

B & B AND MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS:

CAN INTERNATIONAL TREATIES RELEASE CHILDREN FROM IMMIGRATION DETENTION CENTRES? *

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I INTRODUCTION

The controversial decision of the Full Court of the Family Court in *B & B and Minister for Immigration and Multicultural and Indigenous Affairs*¹ received substantial media coverage.² It had the potential to radically change Australian immigration authorities' approach to children who are considered unlawful non-citizens within the meaning of the *Migration Act 1958* (Cth) (*Migration*

* [2003] 30 Fam LR 181.

¹ [2003] 30 Fam LR 181 (*'B & B'*).

² See, eg, Wayne Howell and Mark Phillips, 'Court Liberates Children from Detention', *Herald Sun* (Melbourne, Australia), 26 August 2003, 2; Rebekah Devlin and Sean Fewster, 'After Two Years, Five Children Take Their First Steps to Freedom', *The Advertiser* (Adelaide, Australia), 26 August 2003, 3; Sharon Mathieson, 'Asylum Case Children Win Freedom Fight', *The Daily Telegraph* (Sydney, Australia), 26 August 2003, 11. The High Court decision has also received significant media coverage: see, eg, Sean Fewster and Mark Phillips, 'Court Rules It's Acceptable to Detain Innocent Children behind Razor-Wire Fences', *The Advertiser* (Adelaide, Australia), 30 April 2004, 5; Michelle Grattan, 'Release the Children, Says Report', *The Age* (Melbourne, Australia), 8 May 2004, 7.

Act')³ and who, since their arrival, have been detained in immigration detention centres.

This case note focuses on the Full Court's decision. The matter was appealed to the High Court and judgment was delivered on 29 April 2004,⁴ as summarised at the end of this case note. Whilst the Full Court's decision was overturned and it was held that the Family Court did not have jurisdiction to release children from detention centres, an examination of the Full Court's reasoning is still of value as it provides a legal framework within which to examine Australia's approach to international treaties and provides a challenging example of how Australian domestic law can successfully operate alongside, and comply with, Australia's international obligations. The Full Court's decision still has implications for the relationship between international treaties and Australian domestic law, and more particularly, the impact of the *Convention on the Rights of the Child*⁵ on the *Family Law Act 1975* (Cth) ('*Family Law Act*'). Save for Callinan J, the High Court did not reach a conclusion on whether or not *CROC* had been incorporated into the *Family Law Act*, and therefore the decision of the Full Court may be referred to in this regard in the future. The Full Court and Kirby J of the High Court highlighted Australia's international obligations and exposed breaches which will inevitably be the subject of future discussion. The case note concludes with some reflections on the lawfulness of mandatory detention pursuant to various international human rights conventions.

II *B & B* – SUMMARY OF THE FACTS AND DECISIONS

In July 2002, two male children aged 12 and 14, applied to the Family Court for orders that the Minister for Immigration and Multicultural and Indigenous Affairs release them from the detention centre where they were being held because continued detention was harmful to their welfare. The application was initially made by the two boys. Although not parties to the original application, the boys' three younger sisters were later added as appellants, following leave from the Court. Their father, Mr Bakhtiyari, intervened in the proceedings and was also an appellant. He sought to have all of his five children live with him, or if this was refused, to have regular contact with them. Furthermore, he sought that certain orders be made to protect them while they remained in detention. At the time of the trial, Mr Bakhtiyari was living in the general community but he is now also detained.

The main question before the Family Court was whether or not the Court, in the exercise of its welfare jurisdiction and injunction powers, has the power to make orders to release children from detention or, alternatively, to make orders for the protection of such children whilst in detention.

³ See *Migration Act 1958* (Cth) s 14(1), which provides that '[a] non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen'. See also s 13(1), which provides that '[a] non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen'.

⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) ('*MIMIA v B*').

⁵ Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) ('*CROC*').

In October 2002, Dawe J as a single judge of the Family Court, found that the Family Court had no jurisdiction to make orders in respect of children held in immigration detention. Her Honour held that any welfare jurisdiction that may exist was subject to statute and could not bind a minister exercising his or her executive power.⁶ This decision was appealed to the Full Court.⁷

The Full Court identified the following issues for consideration:

- (a) Whether the welfare jurisdiction contained in s 67ZC of the *Family Law Act* applies to children in South Australia.
- (b) Whether the constitutional basis provided by the marriage and divorce and incidental powers contained in the *Constitution* is sufficient to enable the Family Court to make orders against third parties for the protection of the children.
- (c) Whether the external affairs power contained in the *Constitution* forms an additional source of Commonwealth power that would enable the Court to make orders against third parties for the protection of children.
- (d) Whether, the welfare jurisdiction of the Family Court is to be equated with the *parens patriae* jurisdiction, and in particular, whether it extends to the making of orders against third parties for the protection of children.
- (e) Whether having regard to the provisions of the *Migration Act*, the Family Court of Australia has the power to
 - (i) order the Minister to release the children or
 - (ii) to make orders supervising the Minister's detention of the children.⁸

On 19 June 2003, the Full Court (Nicholson CJ, Ellis and O'Ryan JJ) found that Dawe J wrongly determined that the Court did not have a welfare jurisdiction in respect of the children in detention and was also incorrect in determining that the exercise of the welfare jurisdiction was restricted by statute. The Full Court described its welfare jurisdiction as akin to the ancient *parens patriae*⁹ jurisdiction of the English courts, exercised on behalf of the Sovereign who was considered to have the power to protect children who could not protect themselves. Reference was made to a line of case law whereby the Family Court through relying upon *parens patriae*, has 'sovereignty' over decisions authorising specialised medical treatment.¹⁰ In 1992, the High Court confirmed that the welfare power extended to applications to sterilise minors with serious

⁶ [2002] FamCA 834 (Unreported, Dawe J, 9 October 2002).

⁷ The appeal was brought by the mother, Mrs Bakhtiyari, on behalf of the two boys. Although not parties to the original application, the mother was also given leave to add the children's three sisters who were 11, 9 and 6 years old as appellants. The children's father was also an appellant.

⁸ *B & B* [2003] 30 Fam LR 181, 185.

⁹ This literally means 'parent of the country', ie the Sovereign, or some other authority, regarded as the guardian or protector of citizens who are unable to protect themselves: James Morwood, *A Dictionary of Latin Words and Phrases* (1st ed, 1998) 140.

¹⁰ *B & B* [2003] 30 Fam LR 181, 221.

intellectual disabilities.¹¹ In 1993, Mushin J, sitting as a single Judge of the Family Court, determined that the jurisdiction extended to making the ultimate decision about a child undergoing a sex change operation notwithstanding the consent of the parents.¹²

The Full Court unanimously held that this welfare jurisdiction was well established by its incorporation into s 67ZC of the *Family Law Act*.¹³ The Court acknowledged that the scope of s 67ZC must be read in light of the heads of power conferred on the Parliament by the *Australian Constitution*. Thus, the Court could only make orders in relation to the welfare of children if the orders sought were sufficiently connected to the relevant constitutional heads of power. The majority of the Court (Nicholson CJ and O’Ryan J; Ellis J dissenting) held that orders for the release of children in detention could be derived from the marriage and divorce and incidental powers in ss 51(xxii) and 51(xxiii) of the *Australian Constitution*.¹⁴ The majority noted that if this power was

¹¹ *Secretary, Department of Health & Community Services (NT) v JWB and SMB* (1992) 175 CLR 218 (*Marion’s Case*). *Marion’s Case* involved a 14 year old girl suffering from mental retardation who, at the consent of her parents, was due to undergo a sterilisation procedure. The majority of the High Court was of the view that the Family Court of Australia did have jurisdiction to authorise the carrying out of the procedure. The welfare jurisdiction of the Family Court derived its constitutional validity from the marriage powers contained in s 51(xxii) of the *Australian Constitution*. Here, the question of sterilisation of a child of a marriage arose out of a marriage relationship and was therefore within the Court’s jurisdiction. Ultimately, the Family Court did not authorise the procedure because the circumstances were not so compelling as to justify such invasive surgery.

