

IMPLEMENTING TREATIES IN DOMESTIC LAW: TRANSLATION, ENFORCEMENT AND ADMINISTRATIVE LAW

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In this paper, we analyse the ability of private individuals and organisations to enforce Australia's treaty commitments, as referenced in domestic statutes. More particularly, we analyse the contribution of administrative law to the enforcement of international law within the domestic legal system. We study the complexity of such enforcement through two case studies centred on High Court decisions from the 1990s, Minister for Immigration and Ethnic Affairs v Teoh and Project Blue Sky Inc v Australian Broadcasting Authority. Through the case studies we analyse how and why international law commitments are altered when they are 'drawn down' into domestic law and litigants seek to enforce them there. We focus on a common implementation technique in Australian law, whereby treaty obligations constitute qualified limitations on executive discretion under statute. Through our case studies we illustrate how statutory reference to a treaty needs to be analysed as an intermediate step in implementation, with much of the work to make the treaty obligation enforceable in domestic law being undertaken by the administrative decision-makers charged with applying the statute, potentially supervised by the courts. Our themes are the role of domestic courts in enforcing treaty obligations and the inter-institutional dynamics generated by statutory implementation. We show how the legislative incorporation of international law may only constitute the starting point of a complex series of institutional interactions, often refracted through administrative law doctrine.

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I INTRODUCTION

Minister for Immigration and Ethnic Affairs v Teoh ('*Teoh*') was a dramatic development in Australian law.¹ The High Court accepted that unincorporated treaties can have legally enforceable relevance for administrative decision-making. The case deserves, and has received, a great deal of scholarly analysis. However, for reasons we develop in this article, the reasoning in *Teoh* and the legal effect of unincorporated treaties are now a marginal phenomenon. The attention that they receive in the international law literature distracts from other aspects of administrative law that play a much greater role in the domestic implementation of international law in Australia. Australian administrative law's central contribution to the implementation of international law lies in how it enforces international law when it is referred to in statutes as a means of shaping, confining and structuring executive discretions. This article is a first step in analysing that contribution — the better to provide a complex, descriptively adequate, understanding of the role of international law in Australia.

Our argument centres on a detailed reconsideration of two case studies that have formed centrepieces of Australian scholarship on the implementation of international law in domestic administrative law, *Teoh* and *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*').² These case studies are worth revisiting for two reasons. First, the elapse of time has changed their appearance. Two or so decades later, a wider and different range of consequences of these two decisions can be appreciated, informing and altering the evaluation of earlier commentators. Secondly, we believe their significance with regards to the relationship between international law and administrative law has not been sufficiently understood.

The reason for Australian lawyers' fascination with the effect of unincorporated treaties in administrative law can be readily appreciated. It is a departure from the traditional dualist picture, whereby international law is admitted to domestic law by statutory incorporation. The problem, as we detail below, is that the technique focused upon, namely legitimate expectations, now has a very narrow scope of application in Australian law. It occupies a decidedly 'niche' position within the wider field of the interaction between international law and domestic administrative law. When treaties and conventions are incorporated in domestic law by statute, the options for enforcing international law through domestic administrative law are more widespread, more varied, and in many respects, of greater assistance to the litigant seeking to enforce Australia's international obligations.

The lack of attention to the implementation of international law in domestic statutes leaves the complexity of this implementation, the reasons for that complexity and the contribution of domestic administrative law largely unexplored. Legislative implementation of an international obligation is often the starting point, not the conclusion, of an inquiry into the domestic operation of international law. The effect of a statutory formulation on the implementation of an international law norm is often determined by administrative law. Domestic

¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*').

² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*').

administrative law plays, as Janet McLean notes, a ‘crucial gate-keeping role’ with respect to the implementation of international law.³ Implementing legislation, read in the light of administrative law principles, is often best understood as determining which official, administrator or agency will decide on the implementation of international law and how international law will condition, constrain or structure the decision-maker’s discretion in doing so, as well as the extent to which that implementation will be subject to review by the courts, including judicial review. The statute sets up the terms of the interaction between the domestic participants involved in the implementation of international law. One component of this is that administrative action is potentially supervised by courts, as courts may be called on to review regulations and decisions made by administrators.

We analyse the role of administrative law with regard to statutory implementation of treaty commitments. We focus on a common implementation technique in Australian law, where powers granted to administrators by legislation are qualified by reference to Australia’s treaty commitments. This form of implementation has been included in Australian legislation at least since s 6 of the *Narcotic Drugs Act 1967* (Cth), which provided: ‘The Minister or the Comptroller shall, in exercising any power or performing any function conferred on him by this *Act*, have regard to the obligations of the Commonwealth under the *Convention* and to no other matter’.⁴ Such provisions are now included in a broad range of Commonwealth legislation, such as legislation relating to aviation,⁵ customs duties,⁶ the environment,⁷ nuclear material and facilities⁸ and telecommunications.⁹ Provisions of this form make international law a qualification on the exercise of executive discretion. While providing an administrator with freedom to choose an outcome that responds to the facts and circumstances relevant to the decision,¹⁰ the legislation also seeks to control this discretionary judgment by reference to a treaty or treaties.

³ Janet McLean, ‘Problems of Translation: The State in Domestic and International Public Law and Beyond’ in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 210, 213. See also Janet McLean, ‘Divergent Legal Conceptions of the State: Implications for Global Administrative Law’ (2005) 68(3–4) *Law and Contemporary Problems* 167, 173.

⁴ *Narcotic Drugs Act 1967* (Cth) s 6, as repealed by *Narcotic Drugs Amendment Act 2016* (Cth) s 6. See also *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

⁵ See, eg, *Civil Aviation Act 1988* (Cth) s 11; *Air Services Act 1995* (Cth) s 9(3).

⁶ *Customs Act 1901* (Cth) s 269SK.

⁷ See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 137–40; *Environment Protection (Sea Dumping) Act 1981* (Cth) s 19(8A).

⁸ See, eg, *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 70.

⁹ See, eg, *Telecommunications Act 1997* (Cth) s 580.

¹⁰ See, eg, Peter Cane, *Administrative Law* (Oxford University Press, 5th ed, 2011) 140–3; Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983) 74–5.

This article contributes to the literature on the ‘translation’ of international law into domestic law, to use Karen Knop’s well-known metaphor.¹¹ The central proposition of Knop’s article was that domestic interpretation of international law was ‘not merely the transmittal of the international, but a process of translation from international to national’.¹² The metaphor of translation was intended to convey the art and craft associated with literary translation. This includes the competing issues of ‘faithfulness’ that attend that practice, both to the content of the international law being translated, as well as to the coherence, grammar and idiom of the ‘receiving’ domestic legal system. In this way, ‘translation ... directs our attention to the heterogenization involved in the drawing down of international law’.¹³ Knop’s article was a call to rethink the domestic interpretation and application of international law to better capture its complexity.¹⁴ She suggested that instead of regarding ‘domestic decisions as the middle-brow replication of international law, akin to the provincial production of a famous play’,¹⁵ international lawyers should be alive to the possibility that the complexity of the domestic interpretation and application of international law created ‘space to mediate the relationship between [the] global and [the] local’.¹⁶ Knop’s call to rethink the domestic interpretation and application of international law struck a chord, as evidenced by its extensive citation in the literature on implementation.¹⁷

We apply Knop’s insights to an examination of key case studies from Australian administrative law, and in doing so, develop those insights. Within the Australian legal system, administrative law is critical for much of the enforcement of international law. In the case studies, we analyse the ways in which international law qualifies the exercise of executive discretion.¹⁸ Our

¹¹ Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 *New York University Journal of International Law and Politics* 501, 504. Other scholars have independently used the metaphor of translation: see, eg, McLean, ‘Problems of Translation’, above n 3, 210–28. Sally Engle Merry has famously used the translation metaphor, but her emphasis is on how international law fits into local systems of cultural meaning, distinct from domestic law: Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006) 134–78. Scholars have commonly resorted to metaphors to explain and capture the complexities of transforming international law to domestic law. For example, Knop criticises the idea that domestic courts are ‘little more than downpipes for international law’: Knop, above n 11, 535. Anthea Roberts refers to litigating international law before national courts as being like a ‘fairground mirror — the reflection is there, but it is stretched, contorted and sometimes (almost) unrecognizable’: Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 *International and Comparative Law Quarterly* 57, 79.

¹² Knop, above n 11, 506.

¹³ *Ibid* (citations omitted).

¹⁴ *Ibid* 518.

¹⁵ *Ibid* 533.

¹⁶ *Ibid* 528.

¹⁷ Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 465; Roberts, above n 11, 74; Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 79–80; Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514, 532.

¹⁸ For an earlier study alive to the possibility that executive discretion plays a central role in the domestic implementation of international law, see McLean, ‘Problems of Translation’, above n 3, 212.

focus on executive discretion leads us to reflect on the application of the translation metaphor. The metaphor is most straightforwardly applicable where there is original text (at international law) and a translation in domestic law — in statute, regulation, judicial formulation or otherwise. A clear example of this phenomenon is the way in which Australia's obligations under the *Convention Relating to the Status of Refugees* are currently reformulated in statutory language by ss 5H–5M of the *Migration Act 1958* (Cth) ('*Migration Act*').¹⁹ The metaphor is not exhausted by this text-to-text scenario, and we develop its application to statutory discretions.

