisions of international treaties to which Australia is a party do not have any direct applicability and do not give rise to any enforceable rights in the Australian legal system unless and until they are adopted or implemented by way of legislation[4].

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1 (1995) 183 CLR 273.

2 Report by the Senate Legal and Constitutional References Committee, *Trick or Treaty: Commonwealth Power to Make and Implement Treaties* (1995).

3 (1997) 142 ALR 331.

4 See, eg, *Bradley v Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J; *Kioa v West* (1985) 159 CLR 550 at 570-571 per Gibbs CJ; *Dietrich v R* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J. Obviously, where a treaty provision is in accordance with

It is nevertheless recognised that treaties may be relevant to an Australian court in some circumstances. In particular, treaties to which Australia is a party may be used as an aid to the development of the common law in cases where that common law is ambiguous or uncertain.[5] Secondly, treaties may be used as an aid to statutory interpretation, at least in cases where the statute is ambiguous, pursuant to the Acts Interpretation Act,[6] and possibly also pursuant to the common law principles of statutory interpretation.[7] Finally, a majority of the High Court in *Teoh* held that treaties could give rise to a legitimate expectation that administrative decision-makers would take the provisions of treaties to which Australia is a party into account when reaching decisions. This decision has been the subject of substantial comment,[8] and its continuing effect is now questionable in light of the executive statements made both by the Federal government at the time of the decision[9] and by the present Liberal government,[10] as well as the Administrative Decisions (Effect of International Instruments) Bill 1997 which, if passed, is intended to curtail the domestic legitimate expectations raised by entry into international conventions.

Because of the general requirement that treaties be implemented by legislation prior to their having any formal domestic effect, guidelines for the interpretation of such legislation are crucial. Inconsistencies in the interpretation of implementing legislation lead to ambiguity in the law, increased recourse to international and domestic dispute settlement procedures and, ultimately, the frustration of Australia's international legal obligations.[11] This paper will argue that, although the High Court has recognised the need to look to international law to interpret legislation which expressly adopts terms of international conventions, the Court has not necessarily ensured consistent treatment in the future.

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established Australian law, whether statutory or common law, no further domestic action will be required.

5 "Where the common law is unclear, an international instrument may be used by a court as a guide to that law ...": *Dietrich v R* (1992) 177 CLR 292 at 360 per Toohey J.

6 Acts Interpretation Act 1901 (Cth), s15AB; *ICI Australia Operations Pty Limited v Fraser* (1992) 34 FCR 564 at 569-570.

7 See the discussion in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

8 For example, F McKenzie, "What have we done with the Refugee Convention?" (1996) 70 *ALJ* 813; A Twomey, "Minister for Immigration and Ethnic Affairs v Teoh" (1995) 23 *F L Rev* 348; S Roberts, "Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction to it" (1995) 2 *Aust J Human Rights* 135; M Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's case and the Internationalisation of Administrative Law" (1995) 17 *Syd LR* 204; K Walker and P Mathew, "Minister for Immigration v Ah Hin Teoh" (1995) 20 *MULR* 236.

9 Joint Statement by the Minister for Foreign Affairs and the Attorney-General, *International Treaties and the High Court Decision in Teoh,* 10 May 1995.

10 Joint Statement of the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making,* 25 February 1997.

11 Public international lawyers have consistently referred to the benefits of an approach which takes account of international obligations: see, for example, B Conforti, *International Law and the Role of Domestic Legal Systems* (1993) at 107.

THE DECISION

Applicant A was an appeal from the Full Federal Court of Australia. That Court had overturned a decision by Sackville J upholding a decision of the Refugee Review Tribunal to grant refugee status to the applicants, contrary to the original decision of the Minister for Immigration and Ethnic Affairs (the Minister). The applicants claimed that they had the status of refugees in Australian law on the basis of their fear, found by all of the relevant courts to be well founded, of forced sterilisation if they were compelled to return to China.