¹² *Re A* (1993) 16 Fam LR 715. In *Re A*, the mother of a child applied to the Family Court to authorise a sex change operation for the child. Justice Mushin granted the application and held that the Family Court has jurisdiction to authorise certain medical procedures where there is a significant risk of a ‘wrong’ decision being made by the parties and where the consequences of such a decision are particularly grave. In this case, the proposed sex change would require invasive, irreversible and major surgery. Thus, the decision to proceed with the treatment would fall within the Court’s welfare jurisdiction and not within the ordinary scope of parental power. See also the recent decision of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297.

¹³ *B & B* [2003] 30 Fam LR 181, 206, 207, 247.
Family Law Act 1975 (Cth) s 67ZC provides:

- (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
- (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

¹⁴ *Australian Constitution* s 51 provides:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

- (xxi) marriage;
- (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

insufficient,¹⁵ orders could be made on the basis of s 51(xxix) of the *Australian Constitution*, the external affairs power.¹⁶ The Full Court held that *CROC* — which entered into force in Australia on 16 January 1991 — had been incorporated into the *Family Law Act* by the *Family Law Reform Act 1995* (Cth), pursuant to the external affairs power.¹⁷

Once the Court established that it did have jurisdiction to make orders that children be released from detention, it considered the effect of the *Migration Act* in relation to the exercise of its powers under the welfare jurisdiction. The majority took the view that if it was determined at trial that the children were held in indefinite detention, then this detention would be unlawful.¹⁸ They considered that the *Migration Act* should be interpreted as having regard to Australia's obligations under *CROC*.¹⁹ If this was done, the majority considered that given the interference with liberty involved, the *Migration Act* could not have intended the indefinite detention of children.²⁰ They also considered the capacity of children, as distinct from their parents, to unilaterally end their detention, and expressed the view that it was unlikely that these children had the capacity to make a request for repatriation under s 198(1) of the *Migration Act*. If they were found not to have such a capacity, the majority considered that their detention would be unlawful.²¹ In dissent, Ellis J did not consider that the continued detention of the children was unlawful as it could not be said that there was no likelihood in the reasonably foreseeable future of the children being released from detention.²²

The majority found that if they were erroneous in determining that the Family Court had the power to order the release of the children, the Court nevertheless may still give directions about the nature and type of detention in which the children are held and may also decide issues relating to the medical and educational facilities available to them whilst in immigration detention.²³ Justice

¹⁵ In the High Court decision, Callinan J disagreed that ss 51(xxi) and 51(xxii) of the *Australian Constitution* comprehended a general discretionary welfare power in relation to children and determined that the power only related to *parentage* of children: *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [215]–[216].

¹⁶ *B & B* [2003] 30 Fam LR 181, 223. The majority acknowledged that the marriage and divorce powers could not be relied upon by exnuptial children and, whereas the children in *B & B* were children of a marriage, exnuptial children would need to rely on the external affairs power.

¹⁷ *B & B* [2003] 30 Fam LR 181, 228–9. Only Callinan J of the High Court addressed in any detail whether *CROC* had been incorporated into domestic law. His Honour disagreed with the Full Court's decision that *CROC* had been incorporated: *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [220]–[222]. His Honour determined that the *Family Law Reform Act 1995* (Cth) did not evidence an intention to incorporate *CROC* into the *Family Law Act*: at [221].

¹⁸ *B & B* [2003] 30 Fam LR 181, 243–4.

¹⁹ *Ibid* 228, 243.

²⁰ *Ibid* 243–4.

²¹ *Ibid* 242–3.

²² *Ibid* 250.

²³ *Ibid* 246. The High Court considered it unnecessary to consider whether the welfare power could be extended to require the change of conditions for children in detention centres as the children were not currently within a detention centre: *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [177].

Ellis also considered that the Court had jurisdiction to make certain protective orders concerning children in immigration detention.²⁴ In summary, the majority answered all the initial five questions referred to above in the affirmative.²⁵ The Court set aside the relevant orders of Dawe J and ordered that the case be remitted for rehearing as a matter of urgency.

Both the children and their father filed applications seeking interim orders that the children be released from immigration detention and have contact with their parents. These applications came before Strickland J who held that he was not satisfied that it was in the best interests of the children to release them pending the final hearing.²⁶ Justice Strickland placed significant weight on the risks he saw in disrupting the children's lives for what might be a short-term gain and therefore refused to order the children's release for fear of creating a worse situation for them.²⁷

Justice Strickland's decision was appealed to the Full Court.²⁸ Justices Kay, Coleman and Collier held that the issues identified by Strickland J were too narrow, and that the relevant issues to consider in determining what was in the children's best interests were 'wider than those limited matters'.²⁹ The Full Court focused on the possible duration of the children's detention before their almost certain deportation — namely, that detention was for an indefinite period and could potentially last their entire childhood.³⁰ The Court held that the proposal in respect of release, whereby the day-to-day needs of the children would be the responsibility of carers, better catered for psychological and emotional needs that were not being addressed whilst the children remained in detention and constituted, on balance, a better situation for the children than if they remained in detention.³¹ The Full Court found that the children's welfare would be endangered if they remained in their present situation, referring to evidence that the children were being subjected to inappropriate behaviour and violence in the

²⁴ *B & B* [2003] 30 Fam LR 181, 249, 250.

²⁵ The discussion in relation to questions three and four of the initial questions are the most relevant to the area of international law and will be explored in this case note.

²⁶ *B and B and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 640, (Unreported, Strickland J, 5 August 2003) [25].

²⁷ *Ibid.*

²⁸ *B & B and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 621.

²⁹ *Ibid* [124].

³⁰ *Ibid* [122]; In *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [172], Kirby J disagreed that the detention of the children could be considered permanent or indefinite, arguing that the *Migration Act* clearly provided for the children's detention to terminate when they chose to leave or Australia or upon the completion of the legal proceedings.

³¹ *B & B and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 621, [127]–[131].

detention centre.³² The Full Court granted the appeal and ordered that the children be released immediately.³³

III THE EFFECT OF INTERNATIONAL TREATIES ON AUSTRALIAN DOMESTIC LAW

One of the early drafts of covering cl 7 of the *Australian Constitution* stated that ‘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’, overriding inconsistent State law.³⁴ This position was not reflected in the final draft of the *Australian Constitution*³⁵ and it is now well established in Australia that international treaties do not automatically have force as domestic law in Australia.³⁶ There are four ways in which treaties are incorporated into domestic law. These will be discussed below, followed by an analysis of how *B & B* fits into these categories.

A Incorporation by Legislation (Category One)

The clearest and simplest way of incorporating international law into domestic law is by a direct and intentional incorporation into domestic legislation. Justice Mason aptly describes the position as follows:

³² Ibid [128].

³³ There have since been two cases determined by Chisholm J that have considered in some detail the decision of *B & B*, namely *HR and DR and Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 31 Fam LR 123 (*‘HR and DR’*) and *AI and AA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 943 (*‘AI and AA’*). Whilst Chisholm J expressed some difficulty in interpreting *B & B* (particularly in light of s 474 of the *Migration Act* which provides that the Minister’s decision ‘is final and conclusive’ and ‘must not be challenged ... or called into question in any court’: see *HR and DR* (2003) 31 Fam LR 123, 149, 155; and *AI and AA* [2003] FamCA 943, [282] respectively), His Honour was not required to consider whether or not *CROC* was incorporated into the *Family Law Act*. Furthermore, Chisholm J distinguished the facts of *HR and DR* and *AI and AA* from those in *B & B*. Unlike *B & B*, *HR and DR* involved adults as well as children. Chisholm J concluded that the court cannot make orders against the Minister’s arrangement for the detention of adult members of a child’s family: *HR and DR* (2003) 31 Fam LR 123, 159–60. In *AI and AA*, there was no evidence or argument that the detention was indefinite or illegal. In fact, the evidence suggested that the detention would come to an end upon the conclusion of the asylum proceedings in the Federal Court: *AI and AA* [2003] FamCA 943, [260]. This is in contrast to the position in *B & B*, where the majority held that there was a very real possibility of indefinite detention.