Where powers granted to administrators are qualified by reference to Australia's treaty commitments, the translation of international law into domestic law involves a complex series of interactions between domestic institutions. Critically, the statutory reference to the treaty needs to be understood as an intermediate step in the process, with much of the real work to make the international obligation enforceable in domestic law being undertaken by the administrative decision-makers charged with applying the statute. These translations by administrators are supervised by the courts. An interesting feature of the case studies, which is developed in Part IV(B), is that courts evidence a reluctance to translate treaty obligations into domestic law where the language of the relevant treaty is perceived as unduly indeterminate. In effect, the courts refuse to translate where they perceive that considerable policy discretion is involved in determining how a treaty obligation will be rendered an enforceable domestic standard. The courts understand the exercise of such policy discretion as a role for governments and Parliament, and are consequently reluctant to step into the gap.

Our examination of administrative law's role in statutory implementation is influenced by two themes of implementation scholarship: the role of domestic courts in enforcing treaty commitments and the inter-institutional dynamics generated by statutory implementation. The two themes can be explained separately, but they overlap.

With regard to enforcement, in the cases examined in this article the courts have to determine how, if at all, to enforce a treaty against the government where that treaty has been incorporated by statute to some extent but the government does not want to act in accordance with it. The courts' role in enforcing treaty obligations is particularly important given the prospect of Australian governments being 'Janus-faced' with regard to treaty obligations: they sign up to treaties on the international plane but may be reluctant to implement them domestically.²⁰ The case studies in this article focus on this reluctance in the

¹⁹ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 10–11. The Explanatory Memorandum does not expressly address ss 5I and 5M of the *Migration Act 1958* (Cth) ('*Migration Act*'). *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 1(2). The metaphor of translation leaves open an evaluation of the quality of that translation.

²⁰ Charlesworth et al, above n 17, 436. See generally Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 271–2; James Crawford, 'The International Law Standard in the Statutes of Australia and the United Kingdom' (1979) 73 *American Journal of International Law* 628, 646.

context of treaties implemented as qualifications on administrators' discretionary powers. There may be good reason for administrators' reluctance. The treaty commitment may be at cross-purposes with long-standing objectives of the particular regulatory scheme.

We refer to the second theme as 'institutional dynamics', drawing on McLean's insight that the implementation of international law into domestic law commonly requires action by different, often competing, institutions.²¹ Our focus on administrative law enables us to highlight the relationships between the three traditional branches of government — Parliament empowering administrators to implement international obligations through regulations and particular decisions, with courts playing a supervisory role with respect to the administrator's action. Administrative law not only recognises the different institutional contributions, its doctrinal principles are designed to mediate between them when conflicts arise. When treaties are implemented as a qualification on an administrative discretion, the resolution of the problems is nearly always by an executive decision, but that decision is subject to supervision by courts and, as will be shown below, potentially by parliamentary committees and at times by executive institutions.

In this article we focus on the relationship between statutory implementation techniques and the administrative law doctrine that can be employed to enforce the implemented treaty. The article is structured in the following manner: Part II briefly examines Australian international law scholarship for its understanding of the role of administrative law in implementing international law. Part III defines in more detail the implementation techniques to be examined and the applicable administrative law doctrine. In Part IV we examine, as mentioned above, two case studies in which legislation qualifies discretionary powers by reference to treaty obligations. These case studies involve High Court decisions in the 1990s, *Teoh* and *Project Blue Sky*.²² As noted above, we contend that the legacy of these cases is ripe for reconsideration, and that such reconsideration usefully advances study of the relationship between international and administrative law.

Disciplinary divides explain why international lawyers have not examined the implementation techniques and the legal consequences of those techniques in terms of administrative law, a highly technical and slippery form of domestic law. Our starting point is that if international lawyers are interested in domestic implementation, and in particular the enforcement of treaty obligations against reluctant or even recalcitrant governments, then domestic administrative law is commonly the body of law that governs this process. Our article is descriptive in nature because it meets the gap we have identified in the literature. With an acknowledgement of the importance of administrative law to implementation comes a need for closer attention to the way in which international law in fact operates in domestic administrative law. Our case studies are a first step to this end.

This article is on the interaction between international law and domestic *administrative* law. We exclude discussion of the constitutional principles regarding implementation of treaties. In the cases we examine, the question of

²¹ McLean, 'Divergent Legal Conceptions of the State', above n 3, 167.

²² *Teoh* (1995) 183 CLR 273; *Project Blue Sky* (1998) 194 CLR 355.

whether there is a valid head of legislative power is not at issue, and nor is any other constitutional question relating to the implementation of a treaty. In focusing on issues of administrative law, we acknowledge that many of the Australian constitutional cases have an administrative dimension; the initial implementation of international law may be by legislation but the effective provisions are included in regulations.²³ In these cases, the applicants are adversely affected by the implemented treaty commitments and challenge the Commonwealth's power to implement them. In the cases we examine in this article, the applicant has a different relationship with international law. Rather than questioning the Commonwealth's power to implement a treaty, the applicants seek to enforce treaty commitments that administrators are reluctant to implement. The litigation that we examine involves enforcement of international law rather than attempts to resist its implementation.

II ADMINISTRATIVE LAW IN THE AUSTRALIAN IMPLEMENTATION SCHOLARSHIP

A *The Prominence of Teoh*

The authors of contemporary Australian textbooks addressing the relationship between international and domestic law share a common focus in their treatment of administrative power and executive discretion. The use of legitimate expectations in *Teoh's* case in 1995, grounded in Australia's unincorporated treaty commitments, is treated as the central topic of discussion. Any other aspect of administrative law relevant to the domestic implementation of treaties receives little or no consideration.

Annemarie Devereux and Sarah McCosker's chapter in *International Law in Australia* exemplifies this approach.²⁴ The chapter is structured by a division between the direct and indirect effect of international law.²⁵ In relation to treaties, direct implementation is treated as synonymous with legislative incorporation and there is no attendant discussion of administrative law. The title 'Affecting Exercise of Administrative Power and Executive Discretion' is reserved for their fourth identified way in which 'international law may affect domestic Australian law indirectly',²⁶ with the discussion under this head devoted to the legitimate expectations doctrine as developed in *Teoh* and its

²³ See, eg, *Roche v Kronheimer* (1921) 29 CLR 329; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Commonwealth v Tasmania* (1983) 158 CLR 1.

²⁴ Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3rd ed, 2017) 23–47.

²⁵ The structure adopted by Devereux and McCosker is a longstanding feature of Australian implementation scholarship. Kristen Walker developed the distinction between the direct and indirect operation of international law from her analysis of *Dietrich v The Queen* (1992) 177 CLR 292 and *Teoh* (1995) 183 CLR 273 two decades ago. Walker considered the way in which treaties may indirectly operate in Australian law with respect to statutory interpretation, development of the common law and as a trigger for administrative law remedies: Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204, 209–27.

²⁶ Devereux and McCosker, above n 24, 44.

subsequent fate. Nothing more is said about administrative law or executive discretion.

The same focus is evident in the discussion of the recognition of international law at the municipal level in Donald R Rothwell et al's *International Law: Cases and Materials with Australian Perspectives* from 2014.²⁷ The existence of legal challenges grounded in treaty commitments given effect by statute is simply noted, with 10 pages then devoted to *Teoh* and its aftermath: encompassing judicial, executive and (at state level) legislative responses to the legitimate expectations doctrine introduced in *Teoh*, and judicial responses to those executive, and state legislative, responses.²⁸ The 2014 edition of *Australian Constitutional Law & Theory: Commentary and Materials* devotes more than half of its section on the reception of international law to legitimate expectations.²⁹

Teoh marked an important development in the history of implementing international law within the Australian legal system. We argue that it is nonetheless timely to reassess the place of *Teoh* and legitimate expectations as the focus of treatments of the relationship between international law and domestic administrative law. As we argue in Part IV(A), the legitimate expectations doctrine is a dead letter outside of a very narrow field of application corresponding to the facts of *Teoh*'s case. The account of legitimate expectations provided in the implementation literature needs revising. The attention devoted to *Teoh* and legitimate expectations now serves to obscure other, more active and equally complex, sites of interaction between international law and domestic administrative law.

B Does Qualifying Administrative Discretion Involve Incorporation?

While the contemporary literature on domestic implementation of international law largely neglects implementation of international law in the form of a statutory qualification on an administrative discretion, this topic has been examined, particularly in earlier scholarship. It is worth examining this scholarship, albeit briefly, as it raises some initial issues with this form of implementation.

We first address a terminological issue. Rothwell, in his 1999 article examining the High Court's decision in *Project Blue Sky*, referred to statutory provisions that make international law a qualification on administrative discretionary powers as 'quasi-incorporation'.³⁰ Rothwell attributed this terminology to Ivan Shearer, who had employed the term to refer to

²⁷ Donald R Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2nd ed, 2014) 245–61.

²⁸ *Ibid* 245–61. There is some discussion of the form and content of legislation giving effect to a treaty, but again there is no discussion of administrative law, executive discretion or enforcement of treaty commitments subsequent to legislative incorporation: at 233–45, quoting Bill Campbell, 'The Implementation of Treaties in Australia' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) [135], [144]–[147].

²⁹ George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 885–91.