For the applicants to succeed, they had to demonstrate that they fell within the definition of the term "refugee" as set out in of s 4(1) of the Migration Act 1958 (Cth) (the Act). That section provided that "refugee" has the same meaning as it has in Article 1 of the Convention relating to the Status of Refugees (Geneva 28 July 1951) as amended by the Protocol Relating to the Status of Refugees (New York 31 January 1961). The legislative provision thus adopted the terminology and meaning of the Convention in the clearest possible terms. As a result of the direct reference in the legislation to the meaning of the Convention, there was little or no hesitation on the part of any of the members of the High Court in looking to public international law to assist in relation to the definition of "refugee". The High Court, by majority (Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting), held that the applicants did not satisfy the definition of refugee on the grounds that they did not constitute a "particular social group".[12] The decision can be explained in part by the different approaches used by the members of the Court to the question of treaty interpretation.

The case is important in three main respects. First, it confirmed that Australian courts should adopt an internationalist approach to the interpretation of domestic statutes which incorporate provisions of international treaties. The important issue of whether the interpretation should accord with principles of public international law, or instead accord with precedent, consisting of a specific subset of international principles as defined by the Australian courts in this case and earlier decisions, will be considered below. Second, the members of the Court demonstrated a willingness to turn to international and foreign decisions and rules. In doing so, the High Court has made it clear to lower courts that such rules and decisions can be an important influence on their formulation of principles. Finally, the case suggests that it may be possible to extend its reasoning to cases in which legislation adopts in substance, but not by express reference, Australia's international obligations.

THE RELEVANCE OF INTERNATIONAL LAW TO THE INTERPRETATIVE QUESTION

Section 4(1) of the Act provides that the definition of the term "refugee" in the Act is directly referable to the meaning of the term "refugee" in the Convention. As a result, the High Court was faced with the question of how to determine that Convention's meaning. Put simply, the Court was faced with two alternatives. One was to interpret the word "refugee" in the Convention according to common law principles of Australian law governing the construction of terms in treaties. Although those common

12 Convention relating to the Status of Refugees (Geneva 1951), Article 1A(2).

law rules could include references to international standards and methods (in particular to the Vienna Convention on the Law of Treaties), there would be little guarantee that the resulting interpretation would accord with that given in international law. Alternatively, the Court could refer the question of the interpretation of the treaty term directly to public international law, necessitating an investigation of the relevant international legal rules relating to the interpretation of treaties.

Previous decisions of Australian courts had suggested that the construction in Australian courts of terms contained in treaties should take place according to principles of international law, rather than according to domestic principles of construction. In *Koowarta v Bjelke-Petersen*,[13] Brennan J (as he then was) stated that:

> A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law... .[14]

This approach was generally adopted by the Court in *Applicant A*. However, it remains unclear whether the application of specific interpretative principles of international law such as the Vienna Convention on the Law of Treaties was a result of the Court attempting directly to apply "public international law" relating to the interpretation of treaties, or was instead the application of those provisions of international law which have been incorporated into the Australian common law in previous Australian decisions.

TREATY INTERPRETATION IN INTERNATIONAL LAW

Before considering the approaches adopted by the members of the Court, it is useful to describe the accepted principles of public international law relating to the interpretation of treaties.

The interpretation of treaties has been the subject of considered analysis in international law. Eminent jurists (including McNair,[15] Fitzmaurice,[16] Lauterpacht,[17] Brownlie[18] and Rosenne[19]) have considered the relevant rules. The International Law Commission[20] researched and developed rules considered to be of general application in the preparatory work to the Vienna Convention on the Law of Treaties.[21]

13 (1982) 153 CLR 168.
14 Ibid at 265 per Brennan J.
15 *The Law of Treaties* (2nd ed 1961).
16 G Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 *BYBIL* 203.
17 H Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" (1949) 26 *BYBIL* 48.
18 I Brownlie, *Principles of Public International Law* (4th ed 1990) at 626.
19 S Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison" (1966) 5 *Columbia J Trans Law* 205.
20 International Law Commission "Reports of the Commission to the General Assembly" [1966] 2 *Yearbook of the International Law Commission* 169 at 219.
21 For a detailed analysis of the preparatory work, see P Brazil, "Some Reflections on the Vienna Convention on the Law of Treaties" (1975) 6 *F L Rev* 223.

The fundamental international interpretative rules are generally considered to be reflected by Article 31 and Article 32 of the Vienna Convention,[22] to which Australia is a party.[23] Each of these provisions was considered by the High Court in *Applicant A*.