³⁴ See Draft of a Bill to Constitute the Commonwealth of Australia, South Australia, *Parliamentary Debates*, House of Representatives, 22 March 1897–5 May 1897, appendix.

³⁵ See Cheryl Saunders, ‘Articles of Faith or Lucky Breaks?’ (1995) 17 *Sydney Law Review* 150, 154–5. Saunders argues that the framers of the *Australian Constitution* may not have fully grasped the broader significance of removing the early version of cl 7, as they left the High Court with its jurisdiction to deal with matters arising under a treaty in s 75(i), but removed the only provision which would have enabled matters to arise in this way. Therefore, it is arguable that the framers of the *Australian Constitution* did not intend to remove the direct application of treaties in Australian Law. Cf Peter Heerey, ‘The Commonwealth’s Use of the External Affairs Power’ (1995) 14 *University of Tasmania Law Review* 189, 191, where it is argued that it was a novel concept for treaties to operate with their own force as domestic law and noted that the Privy Council held in *Walker v Baird* [1892] AC 491 that, in the absence of statute, the provisions of treaties are not incorporated into domestic law.

³⁶ *Chow Hung Ching v The King* (1948) 77 CLR 449, 478; *Bradley v Commonwealth* (1973) 128 CLR 557, 582.

It is the well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia ... [i]n this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need of legislation via Congress ... [s]ection 51 (xxix) [the external affairs power of the Constitution] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions].³⁷

The majority in *Victoria v Commonwealth (Industrial Relations Act Case)*³⁸ developed a test to ascertain whether or not a treaty had been incorporated into domestic law. The majority stated that '[w]here a treaty relating to a domestic subject matter is relied on to enliven the legislative power conferred by s 51(xxix) the validity of the law depends on whether its *purpose or object is to implement the treaty*'.³⁹

B *Incorporation by Interpreting Ambiguities and Developing Common Law (Categories Two and Three)*

Whilst treaties have no direct force unless they are incorporated into legislation via Parliament, there are two other well accepted situations where treaties may have effect in Australia — namely in the interpretation of statutes and the development of common law rules. In relation to statutory interpretation, courts have held that if there is an ambiguity, the courts can look to international treaties in order to interpret the statute consistently with Australia's international obligations. However, if the statute is clear in its intention, a court cannot consider international treaties, even if the result is inconsistent with such treaties.⁴⁰ A number of Judges have relied upon international law for guidance when considering the direction of the common law. This is now considered to be an appropriate way to incorporate international law into domestic law. In *Mabo v Queensland [No 2]*,⁴¹ Brennan J stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.⁴²

The first three categories regarding the incorporation of international law, as set out above, were reflected in the *Bangalore Principles* which were developed at a meeting in Bangalore, India in February 1988 by judges and lawyers from

³⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224–5.

³⁸ (1996) 187 CLR 416, 486–7 ('*Industrial Relations Act Case*').

³⁹ *Ibid* 487 (emphasis added).

⁴⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

⁴¹ (1992) 175 CLR 1 ('*Mabo*').

⁴² *Ibid* 42.

various countries.⁴³ At the time, some of the principles were considered to be quite revolutionary and by some to be even ‘heretical’.⁴⁴ More than a decade later, in 1999, Justice Michael Kirby broadly discussed the three categories described above in the context of the *Bangalore Principles* and indicated that

[t]he age of reconciliation of international and national law has dawned in Australia ... It is an exciting and constructive time of legal creativity. But the ultimate question is whether Judges and other lawyers, trained until now to think strictly in jurisdictional terms, can adapt their minds to a new way of thinking that is harmonious to the realities of the world about them.⁴⁵

It is apparent that the courts are becoming more receptive to the concepts summarised in the *Bangalore Principles* as they are reflected in essence in the categories above. However, this use of international law has expanded even further as described in category four below.

C *Legitimate Expectation in Administrative Decision-Making* (Category Four)

In the controversial decision of *Minister for Immigration and Ethnic Affairs v Teoh*,⁴⁶ the High Court extended the impact of international law on domestic law in Australia. Interestingly, the treaty in issue was *CROC*, the same treaty involved in *B & B*. Mr Teoh, an unlawful non-citizen, appealed an administrative review decision that he be deported on the basis that deportation would cause hardship to his wife and young family who resided in Australia. The High Court held that Australia’s ratification of *CROC* created a ‘legitimate expectation’ for Mr Teoh and his children that any decision relating to his deportation or residency would be made in accordance with *CROC* — namely art 3(1), which provides that the best interests of children will be a primary consideration of a decision-maker.⁴⁷

The Court in *Teoh* reaffirmed the orthodox position and refused to introduce mandatory consideration of international law by ‘the back door’.⁴⁸ However, the majority was not prepared to accept what had been considered the logical and legal consequences of that paradigm: that ratified treaties have *no* effect on discretionary administrative decision-making. The Court held that decision-makers are required to take into account ratified but unincorporated international treaty obligations or, alternatively, give those affected the

⁴³ Justice Michael Kirby, ‘The *Bangalore Principles* on “the Domestic Application of International Human Rights Norms”’ (1988) 14 *Commonwealth Law Bulletin* 1196, 1197. This initial attempt at formulating a code of standards for judicial conduct evolved into the *Bangalore Principles of Judicial Conduct 2002*. See Commission on Human Rights, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato’ Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2002/43*, 59th sess, Provisional Agenda Item 11(d), Annex, UN Doc E/CN.4/2003/65 (13 January 2003).

⁴⁴ Justice Michael Kirby, ‘Domestic Implementation of International Human Rights Norms’ (1999) 5(2) *Australian Journal of Human Rights* 109, 116.

⁴⁵ *Ibid* 124–5.

⁴⁶ (1995) 183 CLR 273 (*‘Teoh’*).

⁴⁷ *Ibid* 302 (Toohey J).

⁴⁸ *Ibid* 291 (Mason CJ and Deane J).

opportunity to present arguments as to why the treaty obligations should be taken into account.⁴⁹ Whilst there may be perceived practical difficulties with a judgment that requires decision-makers to be fully informed as to Australia's relevant international treaty obligations,⁵⁰ such moves nevertheless represent a significant step towards the recognition of international treaty obligations in domestic law.⁵¹

The Australian Parliament was very concerned by the Court's decision because it perceived that its role was being usurped.⁵² Relying on the principle of the separation of powers underpinning the *Australian Constitution*, it argued that treaties are ratified by the Government (Executive) and the Court's decision could have the effect of treaties becoming incorporated into domestic law without the legislative branch giving its assent.⁵³ The Administrative Decisions (Effect of International Instruments) Bill was introduced in Parliament in 1997, and again in 1999, to override the outcome of *Teoh*, but was not passed at either stage.⁵⁴ The High Court considered the decision of *Teoh* in *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam*.⁵⁵ Whilst the High Court did not overturn the law in *Teoh*, it raised significant concerns with the decision, which included the impact of the decision on the interaction of the three branches of government.⁵⁶ Nevertheless, the decision in *Teoh* remains good law at present, albeit with an uncertain future.

D *The Approach in B & B*

In *B & B*, the issue was whether *CROC* had been incorporated into legislation — namely, whether it had been incorporated into the *Family Law Act* by the *Family Law Reform Act 1995*. Although the Court considered the

⁴⁹ Ibid 299 (Toohey J).

⁵⁰ Michael Taggart, 'Legitimate Expectation and Treaties in the High Court of Australia' (1996) 112 *The Law Quarterly Review* 50, 52.

⁵¹ See ibid 54, where Taggart postulates that *Teoh* could provide 'a wobbly stepping stone to a position where unincorporated treaty obligations are treated as mandatory relevant considerations in appropriate circumstances'.