³⁰ Donald R Rothwell, 'Quasi-Incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade' (1999) 27 *Federal Law Review* 527.

implementation of the *International Covenant on Civil and Political Rights*³¹ as sch 2 to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).³² For our purposes the term is over-inclusive, covering every form of statutory reference other than direct statutory incorporation. James Crawford's work on implementation of international law into Australian domestic law in the late 1970s and early 1980s offers the following more precise terminology for this form of implementation — 'qualified limitations on executive discretion'.³³ The statutory provisions that we examine operate as such qualifications. In some circumstances, international law obligations may operate as a strict limitation on the administrator's authority. In others, it may be a weak limitation on authority, and in still others, it is a factor to be balanced against other considerations.

Another and more substantive difficulty is whether statutory reference to treaties as a qualification on administrative discretionary powers can be regarded as a form of incorporation. There is uncertainty on this point in the scholarship. Rothwell starts by stating that it 'is not an instance where international law, by way of a treaty or agreement, has been directly incorporated into municipal law by expressly making its terms part of the statute' but neither is it a form of indirect implementation — as occurred in *Teoh*, it 'squarely falls between these two examples'.³⁴ Yet this placement does not capture the complexities, for as he states in his conclusion:

The quasi-incorporation approach may not be one which gives an international treaty as prominent a role in municipal law as does direct incorporation. However, *Project Blue Sky* demonstrates that the effect may ultimately be much the same as direct incorporation, especially in instances where statutory authorities are required to take into account the international obligation.³⁵

Rothwell's uncertainty demonstrates that it can be difficult for international lawyers to classify and situate this form of implementation in terms of incorporation.

In contrast, James Crawford and W R Edeson in their work on international law in Australia in the mid-1980s were untroubled by the classificatory question, treating incorporation as a matter of degree. In their analysis of this form of implementation, they state that:

In such situations it does not matter whether the treaty is incorporated to any greater extent, for the *Act* provides a clear direction to the decision-maker as to how he is to exercise his statutory powers, and failure to have 'regard' or 'due

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

³² I A Shearer, 'The Relationship between International Law and Domestic Law' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 55. Note that this *Act* has been retitled: *Australian Human Rights Commission Act 1986* (Cth) sch 2.

³³ Crawford, above n 20, 638.

³⁴ Rothwell, 'Quasi-Incorporation of International Law in Australia', above n 30, 537.

³⁵ *Ibid* 544. *Project Blue Sky* involves such a provision and is examined in Part IV(B) below: *Project Blue Sky* (1998) 194 CLR 355.

regard' to the relevant treaty would entitle a court, in exercising its powers of review, to find a particular exercise of the statutory power invalid.³⁶

This suggests that to focus on whether or not a measure can be regarded as 'incorporating' international law is to ask the wrong question. The significant factor for Crawford and Edeson is that such statutory references to international law provide a legal hook for litigants to challenge administrative decisions in the courts. In other words, the significant point is not whether such provisions can be regarded as incorporation, but that they enable enforcement of international law through forms of judicial review of administrative action. We agree with Crawford and Edeson that the enforceability of the measure implementing the treaty is the important point. Through the case studies we analyse the complexity of such enforcement, with particular attention to the role played by administrative law principles.

III QUALIFYING ADMINISTRATIVE DISCRETION BY REFERENCE TO TREATY OBLIGATIONS

There are numerous ways in which treaty commitments can be implemented by statute. The general technique that we focus on can be referred to as qualifying discretion by reference to treaty obligations. Parliament's options when deciding to qualify administrative discretions by reference to treaty commitments can be separated into two broad categories.

We refer to provisions in the first category as 'confining discretion'.³⁷ The principal feature of such provisions is that they require decision-makers exercising discretionary powers to act consistently with treaty obligations.³⁸ For example, s 138 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides: 'In deciding whether or not to approve ... the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with Australia's obligations under the *Ramsar Convention*'.³⁹

In such provisions, the scope of the administrator's discretion is limited by reference to treaty obligations, where those limits may be enforceable by courts in administrative law proceedings. We will examine this form of implementation in Part IV(B).

The second category requires administrators to 'have regard to' or consider Australia's international law obligations.⁴⁰ This is usually, but not always,⁴¹ a

³⁶ James Crawford and W R Edeson, 'International Law and Australian Law' in K W Ryan (ed) *International Law in Australia* (Law Book Company, 2nd ed, 1984) 71, 118.

³⁷ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1971) 55.

³⁸ See, eg, *Air Services Act 1995* (Cth) s 9(3); *Australian Postal Corporation Act 1989* (Cth) s 28(c); *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) s 84(1); *Chemical Weapons (Prohibition) Act 1994* (Cth) s 95(1); *Civil Aviation Act 1988* (Cth) s 11; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 137–40; *Narcotic Drugs Act 1967* (Cth) ss 8G(1)(c), 9F(1)(c), 10M(3)(a), 10P(2)(d), 11J(1)(c), 13(3)(a), 13B(2)(d); *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 70(1).

³⁹ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975), cited in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 138.

⁴⁰ See *Air Navigation Regulation 2016* (Cth) s 26(2)(b); *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) s 84(2); *Narcotic Drugs Act 1967* (Cth) ss 9B(2)(b), 10A(2)(b).

statutory requirement. Section 95(2) of the *Chemical Weapons (Prohibition) Act 1994* (Cth) is an example of this kind of provision. It provides: ‘A person must, in exercising a power or discretion conferred by this Act, have regard to Australia’s obligations under the *Convention*’.⁴² We refer to these provisions as ‘structuring discretion’.⁴³ They engage different administrative law principles from the first option. Their principal feature is that they require the administrator to consider, or apply,⁴⁴ treaty obligations when exercising discretionary powers. This option provides administrators with authority to determine how to balance the treaty obligation with other, possibly competing, considerations. That means that the treaty may have little or great effect on the administrator’s decision. We will examine this form of implementation in Part IV(A).

When applicants challenge regulations or decisions on the basis that the treaty obligation has had no effect or too little effect on the decision, the court’s scope of review will be dependent on its interpretation of the implementation technique employed in the statute. The issues that arise at this point go to the heart of judicial review of administrative action. Where, and how, should courts draw the line between ensuring legal accountability and respecting Parliament’s intention to provide the administrator with space in which to exercise his or her discretionary judgment? Administrative law does not come close to having a general answer to such issues. It mediates a constant tension between the legislative implementation provisions, the administrator’s responsibilities, and the court’s limited, supervisory, role in judicial review proceedings. These tensions are resolved on a case by case basis by reference to the applicable statutory provisions and administrative law doctrines, as influenced by general public law principles and norms.

We first discuss the *Teoh* case study, an instance of ‘structuring discretion’. Our contention is that *Teoh* has retained undue prominence, overshadowing other sites and modes of interaction between international and administrative law, and accordingly we begin by putting it in its place. We then turn to *Project Blue Sky*, an instance of ‘confining discretion’, to study the complexity of institutional interactions and doctrinal responses generated by statutory incorporation of international law into the domestic legal system.

IV CASE STUDIES

A *Structuring Discretion: Convention on the Rights of the Child*

Does the Australian government’s ratification of a treaty give rise to a legitimate expectation that, in exercising a discretion, an executive decision-maker will act consistently with that treaty? *Teoh* raised this broad proposition for consideration, and in doing so attracted the attention of those interested in the enforcement of international law in the domestic legal system. The legal issues

⁴¹ The exception, as we will show in Part IV(A), is *Teoh* (1995) 183 CLR 273.

⁴² *Chemical Weapons (Prohibition) Act 1994* (Cth) s 95(2), citing *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 3 September 1992, 1974 UNTS 45 (entered into force 29 April 1997).

⁴³ Davis, above n 37, 97–8.

⁴⁴ See, eg, *Biosecurity Act 2015* (Cth) ss 5, 173(4), 174(3), 179(3), 182(4).

raised by *Teoh*'s case and the legislative and judicial responses to it all constitute instances in which a treaty operates to structure the exercise of the decision-maker's discretion, setting her or his agenda. The features of the post-*Teoh* developments that we focus on in this Part are the minimisation of a form of structuring administrative discretion introduced by the judiciary, namely legitimate expectations grounded in unincorporated treaties, and the adoption of a statutory basis for structuring the relevant administrative discretion to deport in cases affecting children. By way of this statutory basis, the United Nations *Convention on the Rights of the Child* ('*CROC*')⁴⁵ has become a mandatory consideration enforceable by the courts.

Teoh constitutes an important case study in both the Australian and international contexts. As indicated above in Part II(A), in Australian scholarship it has constituted the centrepiece of discussions of the effect of international law on administrative law. Internationally, it has constituted one of an international trinity of cases focused on the legal consequences of ratification of the *CROC*, alongside *Tavita v Minister of Immigration* (New Zealand)⁴⁶ and *Baker v Minister of Citizenship and Immigration* (Canada).⁴⁷ These cases have occupied a central place in discussions of the influence of international norms on administrative discretion, and the contribution of judicial review to that interaction.⁴⁸ The cases raised the prospect of domestic law being permeable to international law in a way that it had not been previously. The requirement, that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law by statute, appeared to have been circumvented.⁴⁹

Mr *Teoh* successfully challenged decisions to refuse him a permanent resident visa and to deport him, on the basis that he had a legitimate expectation, grounded in Australia's ratification of the *CROC*, that the decision-maker would take the best interests of his children into account. This legitimate expectation was held to have been disappointed, constituting a breach of procedural fairness that invalidated the relevant decisions. The legal effect the majority gave to executive ratification of a treaty, absent legislative incorporation, appeared to qualify common understandings of our system as dualist. It appeared to challenge the idea that international law could only become part of the domestic legal order by legislative incorporation. In *Teoh*, the leading judgment sought to soften the perceived challenge, stating that:

The fact that the provisions of the *Convention* do not form part of our law is a less than compelling reason [for saying an unincorporated treaty cannot give rise to a

⁴⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*').