Article 31 of the Vienna Convention provides:

General rule of interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides as follows:

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Thus Article 31 requires that the ordinary meaning of treaty terms be determined "in their context" and "in light of the object and purpose" of the treaty. Further, the context is to be determined according to the principles set out in Articles 31(2) and 31(3). In addition to the mandatory requirement that the words be interpreted according to their context and the object and purpose of the treaty, recourse may be made to the *travaux préparatoires* if necessary to confirm the meaning determined in accordance with Article 31 or if the Article 31 process leads to an ambiguous, obscure or unreasonable result.[24]

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22 I Brownlie, above n 18 at 627.

23 *Australian Treaty Series* 1974 No 2.

24 *Conditions of Admission of State to Membership in the United Nations* [1948] ICJ Rep 56 at 63.

THE COURT'S APPROACH

In light of the above international principles, it is useful to consider the approaches taken by the members of the High Court in *Applicant A*.

There was general agreement that reference to something other than municipal canons of construction was required. This accords with previous authority.[25] Brennan CJ stated that:

> [T]he rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[26]

He then went on to make some general comments regarding the interpretation of a treaty. He agreed with McHugh J and stated that the issue required an "... holistic but ordered approach".[27] In his view, this "may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning."

He went on to consider the object and purpose of the Convention as set out in the Preamble, and with reference to the negotiating history of the Convention. As a result of that consideration, including a detailed discussion of the *travaux préparatoires* and the Canadian decision of *Canada (Attorney-General) v Ward*[28] Brennan CJ was able to conclude that the applicants did indeed fall within the internationally accepted meaning of "refugee".

Both McHugh and Gummow JJ assumed that some reference to international standards of interpretation was appropriate. McHugh J referred to the relevance of Article 31 of the Vienna Convention as being "the leading general rule of interpretation of treaties".[29] Having noted that established authority required that treaties be interpreted in Australia according to the Vienna Convention, McHugh J went on to state that "Australian decisions provide no clear answer as to whether Art 31 requires or merely allows recourse to the context, object and purpose of a treaty...".[30]

Because of the lack of Australian authority on the point, McHugh J turned his attention to international authority. His Honour referred to a number of international jurists, including those referred to above, before adopting the views of Zekia J in the decision of the European Court of Human Rights in *Golder v United Kingdom*.[31] In that case, Zekia J had said that "interpretation is a *single combined operation* which takes into account all relevant facts as a whole".[32]

McHugh J nevertheless understood Zekia J to have emphasised an "ordered yet holistic approach" in which "primacy is to be given to the written text of the

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25 Earlier decisions of the High Court had held that the Vienna Convention should be applied to issues of treaty interpretation by Australian courts. For example, in the *Tasmanian Dams* case (*Tasmania v Commonwealth* (1983) 158 CLR 1) Gibbs CJ stated at 93 that "[t]he interpretation of treaties is now governed by the Vienna Convention on the Law of Treaties".

26 (1997) 142 ALR 331 at 332.

27 Ibid at 333.

28 (1993) 103 DLR (4th) 1.

29 (1997) 142 ALR 331 at 349.

30 Ibid at 350.

31 Series A, Vol 18 (1975) 14.

32 Ibid at 27-28.

Convention but the context, object and purpose of the treaty must also be considered." McHugh J then referred with approval to a statement by Murphy J in the *Tasmanian Dams* case,[33] to the effect that the interpretation of a treaty's provisions involved "giving primacy to the ordinary meaning of its terms in their context and in light of its object and purpose". Finally, he adopted a statement by Shearer to the effect that courts "should focus their attention on the four corners of the actual text".[34]

It is submitted that although McHugh J ultimately recognised that Article 31 of the Vienna Convention does require analysis of the context, object and purpose of a treaty,[35] his emphasis on the text of the treaty as holding a place of "primacy" is not supported by international authority. To place the text in a position of primacy is a misconstruction of Zekia J's formulation, and does not reflect the accepted principles applied by the European Court of Human Rights. In fact, in *Golder*, (where Zekia J was in dissent) the majority of the Court said that "the process of interpretation of a treaty is a unity, a single combined operation ... [Article 31] ... places on the same footing the various elements enumerated in the four paragraphs of the Article".[36]