⁵² The Australian Government expressed these views to the UN Committee on the Rights of the Child ('CRC') during the review of Australia's *First Report* under *CROC*: CRC, *Summary Record of the 403rd Meeting: Initial Report of Australia*, 16th sess, [28], UN Doc CRC/C/SR.403 (29 September 1997).

⁵³ This is a significant argument against treaties being considered domestic law as soon as they are ratified; Taggart, above n 50, 54, suggests that this may be best addressed by reforming treaty-making procedures.

⁵⁴ The Bill was the source of much parliamentary debate. The opponents to the Bill argued that the *Teoh* decision did not raise the position of ratified treaties to the level of domestic law, but that they were comparable to government policy. They argued that the Government could not simply ignore treaties that had been ratified but which had not directly been incorporated into domestic law: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1997, 6232 (Daryl Melham); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1997, 6254 (Lindsay Tanner). In 1995, the South Australian Government passed the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA), which had the same effect as the proposed Commonwealth legislation in relation to South Australian law. In CRC, *Summary Record of the 403rd Meeting: Australia*, above n 52, [66], the CRC indicated that they were very concerned by the proposed federal legislation and indicated that 'its decision in light of the *Teoh* case might amount to a nullification of the ratification process'.

⁵⁵ (2003) 195 ALR 502.

⁵⁶ Ibid 527 (McHugh and Gummow JJ).

well-established principle of whether or not a Convention has been specifically incorporated by legislation into domestic law (category one), it adopted a more liberal approach in arriving at the conclusion that *CROC* had been incorporated into the *Family Law Act*.

In order to satisfy the test in the *Industrial Relations Act Case*, the Full Court needed to firstly make a finding that *CROC* was a treaty that was expressed in terms of more than mere aspiration.⁵⁷ The majority followed the decision in *Teoh* and held that *CROC* had sufficient specificity to satisfy this test.⁵⁸ The second aspect of the test in the *Industrial Relations Act Case* that the Court needed to consider in some detail was whether or not the ‘purpose’ or ‘object’ of the legislation was to implement the treaty.⁵⁹ Justice Ellis, who dissented in *B & B*, stated that:

The [*Family Law Reform Act 1995*] does not by clear language incorporate [*CROC*], nor is the Convention mentioned therein, or attached to it as a Schedule. In my view, the parliament did not, in enacting the *Reform Act*, implement [*CROC*] or the relevant parts thereof ... Accordingly, the court does not have the power to make the orders sought.⁶⁰

Justice Ellis considered only the prima facie position and concluded that as there was no explicit reference to *CROC* in the *Family Law Reform Act 1995*, the Parliament had not incorporated it into domestic law. Therefore, it could not be relied upon to give the Family Court jurisdiction to make an order in relation to releasing the children from detention.⁶¹

The majority were more lateral in their approach and looked to a number of sources to reach their conclusion that the relevant parts of *CROC* had been implemented in the passing of s 67ZC of the *Family Law Reform Act 1995*. The majority indicated that *CROC* had been declared an ‘international instrument’ pursuant to s 47(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*).⁶² The effect of this is that the Human Rights and Equal Opportunity Commission (‘HREOC’) can receive complaints and report to the government as to any action that, in the opinion of HREOC, needs to be taken by Australia in order to comply with *CROC* and any other declared international instruments.⁶³

The majority emphasised that the Commonwealth Parliament had the opportunity to vote as to whether or not *CROC* should be declared an international instrument pursuant to the *HREOC Act*.⁶⁴ Their Honours concluded that the relevance of *CROC* being a declared instrument annexed to the *HREOC*

⁵⁷ *Industrial Relations Act Case* (1996) 187 CLR 416, 486: ‘it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal’.

⁵⁸ *B & B* [2003] 30 Fam LR 181, 225. Whilst not reaching a conclusive decision, Callinan J indicated that there was a strong possibility that *CROC* may be aspirational only: *MIMLA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [222].

⁵⁹ *Industrial Relations Act Case* (1996) 187 CLR 416, 487.

⁶⁰ *B & B* [2003] 30 Fam LR 181, 249–50.

⁶¹ *Ibid*.

⁶² *Ibid* 223.

⁶³ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(k).

⁶⁴ *B & B* [2003] 30 Fam LR 181, 224.

Act is still an open question,⁶⁵ but the evidence suggests that the declaration may give *CROC* a ‘special significance’⁶⁶ and thus may be deemed to be incorporated into domestic law by reason of the *HREOC Act*.

The majority also examined the similarly named Family Court case of *B and B: Family Law Reform Act 1995*,⁶⁷ which considered the relationship between *CROC* and the *Family Law Reform Act 1995*. Whilst the Court in that case did not need to decide whether or not *CROC* had been incorporated into the 1995 legislation, the Court in *B & B* commented that in the 1997 decision, ‘[*CROC*] is described as a “source” to the origins of the new Part VII [of the *Family Law Act*]’.⁶⁸ The Court in *B and B: Family Law Reform Act 1995* also noted that there were specific references to *CROC* in earlier versions of the Bill, Explanatory Memoranda and second reading speeches.⁶⁹ Given these earlier references, the majority agreed with the Full Court in *B and B: Family Law Reform Act 1995* that the deletion of express references to *CROC* in the final enactment does not necessarily mean that the *Convention* had not been incorporated into the *Family Law Act*.⁷⁰

The majority in *B & B* examined the legislative history of the *Family Law Act* and in particular s 43(c), which provides a mandatory direction:

The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to

...

(c) the need to protect the rights of children and to promote their welfare.

The majority held that this section incorporated the provisions of the predecessor to *CROC*, the *UN Declaration on the Rights of the Child*, and therefore the legislative history strongly supported the proposition that the 1995 amendments intentionally incorporated certain articles of *CROC*.⁷¹

⁶⁵ Ibid 224. In the High Court Appeal, Callinan J concluded that the fact that *CROC* is a declared instrument under the *HREOC Act* did not mean that it was incorporated into the domestic law relating to detention of unlawful citizens, which is the subject of the specific provisions of the *Migration Act: MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [220].

⁶⁶ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 743; *B & B* [2003] 30 Fam LR 181, 224.

⁶⁷ [1997] 21 Fam LR 676.

⁶⁸ *B & B* [2003] 30 Fam LR 181, 226. See also *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 743.

⁶⁹ See Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1994, 2759 (Peter Duncan, Parliamentary Secretary to the Attorney-General). In the Second Reading Speech, Duncan said that:

In December 1990 Australia ratified the *UN Convention on the Rights of the Child*. That convention contains a number of basic rights in the raising and development of children towards adulthood. The objects clause to the new part VII of this Bill gives recognition to such rights by specifying a number of such rights that should be observed in any agreements or decisions concerning children.

⁷⁰ *B & B* [2003] 30 Fam LR 181, 227.

⁷¹ Ibid.

The majority also reviewed the *First Report* submitted by Australia under *CROC* to the Committee on the Rights of the Child ('CRC') in January 1996.⁷² In that report, the Government claimed that it had implemented the *Convention* inter alia in family law.⁷³ The majority noted that this could only be a reference to the *Family Law Reform Act 1995* as it is the only significant piece of legislation passed by Parliament in relation to family law since Australia ratified *CROC*.⁷⁴ Whilst Ellis J confined his analysis to the *Family Law Reform Act 1995* and the Explanatory Memorandum in order to arrive at his conclusion that *CROC* had not been incorporated, the majority's approach was more holistic in that it was prepared to consider other legislation (the *HREOC Act*), dicta from other cases (*B and B: Family Law Reform Act 1995*), earlier versions of the Bill and Second Reading Speeches, the legislative history of the *Family Law Act* and Australia's *First Report*. The majority held that these various sources of evidence combined to support their conclusion that *CROC* had been incorporated into the *Family Law Act*.