⁴⁶ *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁴⁷ *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817.

⁴⁸ McLean, 'Problems of Translation', above n 3, 211–16; David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing, 2004); Claudia Geiringer, 'Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' (2004) 21 *New Zealand Universities Law Review* 66; David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 7–16.

⁴⁹ On the requirement, see *Teoh* (1995) 183 CLR 273, 286–7 and authorities referred to therein.

legitimate expectation] — legitimate expectations are not equated to rules or principles of law.⁵⁰

The question of whether, and if so, how and to what extent the legitimate expectations doctrine in *Teoh* qualified dualism was a matter of debate.⁵¹ This debate did not dampen the interest generated by the decision, arising from the prospect that legitimate expectations might have ‘far-reaching’ implications for the implementation of international law in the domestic legal system.⁵² Writing four years after the decision, Sir Gerard Brennan wrote that ‘*Teoh* might prove to be a growth point of principle governing the effect of international law on executive power’.⁵³

Writing now, more than 18 years after Sir Brennan’s comments, it is clear that this potential has not been realised. Our purpose in returning to *Teoh* and its legacy is, in part, to argue that the current focus on *Teoh* in Australian international law is now misplaced. The argument proceeds in three stages: first we clarify exactly what the legitimate expectations doctrine, where it applies, provides to the litigant. Secondly, we uncover aspects of *Teoh*’s legacy that have largely been overlooked in the contemporary implementation literature. Thirdly, we assess the nature and breadth of the proposition for which *Teoh* now stands as authority.

1 *What Does the Legitimate Expectations Doctrine in Teoh Give to the Litigant?*

Mr Teoh came to Australia and married an Australian citizen, having three children by that relationship. His wife had four children by earlier relationships. Mr Teoh was convicted of a drug offence, referenced in the judgment as linked to his wife’s addiction to heroin, and was sentenced to imprisonment for six years. At the time of his conviction, he had a pending application for permanent residence. This application was refused on the basis that he was not of ‘good character’ and a consequent deportation decision was issued. Article 3 of the *CROC*, ratified by Australia at the time of the relevant decisions, directed that the best interests of the child shall be a primary consideration in all actions concerning children.⁵⁴ Mr Teoh successfully challenged the visa and deportation

⁵⁰ *Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

⁵¹ The *Teoh* majority argued that, because the doctrine did not give rise to legal rights or interests, legitimate expectations based on an unincorporated treaty could be reconciled with the traditional ‘transformation’ theory of legislative incorporation of international law. Walker found this argument unpersuasive, seeing an inconsistency between legitimate expectations doctrine and traditional transformation theory. In Walker’s view, so much the worse for the traditional transformation theory: see Walker, above n 25, 227.

⁵² Sir Gerard Brennan, ‘The Role and Rule of Domestic Law in International Relations’ (1999) 10 *Public Law Review* 185, 191.

⁵³ *Ibid.* Cf the contemporaneous judgment of Leslie Katz SC, then New South Wales Solicitor General, that *Teoh* was a ‘one-off’: Leslie Katz, ‘A *Teoh* FAQ’ (1998) 16 *Australian Institute of Administrative Law Forum* 1, 5–6.

⁵⁴ *CROC* art 3. For the purposes of this paper, we do not critically engage with the High Court’s identification of the relevant obligations under the *CROC* in *Teoh*. For criticism of the majority’s use of the *CROC* and its exclusive reliance on art 3, see Michael Taggart, ‘Case Comment: Legitimate Expectation and Treaties in the High Court of Australia’ (1996) 112 *Law Quarterly Review* 50, 53–4. Cf *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 409, 433–4 (Carr J).

decisions on the grounds that Australia's ratification of the *CROC* gave rise to a legitimate expectation that the decision-maker, in the exercise of his or her discretion, would take the best interests of the child into account as a primary consideration, and the decision-maker had not done so.⁵⁵

The legitimate expectations doctrine in *Teoh* only secures procedural requirements. The existence of a legitimate expectation that the best interests of the child will be a primary consideration requires only that *if* the decision-maker does not propose to take the best interests of the child into account, *then* the decision-maker must inform a person likely to be affected by the decision of this, and give him or her an opportunity to be heard as to why the best interests of the child or children should be taken into account.⁵⁶ To put this in negative terms, the legitimate expectations doctrine does *not* require that the best interests of the child *are* taken into account, only that certain procedural steps be taken if those interests are not taken into account.⁵⁷

Turning from the nature and function of the expectation to its content, the judgments in *Teoh*, echoing the language of the *CROC*, were careful to specify that art 3 of the *CROC* does not require that the best interests of the child are *the* primary consideration, only that they are *a* primary consideration. Mason CJ and Deane J stated that art 3 'does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight'.⁵⁸

2 From Legitimate Expectations to Statute-Based Mandatory Considerations

In discussing *Teoh*'s legacy, a theme of international law texts has been the ministerial and state level legislative responses to the decision.⁵⁹ In *Teoh*, the majority judges stated that ratification of a Convention 'is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary'.⁶⁰ Federal and state governments took exception to this proposition, holding it to be inconsistent 'with the proper role of Parliament in implementing treaties in Australian law'.⁶¹ They treated the Court's qualification, namely that legitimate expectations would arise absent 'statutory or executive indication[s] to the contrary',⁶² as an opening and moved to supply the

⁵⁵ As to the subsequent fate of Mr Teoh, his application for permanent residency was eventually granted: Katz, above n 53, 4.

⁵⁶ *Lam v Minister for Immigration and Multicultural Affairs* (2006) 157 FCR 215, 227 [33].

⁵⁷ *Teoh* (1995) 183 CLR 273, 291–2 (Mason CJ and Deane J), 301–2 (Toohey J). See *Rocca v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 71, 540 [40] (Gray J).

⁵⁸ *Teoh* (1995) 183 CLR 273, 289 (Mason CJ and Deane J), 301–2 (Toohey J), 320 (McHugh J); McHugh J was in dissent but not on this point.

⁵⁹ Rothwell et al, above n 27, 252–6; Alison Duxbury, 'The Impact and Significance of *Teoh* and *Lam*' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 299, 304–5; Gavan Griffith and Carolyn Evans, '*Teoh* and Visions of International Law' (2000) 21 *Australian Yearbook of International Law* 75, 76–9.

⁶⁰ *Teoh* (1995) 183 CLR 273, 291.

⁶¹ Alexander Downer and Daryl Williams, 'The Effect of Treaties in Administrative Decision-Making' (Joint Statement, 25 February 1997), quoted in Edward Cole and Marina Tsirbas, 'Australian Practice in International Law 1997' (1998) 19 *Australian Year Book of International Law* 183, 224.

⁶² *Teoh* (1995) 183 CLR 273, 291.

necessary indications with the intent of forestalling the use of legitimate expectations as introduced in *Teoh* in any context.⁶³ We do not propose to revisit these executive and legislative responses, or their reception by the courts. They appear to have had little legal effect in judicial review litigation⁶⁴ and have been well covered in the Australian international law literature.⁶⁵

A second line of legislative and executive response to *Teoh*, largely ignored outside of specialist administrative law publications,⁶⁶ has proven more legally consequential, albeit with a narrower scope of application. As illustrated in *Teoh*'s case, the decision to cancel a visa on the grounds that a person is not of good character is made in the exercise of a discretion by the relevant decision-maker. In part in response to *Teoh*, s 499 of the *Migration Act* was amended to enable the Minister to issue more detailed and prescriptive Directions to those exercising that discretion,⁶⁷ and relevant Directions were issued.⁶⁸ The Directions are binding on the relevant decision-makers.⁶⁹ The Federal Court has said that these Directions create 'a framework within which the discretion vested in the decision-maker is lawfully to be exercised'.⁷⁰ They provide that the best interests of the child, where relevant, are a primary consideration.⁷¹ By this means, art 3 of the *CROC* was, post-*Teoh*, introduced by the government into the very administrative process under review in *Teoh*. Article 3 was referenced in Directions issued by the Minister and made binding on the relevant decision-makers by statute, which determined which factors must, and may, be considered

⁶³ Ibid. Cf *Administrative Decisions (Effect of International Instruments) Act 1995* (SA) s 3(1).

⁶⁴ *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, 103; *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431, 437–8. See also *Lam v Minister for Immigration and Multicultural Affairs* (2006) 157 FCR 215, 226 [30].

⁶⁵ Rothwell et al, above n 27, 252–6; Duxbury, above n 59, 305.

⁶⁶ For discussion of this line of response, see Matthew Groves, 'Treaties and Legitimate Expectations — The Rise and Fall of *Teoh* in Australia' (2010) 15 *Judicial Review* 323, 328–9.

⁶⁷ See *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) sch 1 s 16. For the rationale for the 1998 Amendments to s 499, see Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth) 8 [30]: 'This amendment is intended to ensure that the Minister can specify more precisely how a discretion should be exercised'.