The weight of international opinion, including that of Zekia J, is to the effect that the interpretation of treaties is a "single combined operation",[37] involving each of the elements set out in Article 31 of the Vienna Convention. It is also important to note that several decisions of the European Court of Human Rights subsequent to *Golde*r (which was decided in 1974) have stressed that interpretation of the European Convention should be made in a manner which is dynamic and takes account of the natural evolution of standards.[38]

The primary place given by McHugh J to the text of the treaty necessarily influenced his Honour's judgment. The definition of "refugee" was, in the view of his Honour, capable of determination by reading that definition "as a whole".[39] The definition of refugee in the Convention is as follows:

> [A]ny person who, ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[40]

His analysis led him to conclude that the applicants were not persecuted solely by reason of their membership of a particular social group. Rather, their membership of a social group was the result of the persecutory conduct of the State, and as such they did not fall within the definition of refugee.

Gummow J similarly placed primary emphasis on the text of the treaty[41] for the reasons given by McHugh J. He stated that:

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33 (1983) 158 CLR 1 at 177 per Murphy J.
34 I Shearer (ed), *Starke's International Law* (11th ed 1994) at 435.
35 (1997) 142 ALR 331 at 352.
36 Series A, Vol 18 (1975) 14.
37 International Law Commission, above n 20 at 219; F Jacobs and R White, *The European Convention on Human Rights* (2nd ed 1996) at 28.
38 *Tyrer v United Kingdom* Series A vol 26 at 15-16.
39 (1997) 142 ALR 331 at 354.
40 Refugee Convention, Article 1A(2).
41 (1997) 142 ALR 331 at 369-370.

> Regard primarily is to be had to the ordinary meaning of the terms used therein, albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results. However, as McHugh J demonstrates by the analysis of the subject in his reasons for judgment, with which I agree, it is important to appreciate the primacy to be given to the text of the treaty.[42]

He nevertheless considered a number of historical factors relevant to the negotiation of the Convention. He then noted correctly that the object and context of the Convention must be considered in light of an "appreciation of the limits placed by the Convention upon achievement of such objectives".[43] To do otherwise would in fact be to ignore the context of the Convention.

Following his analysis of the Convention and the terms of Article 1A(2), Gummow J held that:

> Moreover, the text of the Convention as a whole, and Art 1 in particular, shows the deliberate choice not to include as "refugees" all persons who have a well-founded fear of persecution. The submissions for the appellants, in substance, seek to achieve such a result by distorting the framework of par (2) of s A of Art 1, which I sought to outline above.[44]

As a result, he concluded that the applicants were not within a "particular social group" and did not come within the definition of "refugee".

Dawson J addressed the issue of interpretation only briefly, and stated that the construction of a domestic statute which:

> incorporates a definition found in an international treaty ... should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law.[45]

His Honour then stated that the approach must be to apply "the method applicable to the construction of the corresponding words of the treaty" and having set out the text of Article 31 of the Vienna Convention,[46] went on to state that the starting point must be the "text of the treaty".

Noting the requirements of the Vienna Convention, his Honour said that Article 31 precluded a literal construction which would "... defeat the object or purpose of a treaty and be inconsistent with the context ...".[47] His Honour equated this principle with " ... the accepted canon of construction that an instrument is to be construed as a whole and that words are not to be divorced from their context or construed in a manner that would defeat the character of the instrument".[48] With respect, such a simplification is a distortion of the interpretation required by international law, which focuses not on the avoidance of defeat of the legislative object, but on the positive achievement of the treaty objectives. Dawson J concluded that in his opinion, nothing

42 Ibid at 369-370.
43 Ibid at 374.
44 Ibid at 376.
45 Ibid at 339.
46 Ibid at 339.
47 Ibid at 340.
48 Ibid.

in the context, object or purpose of the Convention provided a construction of the definition of refugee which assisted the applicants.[49]

Kirby J in his dissenting judgment also made express reference to the issue, stating:

> [I]t is desirable (so far as possible), and quite possible necessary, that this Court should adopt a definition which pays appropriate regard to the fact that the definition of "refugee" originates in an international treaty. The Court should thus interpret the words in the context in which, and for the purpose for which, they were devised.[50]