Callinan J was the only member of the High Court bench who examined the Full Court's reasoning on this issue.⁷⁵ Notably, His Honour failed to address all the evidence raised by the Full Court, in particular the legislative history and the Australian Government's comments to the reports. Similar to Ellis J, His Honour adopted a narrow view of the evidence and concluded that, in the absence of any direct evidence, *CROC* could only be held to have influenced the amendments to the *Family Law Act*.⁷⁶ As this reasoning did not form the ratio of the High Court judgment, it is possible that a future Court may hold that *CROC* has been incorporated into the *Family Law Act*. In the authors' view, the combination of evidence was compelling and strongly suggested an implied intention, if not an overt one, that justified the conclusion that *CROC* was incorporated into the *Family Law Act*. The Full Court should be commended for encouraging the Parliament to take Australia's international obligations seriously. It is inappropriate for the Parliament and the Government to be in a position where they deliberately discuss Australia's compliance with an international Convention in various forums, as occurred in this case, but then attempt to argue that it has not been incorporated because the Parliament did not specifically proclaim that the *Convention* had been incorporated. In the absence of direct evidence to the contrary it was appropriate and open to the Full Court to find that there was sufficient circumstantial evidence to conclude that *CROC* had been incorporated into the *Family Law Act*.

E Potential Effect of the Approach in B & B

Whilst the *Bangalore Principles* were considered radical at the time, they now appear to reflect the current status of the law as they are summarised in essence

⁷² CRC, *Initial Reports of States Parties Due in 1993: Australia's First Report under Article 44(1)(a) of the Convention on the Rights of the Child, December 1995*, 16th sess, UN Doc CRC/C/8/Add.31 (1 February 1996) ('*First Report*').

⁷³ *Ibid* [5].

⁷⁴ *B & B* [2003] 30 Fam LR 181, 227–8.

⁷⁵ *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [222].

⁷⁶ *Ibid*.

in the three categories above. Despite Callinan J's comments, it is apparent that these boundaries are being challenged. Whilst the decision of the majority of the Full Court did not create a new category whereby international law will be considered as enforceable in Australia — such as was arguably achieved in *Teoh — B & B* encourages a broad and holistic view when assessing whether or not international law has been incorporated into domestic law by legislation. As the Australian community becomes more aware of Australia's international obligations, the Parliament may find itself more frequently considering international instruments when new legislation is being debated. This means that there will inevitably be further sources for courts to rely on if they continue to adopt such a 'big picture' approach in deciding whether or not there was an intention to incorporate international law into domestic law. Whilst this may not necessarily replicate the approach of the early draft of the *Australian Constitution* — where international treaties were deemed to be part of the domestic law — Australia could witness an increase in the incorporation of international law into new legislation. If the legislative drafters are concerned about international instruments impacting on judicial interpretation of legislation, they may expressly state in the Explanatory Memorandum whether or not an international convention is being incorporated into the legislation so there will be no scope for debate. Whilst the question remains open regarding whether or not *CROC* has been incorporated into the *Family Law Act*, the Australian courts may need to consider making reference to, and considering in more detail, the relevant articles of *CROC* in future decisions.

IV EXTENT OF INCORPORATION OF *CROC* INTO THE *FAMILY LAW ACT*

The majority of the Full Court held that *CROC* had been incorporated into s 67ZC of the *Family Law Act*. Furthermore, the Court's comments in obiter suggest that *CROC* has been incorporated more broadly into the *Family Law Act*.

The Full Court did not explicitly specify which articles of *CROC* were incorporated into the *Family Law Act*. The majority's reference to *CROC* being a declaration pursuant to the *HREOC Act*,⁷⁷ as evidencing its incorporation into domestic law, suggests that the whole of *CROC* has somehow been incorporated into the *Family Law Act*. However, it is questionable whether this is a necessary implication; it may be that *CROC* has indeed been incorporated into domestic law but that the relevant articles need to be considered in relation to various pieces of legislation and principles of common law.

Later in their judgment, the majority stated that 'the 1995 amendment to Part VII did intentionally incorporate *certain* articles of [*CROC*]'.⁷⁸ Furthermore, the majority concluded that 'we think that the parliament in passing s 67ZC, has implemented the *relevant parts* of [*CROC*] so far as this case is concerned'.⁷⁹ It seems apparent from these comments that the majority were content simply to determine that some of the articles of *CROC* had been incorporated into the

⁷⁷ *B & B* [2003] 30 Fam LR 181, 223–4.

⁷⁸ *Ibid* 227 (emphasis added).

⁷⁹ *Ibid* 229 (emphasis added).

Family Law Act by the *Family Law Reform Act 1995*. The only articles of *CROC* that the majority transcribe are arts 3(2) and 19.⁸⁰

Section 67ZC of the *Family Law Act* could be construed as a very broad section incorporating various articles in *CROC* that are not specifically addressed in other sections of the *Family Law Act*. However, s 67ZC is a statutory enactment of the *parens patriae* power; which based on its history is quite limited in its operation,⁸¹ and hence so too would be the articles of *CROC* that it can incorporate.⁸² There is a general consensus in all the High Court judgments that s 67ZC relates to parental responsibility and is not a general welfare provision. Therefore, it would appear that at most, one could only argue that those articles of *CROC* that relate to parental responsibility and the relationship between a parent and child have been incorporated.

There are clearly some sections that were introduced by the *Family Law Reform Act 1995* which have very similar wording to articles in *CROC*. Some of these sections can be summarised as follows:

- (a) Section 65E(2) of the *Family Law Act* which states that the Court must regard the best interests of the child as ‘the paramount consideration’, is comparable to art 3(1) of *CROC* which requires that the interests of the child be ‘a primary consideration’.⁸³

⁸⁰ *CROC*, above n 5, art 3(2) states:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 19 states:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

These articles were transcribed by the Court to support the implication that part of the intention behind the introduction of s 67ZC was to extend protection to all children as requested by the articles, and not just children of a marriage.

⁸¹ Australian cases in which this power has been exercised have involved sterilisation of minors with serious intellectual disabilities and making the ultimate decision about a child undergoing a sex change operation. See above nn 11, 12 and accompanying text.

⁸² It is possible that as a result of the medical context in which the *parens patriae* jurisdiction has been developed, art 24 of *CROC* has been incorporated as it addresses the provision of medical assistance and health care to children.

⁸³ The Full Court in the similarly named case of *B and B: The Family Law Reform Act 1995* (1997) 21 Fam LR 676, 688 acknowledged that the standard referred to in the *Family Law Act* exceeds the standard referred to in art 3(1) of *CROC* that the best interests of a child shall be ‘a primary consideration’ (emphasis in original). In *Teoh* (1995) 183 CLR 273, 304, Gaudron J postulated that there may be a common law right for a child’s best interests to be taken into account. The High Court decision in *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) appears to limit the circumstances in which the Family Court can consider the best interests of a child to issues relating to parenting, excluding broader issues.

- (b) Section 60B(1) of the *Family Law Act* is comparable to art 3(2) of *CROC* as they both relate to the protection of the child's welfare, taking into account the rights and responsibilities of parents.
- (c) Section 60B(2)(a) of the *Family Law Act* is comparable to art 7 of *CROC* as these both relate to the right of the child to know and be cared for by both his or her parents.
- (d) Section 60B(2)(b) of the *Family Law Act* is comparable to art 9(3) of *CROC* as they both state the child has a right to maintain contact with both parents.
- (e) Section 60B(2)(c) of the *Family Law Act* is comparable to art 18(1) of *CROC* as they both provide that parents have common responsibilities for the upbringing and development of the child.
- (f) Section 68F(2)(a) of the *Family Law Act* is comparable to arts 9 and 12 of *CROC* as they provide for the child's wishes to be taken into account when determining what is in that child's best interests.
- (g) Section 68F(2)(f) of the *Family Law Act* is comparable to arts 5 and 30 of *CROC* as they provide for the child's background and culture to be taken into account.⁸⁴

Based on the very similar wording and meaning between these legislative sections and the treaty articles, there is a strong argument that these aspects of *CROC* have been incorporated into the *Family Law Act*. Whilst there is a clear parallel in relation to these articles, it will be interesting to observe which articles of *CROC* (if any) future courts will deem to be incorporated into the *Family Law Act* through s 67ZC. From the High Court decision, it would appear that any possible incorporation of *CROC* is restricted to those articles that relate to parental responsibility and not articles that relate to third parties who are governed by other legislation, such as government's obligations towards children in detention centres and prisons.