⁶⁸ Each new Direction repealed its predecessor: Minister for Immigration and Multicultural Affairs (Cth), *Direction No 17 — Visa Refusal and Cancellation under Section 501*, 16 June 1999; Minister for Immigration and Multicultural Affairs (Cth), *Direction No 21 — Visa Refusal and Cancellation under Section 501*, 23 August 2001; Minister for Immigration and Citizenship (Cth), *Direction No 41 — Visa Refusal and Cancellation under Section 501*, 3 June 2009; Minister for Immigration and Citizenship (Cth), *Direction No 55 — Visa Refusal and Cancellation under Section 501*, 1 September 2012.

⁶⁹ *Migration Act* s 499(2A); *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583, 586 [12].

⁷⁰ *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562, 585 [80] (Perry J).

⁷¹ Note that this was most often achieved simply by use of the phrase 'best interests of the child'. *Direction No 41*, in place between 15 June 2009 and 31 August 2012, made explicit reference in para 10(1)(d)(i) to the fact that the phrase 'best interests of the child' was 'as described in' the *CROC*: Minister for Immigration and Citizenship (Cth), *Direction No 41 — Visa Refusal and Cancellation under Section 501*, 3 June 2009. This reverted to being implicit in *Direction No 55*. The children within the Direction's scope of application are, in shorthand, those who are under 18 and with whom the potential deportee is in a parental relationship: Minister for Immigration and Citizenship (Cth), *Direction No 55 — Visa Refusal and Cancellation Under Section 501*, 1 September 2012, para 9.3.

in exercising the statutory discretion. In this way, *Teoh* led to incorporation of art 3 of the *CROC* by reference.

The use of the Directions has curtailed the contribution of the legitimate expectations doctrine from *Teoh* in the context in which that decision arose: visa cancellation and refusal decisions. To the extent that there is any inconsistency between the applicable Direction and the reasoning in *Teoh*, then ‘the Direction necessarily prevails’.⁷² With their greater specificity, the Directions have, within their field of operation, been more legally effective in limiting the legitimate expectations doctrine than the general ministerial statements discussed above,⁷³ which were directed at denying such expectations in all contexts.⁷⁴

At the same time as the Directions curtailed the contribution of the legitimate expectations doctrine to visa cancellation and refusal decisions, they enabled the application of another judicial review doctrine to such cases, namely mandatory relevant considerations. The doctrine requires that, in the exercise of a given discretion, certain matters must be considered, namely those matters that are designated mandatory relevant considerations, and specifies how that designation is arrived at. Where they apply (and where a child is affected by the decision), the Directions convert the best interests of the child into a mandatory relevant consideration.⁷⁵ With the Directions in place, the doctrine of mandatory relevant considerations will be breached where there is a failure to treat the best interests of the child as a primary consideration.

This substitution of mandatory relevant considerations for legitimate expectations is a gain for the litigant seeking to invoke the *CROC* in the visa cancellation and refusal context. As explained above, the procedural nature of the legitimate expectations doctrine means that a decision-maker can choose not to consider the best interests of the child, so long as he or she notifies the person affected of this intention and gives them an opportunity to address it. By way of contrast, when the best interests of the child are a mandatory relevant consideration, the decision-maker *has* to consider those interests. The decision-maker cannot, through notification and allowance for response, dispense with their consideration.⁷⁶

The mandatory relevant considerations doctrine, where it applies, provides the litigant with a more robust means of ensuring that the best interests of the child are considered, not capable of being dislodged by procedural means. The phrase ‘where it applies’ indicates a critical contingency, distinguishing the circumscribed operation of mandatory relevant considerations from the general applicability of the *Teoh* legitimate expectations doctrine. The mandatory

⁷² *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145 (15 October 2012) [55]; *SZRTN v Minister for Immigration and Border Protection* [2014] FCAFC 129 (3 October 2014) [39].

⁷³ See Downer and Williams, above n 61 and accompanying text.

⁷⁴ *Lam v Minister for Immigration and Multicultural Affairs* (2006) 157 FCR 215, 226 [30]. Not to be confused with: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

⁷⁵ The Directions do more than this. In addition to prescribing relevant considerations for the purpose of judicial review, they also provide guidance as to how those considerations are to be balanced, see *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562, 586 [83] (Perry J).

⁷⁶ This leaves untouched the question of the quality of that consideration, a central issue in the jurisprudence on mandatory relevant considerations.

relevant considerations doctrine is dependent on government action in the municipal sphere, in the form of references to the *CROC* in Directions, in a way that the legitimate expectations doctrine introduced in *Teoh* was not (though of course the legitimate expectations doctrine was dependent on the executive ratification of the relevant treaty).

In providing a new capacity to issue Directions, and in issuing them, the legislature and executive intended to push back against the result in *Teoh*. In the second reading speech accompanying the amendments to the *Migration Act* s 499,⁷⁷ the Minister alluded to how the Directions would adjust the weight given to various factors in *Teoh*, such that the best interests of the child would weigh less and competing considerations supportive of visa refusal or cancellation and consequent deportation would weigh more:

I do have a concern that sometimes the rights of a child in Australia of someone who has been selling drugs, for instance, are given greater weight than the rights of the many children of other Australians who are abused by those who are trading in those sorts of products ... I think we have gone overboard on the *Convention on the Rights of the Child* to be concerned only about the rights of children of those people who want to enter Australia, and not the impact that their presence might have on other children, for instance, or the Australian community as a whole.⁷⁸

Notwithstanding this intent, the Directions provide a surer basis for judicial review of the cancellation/refusal decisions for failing to take the best interests of the child into account than the legitimate expectations doctrine from *Teoh*. The Directions have generally strengthened the position of the litigant wishing to use art 3 of the *CROC* to challenge a decision to refuse or cancel a visa on character grounds. In the legal context in which *Teoh* was decided, relating to the cancellation and refusal of visas on character grounds, the need for a decision-maker to consider the best interests of the child under art 3 of the *CROC* is presently unavoidable in a way it was not on the basis of the majority reasoning in *Teoh*.⁷⁹

Even within its area of operation, namely visa cancellation and refusal decisions on character grounds, the substitution of mandatory relevant considerations for the legitimate expectations doctrine is not complete. The Directions do not apply in every case. They are not binding on the Minister in respect of the personal exercise of her or his powers.⁸⁰ Under the *Migration Act*, the Minister has powers to make visa refusal or cancellation decisions on character grounds personally, as opposed to through a delegate.⁸¹ When the Minister makes a decision personally, the Directions do not apply and so do not provide a foothold for the relevant considerations doctrine. As elaborated below,

⁷⁷ These amendments were understood to enable prescriptive Directions of the form subsequently issued under the authority of the provision: see above n 67.

⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1244 (Philip Ruddock).

⁷⁹ This is to confine the discussion to *CROC* art 3. There is a further question as to whether the *Teoh* majority were correct in their exclusive reliance on art 3, or whether additional articles of the *CROC* were relevant. See also the discussion in above n 54.

⁸⁰ See, eg, *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 4 [6] (Allsop CJ and Katzmann J).

⁸¹ *Migration Act* ss 501(3), (4).

this gap in the applicability of the mandatory relevant considerations doctrine has been filled by the legitimate expectation doctrine from *Teoh*.

3 What is *Teoh* Authority for Now with Respect to Legitimate Expectations?

Alongside *Teoh* itself, and the ministerial statements in response, another mainstay of Australian discussion on the effect of international law on administrative power is the fate of the legitimate expectations doctrine subsequent to *Teoh*'s case.⁸² In addressing *Teoh*'s place in discussions of the effects of international law on administrative action, we need to distinguish between the judicial review doctrine of legitimate expectations and the particular subset of that doctrine of interest to international lawyers. The proposition the *Teoh* majority introduced into Australian law was that a legitimate expectation could be grounded in Australia's ratification of a treaty.⁸³ There are other ways a legitimate expectation can arise, quite removed from any consideration of international law. A legitimate expectation can also arise from the statements or conduct of an official.

Following *Teoh*, the High Court has been consistently critical of the doctrine of legitimate expectations.⁸⁴ In its most recent salvo against the doctrine, *Minister for Immigration and Border Protection v WZARH* (2015) ('WZARH'), the High Court gathered up its earlier criticisms in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) ('Lam') and *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) as evidence of the doctrine's 'rejection'⁸⁵ and then proceeded to reiterate its position:

The 'legitimate expectation' of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness ... Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.⁸⁶

The object of this criticism is, at its simplest, any recourse to the doctrine, whether grounded in Australia's international law commitments or solely in domestic matters. This means that much of the criticism, and the debate it has engendered, is not about the implementation of international law at all. Only at

⁸² See Devereux and McCosker, above n 24, 44–5; Williams, Brennan and Lynch, above n 29, 889–91; Duxbury, above n 59, 307–15. While Duxbury's chapter of legitimate expectations begins with a discussion of the impact on international treaties on administrative law, it is expressly concerned with the doctrine more generally.

⁸³ *Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J), 301 (Toohey J), 304 (Gaudron J).

⁸⁴ We do not address the persuasiveness of the High Court's criticism of the legitimate expectations doctrine. That is another debate and another paper. For the purposes of this paper we are concerned only with the outcome, not the reasoning.

⁸⁵ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334–5 [28]–[30] (Kiefel, Bell and Keane JJ) ('WZARH'), quoting *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 36 [111], 38 [121] (Hayne J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

⁸⁶ *WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

limited points does the debate over legitimate expectations overlap with the issue of implementation of international law.

