Saturday, 06 November 2021

AMG 4124 : INSOLVENT AUSTRALIA; TREATY, WHAT TREATY? ; NOTHING TO BIND AUSTRALIA HERE ESPECIALLY IN RESPECT TO HUMAN RIGHTS……..THAT WOULD COST TOO MUCH : MAGNITSKY SANCTIONS MUST FLOW

To: Parliament of Corporate Commonwealth of Australia
(Liquidator & Managing Controller Appointed)
Joint Committee on Corporations & Finance,
Standing Committee on Economics
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Parliament House,
Canberra ACT 2600
To : Commissioner of Taxation
Trading as the Australian Taxation Office
(Liquidator and Managing Controller Appointed)
C/Senate Standing Committee on Economics
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(Together hereinafter The Crown (Liquidator and Managing Controller Appointed)) (**The Crown**)

Cc; OenoViva Global, Australian People Future Fund,

Dear Mesdames et Messieurs,

The Farce that is the Australian Government has been well ventillated : A copy of this communique will be used in International Courts and Tribunals with Jurisdiction to enforce and impose Sanctions on Public Officials comprising the three arms of Governments of Australia.

There is little doubt that the Member Nations of the United Nations and the Commonwealth of Australia recognise that Australian Integrity is compromised by the three arms of government and that there is little utility in execution of treaties with Australia on the basis that Australia does not wish to be bound by them and pays lips service…….. only.

Of Particular note are passages from the findings of the High Court of Australia in *Dietrich v the Queen*[1]

[1] Dietrich v The Queen [1992] HCA 57

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*"Article 14 of the International Covenant on Civil and Political Rights ("**the I.C.C.P.R.**"), to which instrument Australia is a party[2], contains similar minimum rights, as does s. 11 of the Canadian Charter of Rights and Freedoms [9][3] . Similar rights have been discerned in the "**due process**" clauses of the Fifth and Fourteenth Amendments to the United States Constitution. "*

In Jago v. Judges of the District Court of N.S.W. [4] Kirby P. expressed the view that, where the inherited common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law.

There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation.[5]

Ratification of the I.C.C.P.R. as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the I.C.C.P.R. are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions [6]. No such legislation has been passed. This position is not altered by Australia's accession to the First Optional Protocol to the I.C.C.P.R., effective as of 25 December 1991, by which Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the I.C.C.P.R. are incorporated into domestic law, but such an approach is clearly permissible.

Although counsel for the applicant accepted that the I.C.C.P.R. does not form part of domestic law, he submitted that the common law of Australia should be developed in a way which recognizes the existence and enforceability of rights provided for in international instruments to which Australia is a party. In particular, the applicant points to the enactment of the Human Rights and Equal Opportunity Commission Act 1986 Cth. This Act has scheduled to it the I.C.C.P.R., as well as other international legal instruments dealing with human rights, and assigns to the Commission it creates the function, inter alia, of inquiring into and reporting on any act or practice that may be inconsistent with or contrary to human rights as declared in the scheduled instruments (s. 11(1)(f)). The evident intention that the establishment of an Australian Human Rights and Equal Opportunity Commission would be one part of an overall programme to incorporate international human rights obligations into domestic law was made more explicit in the preamble to the former Human Rights Commission Act 1981 Cth which stated:

> **Whereas** it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and Freedoms.

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[2] Australia signed the I.C.C.P.R. on 18 December 1972 and ratified it on 13 August 1980

[3] Pt 1 of the Constitution Act 1982, enacted by the Canada Act 1982 U.K..

[4] (1988) 12 N.S.W.L.R. 558, at p. 569

[5] *McInnis v. The Queen* (1979), 143 C.L.R. 575: see pp. 579, 582, 586-588, 590. supra, fn. (92)

[6] *Bradley v. The Commonwealth* (1973), 128 C.L.R. 557, at p. 582; *Simsek v. MacPhee* (1982), 148 C.L.R. 636, at pp. 641-644; Kioa v. West (1985), 159 C.L.R. 550, at pp. 570-571.

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WITNESS K AND THE 'O[7]UTRAGEOUS' SPY SCANDAL THAT FAILED TO SHAME AUSTRALIA

Timor-Leste's government, with Galbraith as its chief negotiator, was desperate to get a fair deal from the bountiful underwater oil and gas reserves that lay between it and Australia, a trusted ally and regional powerhouse. Success would give it a significant share of fields worth $40bn-$50bn, helping lift the fledgling nation out of poverty. Failure would blow the tyres of an economy heavily reliant on natural resources.

The game, though, was rigged.

Unbeknownst to Galbraith, Australian Secret Intelligence Service (Asis) officers had been instructed to bug key offices of the Timor-Leste government. The listening devices would reveal Timor-Leste's bottom line, its negotiating tactics and the competing views of cabinet members.

"It was outrageous," Galbraith tells Guardian Australia from his home in the US. "I'd taken protective measures against Australian espionage, which I thought would be based on cell phones and internet, but I thought it was pretty crude to be bugging the prime minister's offices.

"It was not what you do to a friendly state. And it was not something you do for commercial advantage."

The Asis operation remained secret. The treaty was signed. Australia secured a 50-50 split of the Greater Sunrise fields, positioned 450km north-west of Darwin and 150km south of Timor-Leste. It was a good deal for the Australian government, and a boon for the joint-venture of multinationals, led by Woodside, seeking to exploit the Timor Sea.