His Honour went on to describe the context of the Convention[51] as being the "... problems of refugee displacement which have been such a significant feature of the world ...".[52] In this respect Kirby J differed from the opinion of Gummow J, who had held that:

> A perusal of the text of Art 1 discloses the following. First, whilst as a matter of ordinary usage, a refugee might be one whose flight has been from invasion, earthquake, flood, famine or pestilence, the definition is not concerned with such persons. Accordingly, care is needed in resolving any apparent obscurity in the text of the definition by seeing the definition as reflecting, in a broad sense, humanitarian concerns for displaced persons.[53]

Kirby J made express reference to the importance of interpreting the treaty in a manner which took account of developments in understanding since the original text was drafted. In his view, the concept of a "particular social group" was neither static, nor fixed by historical appreciation.[54]

His Honour then went on to analyse the circumstances in which the phrase "particular social group" came to be included in the Convention. He drew from that analysis the conclusion that although members of the group must be identifiable, they need not have been individually known as members of the group.[55] Importantly, his Honour approved of the use by Sackville J at first instance of the Handbook on procedures and Criteria for Determining Refugee Status,[56] which sets out some guidance as to the membership of a particular social group. It is relevant to the consideration of the question because it was drafted with reference to the "experience of the High Commissioner's office as well as the practices of contracting States ...".[57] His Honour reached the conclusion that the context of the treaty suggested that the social group under consideration would almost inevitably be subject to persecution, and he therefore rejected the arguments relied on by the members of the majority to deny the existence of refugee status.

Each member of the Court either expressly or implicitly accepted that the interpretation of the term "refugee" involved some reference to the standards of public international law, rather than the established principles of domestic statutory construction. However, it is evident that mere recognition of the need to take account

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49 Ibid at 345.
50 Ibid at 381.
51 Ibid at 382.
52 Ibid.
53 Ibid at 370.
54 Ibid at 383.
55 Ibid at 389.
56 United Nations Doc HCR/PRO/4 (1979).
57 Ibid.

of the international meaning of the term leaves unanswered the question of how to determine that international meaning. One of the issues left unanswered after *Applicant A* is whether the meaning that a phrase "bears in the treaty" is that meaning determined by the Australian court with direct reference to public international law, or alternatively the meaning determined according to the textual focus resulting from the interpretation of Article 31 of the Vienna Convention preferred by the majority.

Notwithstanding their recognition of the importance of interpreting domestic provisions intended to reflect or adopt international conventions according to public international law, the majority of the High Court in *Applicant A* ultimately failed to ensure the achievement of that goal. The majority placed unnecessary emphasis on the text of the treaty and did not sufficiently consider the extent to which the object of the Convention was to provide asylum for those individuals who were unable to gain the protection of their *de facto* or *de jure* government in particular circumstances. Perhaps more importantly for the longer term development of the issue in Australian courts, the majority made only superficial reference to the requirements of Article 31(3)(b) and (c).

It is submitted that the textual approach adopted by the majority of the Court is a misapplication of the words of Article 31 of the Vienna Convention. If it is accepted, as it seems to have been by the majority of the Court, that the rules of interpretation of international law are applicable, it is inappropriate to place undue emphasis on the text of the treaty. To do so risks reverting, in substance if not in form, to the traditional common law methods of statutory interpretation. Indeed, in a decision in the Federal Court subsequent to *Applicant A*,[58] Emmett J referred to *Applicant A*, and in particular the statements made by Brennan CJ and McHugh J, as deciding that in Australian law:

> The text of the treaty necessarily has primacy in the interpretation process. However, the mandatory requirement that courts look to the context, object and purpose of the treaty provisions as well as the text is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court were required to construe exclusively domestic legislation.[59]

The conclusion of Emmett J demonstrates the potential for the various statements of the members of the High Court in *Applicant A* to limit the recourse that may be had by lower courts to sources which would be considered legitimate according to public international law.