There are two ways in which Australian legitimate expectations principles remain of interest to international lawyers. The first is the intrinsic interest of the judicial discussions of implementation of international law that have on occasion arisen in the legitimate expectations context. In the jurisprudence of the High Court, the most notable instance of this is the obiter dictum discussion on this point in *Lam*.⁸⁷ The relevant passages in *Lam* have been well-analysed in the academic literature and we do not propose to discuss them further.⁸⁸ The second way in which the doctrine of legitimate expectations remains of interest is as a practical vehicle for the influence of international law on executive discretion. Here the relative importance — or conversely, marginality — of the legitimate expectations doctrine matters. To what extent does the legitimate expectations doctrine still warrant attention as a means by which international law can influence executive discretion? Recent textbook treatments of the effect of international law on executive discretion rehearse the High Court's criticisms of legitimate expectations, without directly addressing the question of whether legitimate expectations grounded in unincorporated treaties continue to have any purchase in Australian domestic law.⁸⁹ On investigation, the *Teoh* doctrine does continue to have a foothold in Australian administrative law. But it is the narrowest of footholds, its scope tightly circumscribed.

The High Court's sustained critical commentary on the legitimate expectation doctrine has had an effect. It has stunted the growth of the doctrine. A review of the case law suggests that, following the *Lam* decision in 2003, *Teoh* has ceased to stand for the broad proposition of interest to international lawyers, namely that Australia being a signatory to *any* international convention raises a legitimate expectation that a decision-maker will act consistently with that convention. Instead, it stands for the much narrower proposition that Australia's ratification of one particular international *Convention*, the *CROC*, gives rise to a legitimate expectation that a decision-maker will act consistently with that *Convention*.⁹⁰

Notwithstanding the High Court's strident criticism of the legitimate expectations doctrine, it does have some ongoing application. *Teoh* has never been formally overruled. As formulated in a 2016 Federal Court decision, 'if a decision-maker is making a migration decision affecting children, there is a legitimate expectation that their interests will be a primary consideration, and will not be treated otherwise without an opportunity to be heard: *Teoh*'.⁹¹ This

⁸⁷ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 31–4 [95]–[102] (McHugh and Gummow JJ).

⁸⁸ Duxbury, above n 59, 307–9.

⁸⁹ See the texts discussed in Part II(A) above.

⁹⁰ In *Amohanga v Minister for Immigration and Citizenship* (2013) 209 FCR 487, the applicant's argument that *Teoh* was authority for a legitimate expectation based on the *CROC* was accepted, though it was not successful in its application to the case: at 492 [24]–[27]. By way of contrast, the applicant's argument that *Teoh* provided a basis for a legitimate expectation arising from Australia's ratification of the *ICCPR* was rejected, on the grounds that *Teoh*'s ratio did not extend beyond the *CROC*, and the legitimate expectations doctrine from *Teoh* did not bind the court with respect to the *ICCPR*: at 494–5 [34]–[37].

⁹¹ *Murad v Assistant Minister for Immigration and Border Protection* (2016) 154 ALD 425, 434 [41].

narrower proposition, confining the legitimate expectations doctrine from *Teoh* to the *CROC*, has been accepted by government lawyers as constituting the binding ratio from *Teoh*.⁹² To put this in the negative, *Teoh* is no longer authority for the proposition that Australia's ratification of a convention, other than the *CROC*, grounds a legitimate expectation that a decision-maker will act consistently with that convention. *Teoh* was a case on migration decisions that affected children. Within that narrow compass the legitimate expectations doctrine from *Teoh* continues to be successfully invoked.⁹³

Even this narrow formulation suggests a broader application for *Teoh*'s legitimate expectations than currently obtains. Recall that in character decisions on visa refusal and cancellation that affect children (*Teoh*'s current field of operation), where the Directions apply they displace legitimate expectations to the extent of any inconsistency between the Directions and legitimate expectations.⁹⁴ This further narrows the field of application for legitimate expectations to decisions that are made by the Minister personally. We have located two cases since *Lam* in which an applicant has successfully quashed a visa cancellation or refusal decision made by the Minister personally on the basis of a disappointed legitimate expectation that the Minister would act consistently with the *CROC* in making the best interests of the children a primary consideration.⁹⁵ While still something, this is very much a 'niche' contribution to the implementation of international law. Further, we know of no case in which an applicant *successfully* invoked legitimate expectations since *WZARH*.⁹⁶

The government's motivation for introducing the Directions was, in part, to influence decision-makers' exercise of discretion, rebalancing the weight given to the interests of the deportee's children under art 3 of the *CROC* so as to give greater relative weight to competing factors. These motivations should not lead to dismissal of the Directions as wholly contrary to the applicant's interests in having the best interests of the child considered. This is not a case where there is a straight line leading from executive or legislative motivation to legal

⁹² *Amohanga v Minister for Immigration and Citizenship* (2013) 209 FCR 487, 494–5 [34], [36].

⁹³ *Nweke v Minister for Immigration and Citizenship* (2012) 126 ALD 501, 507–8 [16]–[21] (Jagot J); *Lesianawai v Minister for Immigration and Citizenship* (2012) 131 ALD 27, 33 [33], 35 [43].

⁹⁴ See above n 72 and accompanying text.

⁹⁵ *Nweke v Minister for Immigration and Citizenship* (2012) 126 ALD 501, 506 [10], 507–8 [16]–[21]; *Lesianawai v Minister for Immigration and Citizenship* [2012] 131 ALD 27, 33 [32]–[33], 35 [43] (Katzmann J). The *Nweke* litigation is also an example of a successful judicial review application delivering a pyrrhic victory. Following the 2012 decision it was open to the Minister to exercise his visa cancellation powers for a second time, which the Minister did. The second decision was also challenged on judicial review, this time unsuccessfully: *Nweke v Minister for Immigration and Citizenship* (2013) 140 ALD 320.

⁹⁶ *WZARH* (2015) 256 CLR 326. In the wake of *WZARH*, *Teoh* has been relied on for the narrow proposition that: 'If a decision maker is making a migration decision affecting children, there is a legitimate expectation that their interests will be a primary consideration, and will not be treated otherwise without an opportunity to be heard': *Wozniak v Minister for Immigration and Border Protection* [2017] FCA 44 (3 February 2017) [53], [65]–[66] (Burley J), citing *Teoh* (1995) 183 CLR 273, 291–2. See also *BCR16 v Minister for Immigration and Border Protection* [2016] FCA 965 (17 August 2016) [53], [57]–[58]; *Murad v Assistant Minister for Immigration and Border Protection* (2016) 154 ALD 425, 434 [41], [51]–[52]. In none of these cases, post-*WZARH*, has the applicant's legitimate expectation argument been successful.

consequence. The relevant considerations ground of review enabled by the Directions is, as introduced above, more robust than the legitimate expectations ground from *Teoh* that it substantially replaces. It is a better vehicle for ensuring that art 3 of the *CROC* is treated as a primary consideration in such decisions.

In the decade or more since *Lam*, the *Teoh* legitimate expectations doctrine has delivered minimal, narrowly circumscribed, returns as a vehicle for the implementation of international law in domestic administrative law. While it once appeared that '*Teoh* might prove to be a growth point of principle',⁹⁷ this has not eventuated. The attention of those interested in the effect of international law on executive discretion needs to shift accordingly.

A return to *Teoh*'s original, and still primary, field of operation, namely visa decisions on character grounds affecting children, suggests more fruitful areas of investigation. The case law highlights the translation of international law into domestic law by administrators, grounded in a reference in a sub-statutory instrument. This form of translation enables a supervisory role for the courts, who review decision-makers' consideration of the international law obligation according to administrative law doctrine. Our next case study, of *Project Blue Sky*, is of another such translation process, instigated by statutory reference to Australia's international obligations.

B *Confining Discretion: Australia New Zealand Closer Economic Relations — Trade Agreement*

Where statute confines an administrator's discretion, the legal effects of the constraint can vary. In some statutes, such confining provisions can be treated as strict limits on the administrator's powers so that when breached, the administrator has no authority to exercise the statutory power.⁹⁸ However, confining provisions can also be interpreted by courts as less than strict limits. Breach of such 'soft' confining provisions is likely to result in the court taking a restrained enforcement role: the court may grant a weak remedy (one that the plaintiff is not seeking and will not necessarily resolve their concern)⁹⁹ or may review the administrator's decision in a restrained manner that treats judgments on the effect of the treaty as primarily for the administrator and not the courts.¹⁰⁰

Such complexities are apparent in the High Court's decision in *Project Blue Sky*.¹⁰¹ The provision requiring compliance with treaty obligations in this case was s 160(d) of the *Broadcasting Services Act 1992* (Cth) ('*Broadcasting Services Act*'). It required the Australian Broadcasting Authority to perform its functions in a manner consistent with 'Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country'. This is a very broad form of implementation, one that exposed the Australian Broadcasting Authority to an obligation to comply with

⁹⁷ Brennan, above n 52, 191.

⁹⁸ See, eg, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 193–4 [106], 195–7 [116]–[119] (Gummow, Hayne, Crennan and Bell JJ) ('*Malaysian Declaration Case*').