V IS MANDATORY IMMIGRATION DETENTION OF CHILDREN INCONSISTENT WITH *CROC* AND THE *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*?

It has been argued that Australia's mandatory detention of unlawful non-citizens violates Australia's commitments under *CROC*, the *International Covenant on Civil and Political Rights*,⁸⁵ the *International Covenant on Economic, Social and Cultural Rights*,⁸⁶ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁸⁷ and the *International Convention on the Elimination of all Forms of Racial*

⁸⁴ This is not an exhaustive list, but rather provides a few clear examples that the authors have ascertained from comparing the *Family Law Act* with *CROC*.

⁸⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

⁸⁶ Opened for signature 16 December 1966, 993 UNTS 171 (entered into force 3 January 1976).

⁸⁷ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

Discrimination.⁸⁸ This section of the case note will only concentrate on violations of *CROC* and the *ICCPR*.⁸⁹

After the Full Court decision, the applicants in *B & B* made a submission to the UN Human Rights Committee ('HRC') alleging that Australia had breached arts 7, 9(1), 9(4), 17(1), 23(1) and 24(1) of the *ICCPR*.⁹⁰ The HRC held that the alleged breach of art 7, which relates to fear of torture, cruel, inhuman or degrading treatment or punishment, was not substantiated by the applicants.

A Article 9(1) of the ICCPR and Article 37(b) of CROC

The HRC held that Australia was in breach of art 9(1) of the *ICCPR*. Article 9(1) provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty, except on such grounds in accordance with such procedure as are established by Law.

The HRC observed that the mother and children had been detained in immigration for two years and ten months at the time of making the application to the HRC. The HRC concluded as follows:

Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period ... the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs [B] and her children for length [sic] of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the *Covenant*.⁹¹

The HRC's conclusion that there was a breach of art 9(1) of the *ICCPR* appeared to be based on the duration of the detention; in essence, it questioned whether such a significant length of time could ever be justified. This recalls an earlier decision of the HRC, where it was held that Australia had breached art 9(1) in relation to a father and son who were held in detention for almost two

⁸⁸ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). See Chris Sidoti, Human Rights Council of Australia, 'Refugee Policy: Is There a Way Out of This Mess?' (Speech delivered at the Racial Respect Seminar, Canberra, Australia, 21 February 2002) <<http://www.hrca.org/refugees.htm>> at 1 May 2004; The University of New South Wales Centre for Refugee Research, 'UNSW Centre for Refugee Research Policy Position: Asylum Seekers — Mandatory Detention' [2001] 30 *Australian Children's Rights News* 25, 25; Judy Cashmore, cited in DCI-Australia, 'DCI-Australia Advocacy and Research on Asylum Seekers' [2002] 32 *Australian Children's Rights News* 10, 10.

⁸⁹ Both these *Conventions* are scheduled and declared under the *HREOC Act* and therefore HREOC is authorised to receive complaints and make findings as to whether or not acts or practices complained of are consistent with or contrary to *CROC* and the *ICCPR*: see *Human Rights and Equal Opportunity Commission Act*, above n 63, schs 2 (*ICCPR*), 3 (*CROC*, preamble).

⁹⁰ *Bakhtiyari & Bakhtiyari v Australia*, Human Rights Committee, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) ('*B v Australia*').

⁹¹ *Ibid* [9.3].

years.⁹² HREOC has also determined that Australia has breached art 9(1) on several other occasions.⁹³

Article 37(b) of *CROC* is similarly worded to art 9(1) of the *ICCPR*, but adds that detention ‘shall be used only as a measure of last resort and for the shortest appropriate period of time’. HREOC noted in one of its reports that

the Minister’s failure to exercise his powers under section 417 [of the Migration Act] meant that [the child’s] detention was not used as a last resort. Under the current regime put in place by the Migration Act, detention is the “first resort” for every child.⁹⁴

The conclusion that can be drawn from this decision is that Australia is in breach of art 37(b) of *CROC* each time it immediately places a child in detention without fully considering the alternatives.⁹⁵

B Article 9(4) of the ICCPR and Article 37(d) of CROC

In *B v Australia*, the HRC also held that Australia had breached art 9(4) of the *ICCPR*. Article 9(4) provides that

anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a Court in order that that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The HRC observed that Australia’s law provides for mandatory detention for unlawful entrants and that a *habeas corpus* application would only test whether the individuals were in fact ‘unlawful arrivals’, rather than whether the

⁹² *Baban v Australia*, Human Rights Committee, Communication No 1014/2001, [7.2], UN Doc CCPR/C/78/D/1014/2001 (18 September 2003). One member of the HRC (Ms Ruth Wedgwood) dissented, finding that Australia adjudicated the merits of the applicant’s immigration claim expediently and it was the applicant’s decision to pursue the avenues of judicial appeal that prolonged the case beyond a period of three months. Ms Wedgwood also concluded that it was reasonable to detain illegal entrants who had received an administrative or lower court denial of their asylum claim as they would be unlikely to report for possible deportation after appeals were exhausted.

⁹³ HREOC, *Report of an Inquiry into a Complaint by Mr Duc Anh Ha of Acts or Practices Inconsistent With or Contrary to Human Rights Arising from Immigration Detention* (2002) Report No 18, appendix 2, pt 15 (‘Report No 18’); HREOC, *Report of an Inquiry into a Complaint by Six Asylum Seekers concerning Their Transfer from Immigration Detention Centres to State Prisons and their Detention in those Prisons* (2002) Report No 21, pt 4.4.1 (‘Report No 21’); HREOC, *Report of an Inquiry into a Complaint by Mr XY concerning his Continuing Detention Despite Having Completed his Criminal Sentence* (2002) Report No 22, pt 9 (‘Report No 22’); HREOC, *Report of an Inquiry into Complaints by Five Asylum Seekers concerning their Detention in the Separation and Management Block at the Port Hedland Immigration Reception and Processing Centre* (2002) Report No 24, pt 5 (‘Report No 24’). See generally HREOC, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent with or contrary to Human Rights in an Immigration Detention Centre* (2000) Report No 10 (‘Report No 10’).

⁹⁴ HREOC, *Report of an Inquiry into a Complaint by Mr Mohammad Badraie on behalf of his Son Shayan Regarding Acts or Practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, (2002) Report No 25, [14.7] (‘Report No 25’).

⁹⁵ *Ibid.* HREOC conceded that this conclusion may not be tenable in light of other sections of the *Migration Act*. However, it noted that the child’s detention in the case reviewed by its Report No 25 ceased to be appropriate when the child developed a mental illness by reasons of his conditions of detention.

individual's detention was justified.⁹⁶ The HRC concluded 'that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4'.⁹⁷ The HRC made the same finding in *A v Australia* in 1997.⁹⁸

The HRC in *B v Australia* examined the approach of the Full Court in *B & B* in determining that it had jurisdiction to order release of the children from detention. The HRC held that this welfare jurisdiction provided detainees with a sufficient avenue of review to satisfy the requirement of art 9(4). As a result they held 'the violation of article 9, paragraph 4 with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders'.⁹⁹ This was a significant finding as it confirmed that the Full Court's decision has resulted in Australia complying with art 9(4) of the *ICCPR* with respect to children. The Full Court's decision also ensured that Australia was no longer in breach of the similar provision in *CROC*.¹⁰⁰

C Article 24(10) of the *ICCPR* and Article 3(1) of *CROC*

The HRC interpreted art 24(1) of the *ICCPR*, which provides that each child has 'the right to such measures of protection as are required by his status as a minor', to include the principle that in all decisions affecting a child, his or her best interests shall be 'a primary consideration', in reference to art 3(1) of *CROC*.¹⁰¹ The HRC held that the Full Court decision, which found that the Family Court had jurisdiction to determine whether or not ongoing detention was in the best interests of the children, satisfied art 24(1) of the *ICCPR*, and by inference, art 3(1) of *CROC*.¹⁰²

⁹⁶ *B v Australia*, Human Rights Committee, Communication No 1069/2002, [8.2], UN Doc CCPR/C/79/D/1069/2002 (6 November 2003).