Although the majority of the Court in *Applicant A* did, in the end result, make reference to a number of sources which fall within the categories of Article 31 of the Vienna Convention, it is submitted that it is unfortunate that no precise reference to the matters set out in Article 31(3) of the Vienna Convention was made. The difference in result is demonstrated convincingly in a comparison between the majority judgments and the dissenting reasons given by Kirby J.

Article 31 is sufficiently clear to render unnecessary attempts to paraphrase its requirements. The strict application of precedent in Australian courts increases the possibility that statements made in the course of one case as to the application of public international law in that case will be applied by other courts in later cases. Having decided that international law should be applied to determine the meaning of terms adopted in domestic legislation by treaties, Australian courts should make every effort

58 *Thiyagarajah v Minister for Immigration and Ethnic Affairs* (1997) 143 ALR 118.
59 Ibid at 124.

to follow and apply the clearly phrased and generally accepted canons of public international law.

APPLICATION OF THE DECISION TO OTHER LEGISLATION

A variety of legislative techniques have been employed by the Commonwealth parliament to implement international obligations in domestic law. These range from providing that particular Conventions have the force of law in Australia, to enacting legislation which is based on, but does not expressly refer to, an international Convention.[60] One of the main unresolved issues following *Applicant A* is the extent to which its reasoning is applicable to legislation which is based on, but does not directly adopt, international conventions. Because that question was not directly at issue in *Applicant A* it was not considered by all members of the Court. However, some statements suggest that it may be possible to extend the reasoning in *Applicant A* to the interpretation of statutes which adopt treaty provisions in substance, but do not make express reference to the treaty.

Brennan CJ commented that:

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.[61]

Thus, he refers to a transposition of the treaty terminology as the decisive legislative act. This transposition could conceivably occur without a formal reference to the treaty itself.

It is submitted that there should be no distinction drawn between legislation which adopts in substance Australia's international obligations, and legislation which directly refers to the provisions of international conventions and agreements. Where it is clear that parliament has intended to implement international obligations through legislation, whether that intention is determined on the face of the legislation or by analysis of the various reading speeches in parliament, Australian courts should endeavour to give the resulting legislation a meaning that is in conformity with the underlying international obligation.[62] Not every piece of implementing legislation will refer directly to the underlying treaty or international obligation. In fact, as was noted above, in some cases, Australia's existing law may be in conformity with newly entered international treaty provisions. In such a case, a strong case can be made out for interpreting such pre-existing Australian law with reference to the international standards, and by using the accepted methods of interpretation of international law.

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60 The nature of legislative responses to international obligations has recently been considered by Campbell: B Campbell, "The Implementation of Treaties in Australia" in B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997) at 144-147.

61 (1997) 142 ALR 331 at 332.

62 A similar view was expressed by Mr P Brazil (Leader of the Australian Delegation to the Conference which resulted in the Vienna Convention) when he stated that in cases of interpretation of treaties by domestic courts "[t]here can be no doubt that, in principle, the Court should apply the meaning the treaty bears under international law." P Brazil, above n 21.

CONCLUSION

Applicant A represented a significant opportunity for the High Court to make explicit the principles relating to the interpretation of statutes which implement Australia's international obligations. While the decision has confirmed that reference should be made by courts to the Vienna Convention on the Law of Treaties, and in particular to Article 31 of that Convention, in cases where it is clearly necessary for the domestic court to interpret a treaty provision, the Court ultimately failed to resolve the extent to which the text of Articles 31 and 32 should guide an Australian court over a simplistic reference to the text of the treaty in question.

Obviously other sources are relevant to the interpretative question. It is likely that decisions to follow *Applicant A* will continue to exhibit a lack of consistency in receiving and applying those sources. It would be unfortunate in the extreme if the growing and important body of foreign and international jurisprudence (which forms part of the subsequent practice referred to in Article 31(3)) was not clearly available to an Australian court when dealing with a question of treaty interpretation.

Equally, it is unfortunate that the Court did not grasp the opportunity to clarify the extent to which international law is relevant to the interpretation of statutes which apply and incorporate in substance Australia's international obligations. Although there are compelling policy reasons which favour such statutes being given an "internationalist" interpretation, the strictures of precedent may well lead to frequent reliance on the traditional, textual, canons of domestic statutory construction. The topic is certain to come under increasing focus as the internationalisation of Australia's law continues.