⁹⁹ As discussed below, see, eg, *Project Blue Sky* (1998) 194 CLR 355, 375 [44], 391–3 [94]–[101] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰⁰ As discussed below, see, eg, *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308, 357 [201].

¹⁰¹ (1998) 194 CLR 355.

the requirements of numerous, potentially conflicting, treaties.¹⁰² This is a fairly common provision in Commonwealth statutes, with many examples of such provisions currently operative.¹⁰³ Section 160(d) was amended¹⁰⁴ after *Project Blue Sky* in order to limit the requirement for consistency with international conventions and agreements to consistency with the treaty that was relevant in *Project Blue Sky*: the *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement* ('*Closer Economic Relations Agreement*').¹⁰⁵

The issue in *Project Blue Sky* was that broadcasting standards made by the Australian Broadcasting Authority were in breach of the *Closer Economic Relations Agreement*. Section 122 of the *Broadcasting Services Act* granted the Authority power to make standards to be observed by television broadcasting licensees for the Australian content of television programs. The Australian Broadcasting Authority exercised that power to make a content standard that required half of all television programming to be Australian programs.¹⁰⁶ The exercise of this power appeared to be inconsistent with s 160(d), the provision requiring consistency with Australia's international law obligations. More particularly, the content standard's favouring of Australian programs was inconsistent with articles of the *Closer Economic Relations Agreement* requiring each country to provide persons of the other member state 'access rights in its market no less favourable than those allowed to its own persons and services provided by them' and accord such persons 'treatment no less favourable than that accorded in like circumstances to its persons and services provided by them'.¹⁰⁷

The Australian Broadcasting Authority was aware that the previous content standard was inconsistent with the *Closer Economic Relations Agreement* as the Minister had pointed it out in correspondence.¹⁰⁸ The requirement for the Australian Broadcasting Authority to perform its functions consistently with the *Closer Economic Relations Agreement* had also been made clear in the explanatory memorandum for the *Broadcasting Services Act*.¹⁰⁹ Against this, the Australian Broadcasting Authority had received legal advice that the content standard could not include television programs from New Zealand because such

¹⁰² Rothwell, above n 30, 539–41.

¹⁰³ See, eg, *Air Services Act 1995* (Cth) s 9(3); *Australian Maritime Safety Authority Act 1990* (Cth) s 7; *Australian Postal Corporation Act 1989* (Cth) s 28(c); *Customs Act 1901* (Cth) s 269SK; *Great Barrier Reef Marine Park Act 1975* (Cth) s 65; *Sea Installations Act 1987* (Cth) s 13; *Telecommunications Act 1997* (Cth) s 580(1).

¹⁰⁴ *Broadcasting Services Amendment Act (No 3) 1999* (Cth) sch 2. The equivalent provision for the current agency, the Australian Communications and Media Authority, is included in the *Australian Communications and Media Authority Act 2005* (Cth) s 16.

¹⁰⁵ *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement*, signed 18 August 1988, [1988] ATS 20 (entered into force 1 January 1989) ('*Closer Economic Relations Agreement*').

¹⁰⁶ Rising to 55 per cent in 1998: *Australian Content Standard 1995* (Cth) cl 9, quoted in *Project Blue Sky* (1998) 194 CLR 355, 379 [58].

¹⁰⁷ *Closer Economic Relations Agreement* arts 4, 5(1); *Project Blue Sky* (1998) 194 CLR 355, 380 [64]–[65].

¹⁰⁸ *Project Blue Sky* (1998) 194 CLR 355, 385–6 [83]; Letter from Bob Collins to Brian Johns, 2 December 1992 <<http://www.austlii.edu.au/au/journals/AUBAUpdateNlr/1993/2.html>>.

¹⁰⁹ Explanatory Memorandum, *Broadcasting Services Bill 1992* (Cth) 78.

programs could not be regarded as *Australian* content, as required by s 122 of the *Broadcasting Services Act*.¹¹⁰

The proceedings were brought against the Australian Broadcasting Authority's updated content standard by applicants seeking to promote the New Zealand film and television industry. They sought to enforce the *Closer Economic Relations Agreement* via the implementing provision, s 160(d) of the *Broadcasting Services Act*, against the Australian Broadcasting Authority's new content standard. The High Court agreed that the content standard was inconsistent with s 160(d),¹¹¹ but that finding raised a difficult administrative law issue: did breach of s 160(d) mean that the content standard was invalid? The question raised the issue of the enforceability of the *Closer Economic Relations Agreement* as a matter of Australian domestic law. The applicants claimed that the breach of s 160(d) resulted in the content standard being invalid.¹¹² However, representatives of the Australian film and television industry appearing as *amicus curiae* argued that it did not, and that the effect of any breach of s 160(d) was a matter for Parliament rather than the courts.¹¹³

A majority of the High Court resolved the case by taking a middle line between the two argued positions and did so by granting a relatively weak remedy.¹¹⁴ They determined that the fact that the Australian content standard breached s 160(d) and the *Closer Economic Relations Agreement* did not mean that the content standard was invalid. A finding that it was invalid would have meant that the content standard had no effect,¹¹⁵ which is the usual remedy in successful administrative law proceedings. The majority instead determined that the content standard was unlawful,¹¹⁶ meaning that it remained legally effective but that a person could apply for an injunction to stop the content standard being enforced against them.¹¹⁷ Accordingly, a remedy was granted but it was not the remedy sought by the applicants.

The majority's conclusion and the remedy it granted followed from the Court's understanding of the relationship between the technique employed in the *Broadcasting Services Act* for implementing treaties and administrative law doctrines. The High Court treated the content standard as unlawful but not invalid primarily because it regarded the requirement in s 160(d) (that the Australian Broadcasting Authority perform its functions consistently with Australia's international obligations) as not constituting an 'essential

¹¹⁰ Editorial, 'ABA Proposes Changes to Levels of Australian Content on TV', *ABA Update: Newsletter of the Australian Broadcasting Authority* (North Sydney), December 1994, 3–4 <<http://www.austlii.edu.au/au/journals/AUBAUpdateNlr/1994/183.html>>. See also Editorial, 'Australian Content Standard Still in Place', *ABA Update: Newsletter of the Australian Broadcasting Authority* (North Sydney), September 1996, 8 <<http://www.austlii.edu.au/au/journals/AUBAUpdateNlr/1996/147.html>>.

¹¹¹ *Project Blue Sky* (1998) 194 CLR 355, 385 [82], 386 [84].

¹¹² *Ibid* 375 [44].

¹¹³ *Ibid* 359, 386 [86].

¹¹⁴ *Ibid* 388–93 [91]–[101] (McHugh, Gummow, Kirby and Hayne JJ).

¹¹⁵ *Ibid* 389 [92].

¹¹⁶ *Ibid* 393 [100].

¹¹⁷ *Ibid*. See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 758–9; Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 49, 79.

preliminary' to the Australian Broadcasting Authority's power to make content standards.¹¹⁸ That is to say, s 160(d) was not regarded as a strict limit on the Australian Broadcasting Authority's power to make content standards. The provision that established the power to make content standards was a different provision: s 122 of the *Broadcasting Services Act*. Section 160(d) was regarded as *regulating* the way the s 122 power was to be exercised rather than a provision *empowering* the Australian Broadcasting Authority to make content standards.¹¹⁹ Interpreting s 160(d) as a regulating, rather than empowering, provision enabled the majority to enforce s 160(d) as a soft, rather than strict, limit on the Australian Broadcasting Authority's power to make content standards. The statutory incorporation of international law in s 160(d) marked the starting point of a translation process shaped by the exercise of reconciling the different statutory provisions, and articulated through administrative law doctrine.

The conclusion that s 160(d) was not a strict limit on the Australian Broadcasting Authority's power was reinforced by two considerations, each relating to concerns about different forms of indeterminacy of international law. The first form of indeterminacy related to potential indeterminacy of the treaty obligation. The majority expressed a general concern that international conventions and agreements are often expressed in what the majority stated was 'indeterminate language' and 'are more aptly described as goals to be achieved rather than rules to be obeyed'.¹²⁰ This concern followed on from the majority's discussion of the difficulty for courts in determining the Australian Broadcasting Authority's compliance with the other subsections of s 160 that required the Authority to perform its functions consistently with the objects of the *Act*, government policy, and ministerial directions. The majority stated that 'it is almost certain that there will be room for widely differing opinions' as to whether the Authority had acted consistently with such requirements.¹²¹ This clearly suggests that the majority had a general concern that direct enforcement of the statutory provision, requiring the Australian Broadcasting Authority to carry out its functions consistently with all of Australia's international law obligations, would see the courts in an inappropriate role, namely determining policy. Identifying statutory requirements as soft limits enables the courts to adopt a more limited supervisory role.

The majority's second concern related to indeterminacy with respect to the range and number of treaty obligations to which Australia was party. More particularly, the majority was concerned with the consequences of this indeterminacy of international law for particular non-parties: the television stations holding broadcasting licences. The majority's concern was that if the requirement for consistency with international conventions was directly enforceable, it could expose television stations to potential challenges on the grounds that their licences were granted by the Australian Broadcasting Authority inconsistently with some as yet unknown and unappreciated obligation under international law and therefore in breach of s 160(d). The majority stated that the licensees would find it difficult to ascertain whether the Australian

¹¹⁸ *Project Blue Sky* (1998) 194 CLR 355, 391 [94].

¹¹⁹ *Ibid* 391 [94].