⁹⁷ *Ibid* [9.4].

⁹⁸ *A v Australia*, Human Rights Committee, Communication No 560/1993, [9.5], UN Doc CCPR/C/59/D/560/1993 (30 April 1997). The initial submission to the HRC was made in 1993, with judgment being reached in 1997. The Australian Government disagreed with the HRC's interpretation of art 9(4): see Devika Hovell, 'The Sovereignty Stratagem' 28 *Alternative Law Journal* 297, 298. In their response to the views of the HRC, the Government submitted that there is nothing to suggest that the term 'lawful' means 'lawful international law' or 'not arbitrary'. In other cases the HRC held that short periods of detention without judicial review breached art 9(4) of the *ICCPR*: *Hammel v Madagascar*, Human Rights Committee, Communication No 155/1983, [18.2], [20], UN Doc CCPR/C/29/D/155/1983 (3 April 1987) (3 days); *Torres v Finland*, Human Rights Committee, *Communication No 291/1988*, [7.2], UN Doc CCPR/C/38/D/291/1988 (26 March 1990) (2 periods of 7 days and 1 period of 5 days).

⁹⁹ *B v Australia*, Human Rights Committee, Communication No 1014/2001, [9.5], UN Doc CCPR/C/78/D/1014/2001 (18 September 2003).

¹⁰⁰ *CROC*, above n 5, art 37(d).

¹⁰¹ *B v Australia*, Human Rights Committee, Communication No 1069/2002, [9.7], UN Doc CCPR/C/79/D/1069/2002 (6 November 2003).

¹⁰² The High Court decision, which overturned the Full Court's finding that the Family Court had jurisdiction to determine whether or not detention was in the best interests of a child, means that Australia will be considered to be in breach again of art 24(1) of the *ICCPR*, and by inference, art 3(1) of *CROC*.

D *Articles 17(1) and 23(1) of the ICCPR and Article 9 of CROC*

In *B v Australia*, the HRC held that Australia may potentially be in breach of arts 17(1) and 23(1) of the *ICCPR*.¹⁰³ These articles provide for the protection of the family unit and protect against unlawful interference with the family or the home. These articles are similar to arts 9(1) and (2) of *CROC* which provide that a 'child shall not be separated from his or her parents against their will' and that a child has a right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. The HRC held that the government's deportation of the children and their mother without awaiting the final determination of Mr Bakhtiyari's proceedings would constitute a violation of arts 17(1) and 23(1).¹⁰⁴

Whilst the High Court held that the Family Court does not have jurisdiction to release children from detention centres, the Respondents are now seeking to argue that the children should not be returned to detention and that their foster care residence should be declared a detention centre. From an optimistic point of view, the high profile of this case may encourage authorities to release children pursuant to the *Migration Act* on this basis. Whilst children may be released from detention there is no suggestion that the Australian Government will change the domestic laws regarding the mandatory detention of adults. The consequence of this may be that Australia is no longer in breach of arts 9(1), 9(4) and 24(1) of the *ICCPR* and arts 37(b), 37(d) and 3(1) of *CROC* in relation to children; but remains in breach of arts 17(1) and 23(1) of the *ICCPR* and arts 9(1) and (2) of *CROC* on the basis that the family will be separated.¹⁰⁵

E *Articles regarding Facilities at Detention Centres*

As a result of the government's ongoing policy of mandatory detention, the facilities of detention centres have been brought into scrutiny for the purposes of assessing whether Australia violates its international obligations with respect to: the right to legal assistance;¹⁰⁶ the right to be treated with humanity and respect;¹⁰⁷ the right to be segregated from convicted persons;¹⁰⁸ freedom from torture and cruel, inhuman or degrading treatment or punishment;¹⁰⁹ a child's right to education;¹¹⁰ a child's right to enjoy the highest obtainable standard of health and access to facilities for the treatment of illness;¹¹¹ and a child's right to

¹⁰³ *B v Australia*, Human Rights Committee, Communication No 1069/2002, [6.4], UN Doc CCPR/C/79/D/1069/2002 (6 November 2003).

¹⁰⁴ *B v Australia*, Human Rights Committee, Communication No 1069/2002, [9.6], UN Doc CCPR/C/79/D/1069/2002 (6 November 2003).

¹⁰⁵ See Report No 25, above n 94, [15.5]. In that case, where a child was removed from detention and placed in foster care, HREOC held that that the child's removal from his parents was not necessary within the meaning of art 9(1) of *CROC* and noted that the Department of Immigration 'could have declared an alternative place of detention or granted visa to the family under section 417'.

¹⁰⁶ *CROC*, above n 5, art 37(d).

¹⁰⁷ *ICCPR*, above n 85, art 10(1); *CROC*, above n 5, art 37(c).

¹⁰⁸ *ICCPR*, above n 85, art 10(2)(a).

¹⁰⁹ *ICCPR*, above n 85, art 7; *CROC*, above n 5, art 37(a).

¹¹⁰ *CROC*, above n 5, art 28.

¹¹¹ *CROC*, above n 5, art 24.

engage in recreational activities.¹¹² It is beyond the scope of this case note to examine the extent of Australia's compliance with all these provisions; however, significant concerns about the state of the facilities have been raised by HREOC. In its paper, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, HREOC reports receipt of 58 complaints during the period 1989–97 concerning people in detention centres.¹¹³ HREOC has published 11 written reports regarding some of the complaints about human rights breaches under the *HREOC Act*.¹¹⁴ HREOC has made findings that Australia has breached arts 10(1)¹¹⁵ and 10(2)(a)¹¹⁶ of the *ICCPR* and art 37(c) of *CROC*.¹¹⁷

The current Human Rights Commissioner, Dr Sev Ozdowski, commented in his report produced after visits to immigration detention facilities in 2001 that 'immigration detention facilities are, in general, not equipped for long-term detention'.¹¹⁸ In cases like *B & B*, where members of the family have been detained in excess of three years, there is a high probability that Australia will be in breach of several articles of either *CROC* or the *ICCPR* regarding the facilities at detention centres in addition to articles that address the duration of the detention. HREOC has just released a comprehensive National Inquiry into Children in Immigration Detention, detailing the adverse conditions children have had to endure in detention centres.¹¹⁹

The High Court decision leaves open the question of whether or not the Family Court has jurisdiction to make orders in relation to the conditions of detention centres for children. However, it would appear unlikely that the Court would have such jurisdiction in light of the High Court decision as the orders would be made against a third party in relation to non-parenting issues.

¹¹² *CROC*, above n 5, art 31.

¹¹³ HREOC, *Those Who've Come Across the Sea: Detention of Unauthorised Arrivals* (1998) 4 ('*Those Who've Come Across the Sea*').

¹¹⁴ HREOC, Report No 10, above n 93; HREOC, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre* (2000) Report No 12 ('Report No 12'); HREOC, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights* (2001) Report No 13; HREOC, *Report of an Inquiry into a Complaint by Mr Hocine Kaci of Acts or Practices Inconsistent With or Contrary to Human Rights Arising from Immigration Detention* (2002) Report No 16 ('Report No 16'); HREOC, *Report of an Inquiry into a Complaint by the Asylum Seekers Centre concerning Changes to the Asylum Seekers Assistance Scheme* (2002) Report No 17; HREOC, Report No 18, above n 93; HREOC, Report No 21, above n 93; HREOC, Report No 22, above n 93; HREOC, *Report of an Inquiry into a Complaint by Mr Hassan Ghomwari concerning his Immigration Detention and the Adequacy of the Medical Treatment he Received While Detained* (2002) Report No 23 ('Report No 23'); HREOC, Report No 24, above n 93; HREOC, Report No 25, above n 94.

¹¹⁵ In relation to breaches of art 10(1) of the *ICCPR*, see HREOC, Report No 10, above n 93; HREOC, Report No 12, above n 114; HREOC, Report No 18, above n 93; HREOC, Report No 21, above n 93; HREOC, Report No 23, above n 114.

¹¹⁶ See HREOC, Report No 10, above n 93; HREOC, Report No 16, above n 114; HREOC, Report No 21, above n 93; HREOC, Report No 23, above n 114; see also HREOC, *Those Who've Come Across the Sea*, above n 113, 98–109.

¹¹⁷ See, eg, HREOC, Report No 16, above n 114; HREOC, Report No 25, above n 94; see also HREOC, *Those Who've Come Across the Sea*, above n 113, 99.

¹¹⁸ HREOC, *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001* (2002) pt 3.6.

¹¹⁹ See HREOC, 'A Last Resort?' *The National Inquiry into Children in Immigration Detention* (2003) <http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm> at 1 May 2004.

Nevertheless, the results of the HREOC inquiry, which are likely to be tabled before Parliament this year, and the high profile of this case may produce an outcome whereby conditions are improved for children held in detention centres.¹²⁰

VI CONCLUSION

As a result of the High Court's decision, the Full Court's decision in *B & B* has not proved to be the landmark decision that many had hoped for, resulting in the release of children from immigration detention centres. Despite this, the High Court decision did not address several of the issues raised by the Full Court and therefore the Full Court's decision may still be considered a pioneering decision. The Full Court encouraged a holistic approach when assessing whether or not there was an intention to incorporate *CROC* into the *Family Law Act*. This approach may be utilised by future Courts and there will inevitably be further discussion about whether or not *CROC* has been incorporated into the *Family Law Act* and if so, the extent of its incorporation.

The decision in *B & B* and the applicants' submissions to the HRC also raise the issue of Australia's compliance with ratified international treaties, in particular *CROC* and the *ICCPR*. Whilst HREOC and the UN Committees have held on several occasions that Australia is in breach of *CROC* and the *ICCPR* in relation to mandatory detention of unlawful non-citizens, the Government has refused to acknowledge its breaches or demonstrate a willingness to alter the domestic law. The High Court decision does not assist in ensuring that Australia's domestic law complies with Australia's international obligations, but it is hoped that the discussions in the Full Court and High Court decisions and the publicity of this case will raise awareness of Australia's international obligations and drive Australia towards a holistic understanding of international law that facilitates the fulfilment of its international obligations.

VII POSTSCRIPT: HIGH COURT APPEAL JUDGMENT

On 29 April 2004, shortly prior to this case note being published, the High Court of Australia handed down its decision, setting aside the orders of the Full Court and allowing the appeal brought by the Minister.

Chief Justice Gleeson and McHugh J focused on ss 75, 76 and 77 of the *Australian Constitution*.¹²¹ Their Honours reasoned that the Family Court cannot deal with a matter 'unless the relevant legislation identifies ... some right that may be determined or privilege that may be granted by a court, or some duty or

¹²⁰ The Labour Government has indicated that if they are elected into Government they would introduce a policy that children will not be held in immigration detention centres. See Michelle Grattan and Meaghan Shaw, 'Fewer Boat Children in Detention', *The Age* (Melbourne, Australia) 14 February 2004, 10; Cynthia Bentham, 'Faced with Unprecedented Influx, Government Did What It Had To, Says Ruddock', *Sydney Morning Herald* (Sydney, Australia), 7 May 2004, 5. This political pressure that has arisen, partly as a result of *B & B*, may result in the current Government also changing its policy.

¹²¹ *Australian Constitution* s 77 gives the Parliament power to define the jurisdiction of a federal court in relation to any 'matters' referred to in ss 75 and 76. *Australian Constitution* s 76(ii) provides that one of these relevant matters is one '[a]rising under any laws made by the Parliament'.

liability that is enforceable against a person by another person'.¹²² Their Honours held that s 67ZC cannot confer jurisdiction in respect of a 'matter', 'because it does not confer rights or impose duties on anyone'.¹²³ Therefore their Honours reasoned that s 67ZC must be dependant for its jurisdiction upon some other provision in pt VII of the *Family Law Act*. Their Honours examined several provisions relied upon by the Minister¹²⁴ and the respondents¹²⁵ and concluded that all the relevant sections focused on parental responsibility. This led their Honours to conclude that the Family Court does not have jurisdiction to make orders binding on third parties, even if it would advance the welfare of a child.¹²⁶ As the orders sought by the respondents were not concerned with the relationship between parents and did not enforce duties or obligations owed by the parents to the children, they did not constitute a 'matter' falling with the Family Court's jurisdiction pursuant to ss 75 and 76 of the *Australian Constitution*.¹²⁷

Justices Gummow, Hayne and Heydon utilised similar reasoning to Gleeson CJ and McHugh J, finding that there is no provision in Pt VII of the *Family Law Act* to give the Family Court jurisdiction to make orders in this case.¹²⁸

Justice Callinan agreed that 'the whole thrust of the [*Family Law Act*] so far as children are concerned is to deal with children of marriages and the obligations of their parents to them'.¹²⁹ Callinan J held that the powers conferred by ss 51 (xxi) and (xxii) do not confer 'a general discretionary welfare power over any or all children'.¹³⁰ His Honour examined the Full Court's analysis of the external affairs powers and disagreed that *CROC* had been incorporated into the *Family Law Act*.¹³¹ Similarly to Ellis J in the Full Court, His Honour was persuaded by the fact that there was no specific intention to incorporate *CROC* recorded in the *Family Law Act* or the Explanatory Memorandum.¹³²

Justice Kirby adopted a different approach. His Honour confirmed that wherever possible, federal statutes should be interpreted in light of Australia's international law obligations.¹³³ He refers to the HRC's communication in *B v Australia*¹³⁴ and notes their finding that Australia had ceased breaching art 24(1) of the *ICCPR* when the Family Court determined it had a welfare jurisdiction with respect to children.¹³⁵ After providing evidence that Australia was likely to be in breach of its international law obligations if the Full Court's decision was not upheld, Kirby J posed the following question:

¹²² *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [8].

¹²³ *Ibid* [13].

¹²⁴ *Family Law Act* Div 12. See *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [48].

¹²⁵ *Family Law Act* Div 8 (s 67ZC), Div 9 (s 68B).

¹²⁶ *MIMIA v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 29 April 2004) [52].

¹²⁷ *Ibid* [53].

¹²⁸ *Ibid* [74].

¹²⁹ *Ibid* [205].

¹³⁰ *Ibid* [215].

¹³¹ *Ibid* [221].

¹³² *Ibid* [222].

¹³³ *Ibid* [143].

¹³⁴ *Ibid* [147]–[151].

¹³⁵ *Ibid* [150].

would such a reading of the [*Migration Act*], viewed in the context of the welfare provisions of the [*Family Law Act*], amount to a construction ‘so far as the language of the legislation permits’? Or would it involve an impermissible defiance by the courts of the clear requirements of valid Australian federal law?¹³⁶

Justice Kirby held that the language of the *Migration Act* is ‘intractable’ and cannot be ‘read down’ to avoid Australia’s international law obligations.¹³⁷ His Honour acknowledged that there is a deliberate statutory policy of mandatory detention and this has remained despite several parliamentary reports which address the alleged defects of the mandatory immigration detention system, including the problems associated with prolonged detention of children.¹³⁸ In light of these reports, Kirby J concluded that international law cannot be enforced by the Family Court in the face of such clear provisions in the *Migration Act*.¹³⁹

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¹³⁶ Ibid [155].

¹³⁷ Ibid [159].

¹³⁸ Ibid [160]–[170].

¹³⁹ Ibid [171].

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