¹²⁰ *Ibid* 391–2 [96].

¹²¹ *Ibid* 391 [95].

Broadcasting Authority had acted consistently with international law when granting their licences and stated that, ‘even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia’s obligations under agreements with other countries’.¹²²

The majority’s concerns about the indeterminacy of international law obligations played an important role in their reasoning on the legal significance of s 160(d). The majority had no difficulty interpreting and applying the relevant articles of the *Closer Economic Relations Agreement* to the Australian Broadcasting Authority’s content standard; the content standard was said to be ‘plainly in breach’ of the *Agreement*.¹²³ Nevertheless, the judges’ reasoning as to the remedy in *Project Blue Sky* offered a solution to anticipated litigation in which the Australian Broadcasting Authority could be challenged for breach of s 160(d) for conducting its functions inconsistently with indeterminate and as yet unknown obligations in other treaties. Future plaintiffs seeking to enforce s 160(d) in the form that it stood at that time, with respect to international law obligations other than the *Closer Economic Relations Agreement*, might not receive any remedy at all, despite being able to establish a breach of s 160(d).

The concerns regarding indeterminacy in the relevant treaty provisions, the first type of indeterminacy discussed in relation to *Project Blue Sky*, were relevant in a recent decision of the Federal Court, *Australian Conservation Foundation Inc v Minister for the Environment* (‘*Australian Conservation Foundation*’).¹²⁴ This case involved a challenge to the approval of the controversial Adani coal mine on the ground that the approval was inconsistent with articles of the *Convention concerning the Protection of World Cultural and Natural Heritage* (‘*World Heritage Convention*’)¹²⁵ and, consequently, in breach of s 137 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which stated that ‘the Minister must not act inconsistently with ... Australia’s obligations under the *World Heritage Convention*’.¹²⁶ Although Griffiths J accepted that s 137 was a ‘prohibition’,¹²⁷ suggesting that it was a strict limit on the Minister’s discretion to grant the approval, he determined that it was inappropriate to interpret that obligation literally¹²⁸ and that it was for the Minister to ‘form a view’ regarding whether the approval and any conditions would be inconsistent with Australia’s obligations under the *World Heritage Convention*.¹²⁹ This reasoning resulted in Griffiths J not directly testing the approval by reference to the *World Heritage Convention*. It was enough for Griffiths J that the Minister was ‘mindful’ of s 137 as the Minister had referred

¹²² Ibid 392 [98].

¹²³ Ibid 386 [84]; *Closer Economic Relations Agreement* arts 4, 5.

¹²⁴ (2016) 251 FCR 308. An appeal of the *Australian Conservation Foundation* case focusing on different issues to those discussed here was dismissed by the Full Court of the Federal Court: *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359.

¹²⁵ *Convention concerning the Protection of World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

¹²⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 137(a).

¹²⁷ *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308, 357 [201].

¹²⁸ Ibid 356 [197].

¹²⁹ Ibid 357 [201].

to it in his reasons for the approval.¹³⁰ The concern that the relevant articles of the *World Heritage Convention* were stated in indeterminate terms greatly influenced Griffiths J's reasoning in this part of the judgment.¹³¹ In particular, he understood the *World Heritage Convention* as giving 'considerable latitude' to the state parties when they implement their obligations.¹³²

It is not our intent in this paper to evaluate the persuasiveness of Griffiths J's reasoning. The primary significance of the *Australian Conservation Foundation* case for our purposes is that it confirms that indeterminacy in the relevant treaty obligations can play a major role in determining the enforceability of statutory provisions that qualify administrative discretions by reference to international law. In contrast to *Project Blue Sky*, the indeterminacy of the relevant international law obligations in *Australian Conservation Foundation* led the Court to adopt a relatively restrained standard of review (rather than a weak remedy as occurred in *Project Blue Sky*); a standard of review that enabled Griffiths J to avoid directly assessing the administrative decision against the *World Heritage Convention* obligations. The case is a clear example of a court declining to take up the translation task required by a literal reading of the statutory incorporation provision, where the court perceives that doing so would be an inappropriate exercise of policy determination given the indeterminacy of the treaty.

We can now return to the primary case, *Project Blue Sky*, and its significance for the institutional dynamics between domestic institutions ensuring compliance with international law. *Project Blue Sky* is particularly interesting for highlighting the potential for intra-executive conflict. As referred to earlier, the Minister was concerned about the previous content standard's compliance with the *Closer Economic Relations Agreement* and was of the view that this compliance issue should be reconsidered when devising any new standard. By way of contrast, the Australian Broadcasting Authority prioritised the objects of the *Broadcasting Services Act* relating to the promotion of Australian identity, character and cultural diversity in broadcasting services.¹³³ Commonwealth broadcasting officials had made such content standards under the previous Act, the *Broadcasting Act 1942* (Cth), since the early 1960s.¹³⁴ The Chairman of the Australian Broadcasting Authority stated, at the time it was preparing the content standards challenged in *Project Blue Sky*, that:

'The Australian content regulations have helped create one of the best television systems in the world ... Their importance is recognised by all in the industry, including the television networks. The changes we are proposing will lift the amount of Australian programs over the next three years, with programs funded by the Government's *Creative Nation* initiative being a further add-on ... Looking

¹³⁰ Ibid 357 [201]–[202].

¹³¹ Ibid 355–7 [189]–[200].

¹³² Ibid 356 [199].

¹³³ *Broadcasting Services Act 1992* (Cth) s 3(1)(e); *Project Blue Sky* (1998) 194 CLR 355, 376 [48].

¹³⁴ *Broadcasting Act 1942* (Cth) s 134; Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Parliament of Australia, *Australian Content Standard for Television & Paragraph 160(d) of the Broadcasting Services Act 1992* (1999) 1 [1.1].

down the track, I am confident that Australian viewers will be among the big winners'.¹³⁵

Accordingly, different administrative institutions within the executive took opposing policy positions regarding the content standard. The agency empowered to administer the legislation focused on domestic, cultural concerns. Ministers were concerned about consistency with international trade obligations.

The particular circumstances of *Project Blue Sky* demonstrate how international law can disrupt longstanding Commonwealth policy, in this case regarding Australian television programming. Although the remedy granted by the Court was far from clear, it prompted the Australian Broadcasting Authority to provide a lasting solution. The Authority prepared a new content standard that treated New Zealand-made programs the same as Australian programs.¹³⁶ In a response to a parliamentary committee inquiry, the Australian government stated that both it and the New Zealand government recognised that the new content standard was consistent with the *Closer Economic Relations Agreement*.¹³⁷ From this perspective, the indirect manner in which the Court translated the relevant international law into domestic law was effective in enforcing the obligation insisted on by the plaintiffs, while being less disruptive of domestic legal arrangements than the remedy sought by the plaintiffs would have been.

More generally, *Project Blue Sky* demonstrates how courts can use administrative law doctrine to 'redirect', and so soften, the enforcement of international law obligations in discretionary deliberations, in ways that might not be expected on a first read of the implementation provision. It emphasises the concerns that courts can have when put into the role of enforcers of indeterminate international obligations. It is important to recognise these judicial concerns, given common use of this implementation technique.¹³⁸ Members of the public seeking to enforce such provisions against administrators may face difficulties where the court understands the relevant international law obligation to be indeterminate.

V CONCLUSION

In all their aspects, the case studies seek to show how and why international law commitments are altered when they are 'drawn down' into domestic law and litigants seek to enforce them there. In particular, they constitute an exploration of how international law is 'translated' into domestic law, where that translation exercise is instigated by statutory reference to treaty obligations that qualify the

¹³⁵ Editorial, 'ABA Proposes Changes to Levels of Australian Content on TV', above n 110, 3–4, quoting Mr Brian Johns, Australian Broadcasting Authority Chairman.

¹³⁶ Editorial, 'New ABA Australian Content Standard from 1 March' *ABA Update: Newsletter of the Australian Broadcasting Authority* (North Sydney), March 1999, 6 <<http://www.austlii.edu.au/au/journals/AUBAUpdateNlr/1999/24.html>>. See also *Broadcasting Services (Australian Content) Standard 2005* (Cth) ss 18–20; *Broadcasting Services (Australian Content) Standard 2016* (Cth) ss 18–20.

¹³⁷ Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Parliament of Australia, *Government Response to the Report, Australian Content Standard for Television and Paragraph 160(d) of the Broadcasting Services Act 1992 by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee* (1999) 3, 6.

¹³⁸ See above n 38 for examples of such provisions.

exercise of administrative discretion. When administrative officials seek to ignore, or sideline, international law in their deliberations regarding the discretion, plaintiffs can, through administrative law proceedings, seek to bring those international law obligations to the fore. Our case studies demonstrate that the primary factors affecting the courts' ability to enforce international law in such proceedings are the statutory implementation technique and the degree of indeterminacy of the international law obligation.

More generally we have sought to demonstrate two points. The first is that *Teoh* now has very little scope for operation in relation to the implementation and enforcement of unincorporated international law obligations. This finding contrasts with hopes expressed in the early years after *Teoh* was decided and with the focus on *Teoh* in Australian international law texts. The second is that interest in the influence of international law in domestic administrative law is best served by engagement with, or at least an awareness of, the fact that legislative implementation of international law may only constitute the starting point of the translation process, a process shaped by a complex series of institutional interactions, often refracted through administrative law doctrine.