As a former US ambassador to Croatia, Galbraith had frequent access to US intelligence. Never has he seen his country attempt an operation as commercially driven as Australia's was.

"The whole experience of the negotiation from 2000 on and through this whole episode was to see a country that – yes, in many ways focuses on the public good – but where corporate greed was a big part of it, because ***the Howard and Downer government, they were shills for the corporations,"*** *Galbraith said. "That was what was really important to them.*

"That is not something that goes on in the United States. It was pretty shocking."

The Australian Government cannot be trusted to deal with value and equity in accordance with the intentions of the International Community.

The Assets of a The Andrew Garrett Family Trust No 4 trading as OenoViva Capital Resources vest equally in the Joint Trustees of the Board of Trustees and are domiciled in each of the juridictions the Trustees are Resident in.

OenoViva Capital Resources now draws Financial Instruments under the protections of US Securities Law as a direct consequence of collapse of Rule of Law in Australia.

WITNESS K AND BERNARD COLLEARY

[7] AMG 4125 The Guardian 10th August 2019

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[8]*After all of that, the pair was not charged, even after Commonwealth prosecutors recommended a prosecution to then-federal attorney-general George Brandis.*

It was not until 2018 that a new attorney-general, Christian Porter, authorised the case to proceed……

Mr Richter also noted it had been many years since Witness K had known there would probably be a prosecution.

"The mental anguish he has suffered has been amplified," he told the court.

"There is no utility in convicting Mr K."

But Magistrate Glenn Theakston found Witness K had still deliberately breached security laws, convicting him, handing him a suspended sentence with a 12-month good behaviour order, and an opportunity to move on with his life.

AUSTRALIAN HUMAN RIGHTS : THERE ARE NONE WHERE LIABILITY OF THE CROWN IS INVOLVED ; THE BETHCAR STRATEGY

I have made complaint to the Australian Human Rights Commission in respect to operation of rule of law and breaches of Separation of Powers and received reply on 27 October 2015 as yet another example of the Farce that is Fake Regulation in Australia a copy of the decision of the Commissioner is now produced and shown at Annexure 1

Following the Second Sequestration Order made on the 15th May 2015 as a barrier to justice I appeared in the Appeal of the Vexatious Litigant orders made in VID 600 of 2014

FEDERAL COURT OF AUSTRALIA

Garrett v The Commissioner of Taxation [2015] FCA 665

Citation:	Garrett v The Commissioner of Taxation [2015] FCA 665
Parties:	**ANDREW MORTON GARRETT v THE COMMISSIONER OF TAXATION AND OTHERS NAMED IN THE SCHEDULE**
File number:	VID 129 of 2015
Judge:	**KENNY J**
Date of judgment:	**2 JULY 2015**
Catchwords:	**BANKRUPTCY AND INSOLVENCY** – Application to institute appeal proceeding commenced prior to bankruptcy – whether stayed as "action" under s 60(2) of *Bankruptcy Act 1966* (Cth) – whether action in respect of a "personal injury or wrong" under s 60(4) *Bankruptcy Act 1966* (Cth)
Legislation:	*Federal Court of Australia Act 1976* (Cth) *Bankruptcy Act 1966* (Cth) *Human Rights and Equal Opportunity Commission Act 1986* (Cth) *Charter of Human Rights and Responsibilities Act 2006* (Vic) *Administrative Appeals Tribunal Act 1975* (Cth) *Judiciary Act 1903* (Cth)

[8] AMG 4127 Court documents shed new light on man behind moniker 'Witness K' and how he met lawyer Bernard Collaery The Guardian 4th July 2021

16 It is only a statement in the reasons of Cooper J, which might be thought to support the proposition that s 60(2) may not apply to an action that lacks the necessary connection with a bankrupt's estate. Specifically in the context of s 116(1) and the definition of property in s 5, Cooper J focussed on the way in which the Bankruptcy Act achieved its statutory object of vesting the property of a bankrupt in a trustee in order that property may be divisible amongst the bankrupt's creditors: 67 FCR at 323-324. In this connection, his Honour said (at 324) that "[c]aims by or against the bankrupt which do not affect the estate of the bankrupt in any way … are of no interest to the trustee" and continued, first citing Merry v The Queen (1997) 13 VLR 264:

> Personal wrongs within the meaning of s 77, are wrongs or injuries done to the reputation or person, such as libel, slander or assault; these do not affect his estate in any way; John v Neiman Holdings Pty Ltd (1986) 84 FLR 84 at 85 where Young J held that "action" in s 60(2) of the [Bankruptcy] Act had to be read down to mean a civil proceeding at law or equity which must relate to the property of the bankrupt …

41 For the reasons stated, the application by Mr Garrett for leave to institute an appeal against the vexatious proceeding order is stayed under s 60(2) of the Bankruptcy Act.

42 At this point, it is convenient to note two further matters. The first concerns the proposed nature of the appeal that Mr Garrett sought to institute. As noted, Mr Garrett's judicial review application was brought to an end by the vexatious proceedings order. Even if the leave sought by Mr Garrett were to be granted, an appeal would lie only against that order and in itself would not be a vehicle for Mr Garrett to pursue a more wide-ranging challenge to his tax assessments or tax debts, as his draft notice of appeal apparently envisaged.

Secondly, at the hearing, Mr Garrett made an oral application for leave to amend his proposed notice of appeal and was granted leave to file a note on what amendment he sought to make. A document headed "Submissions of applicant to amend the draft notice of appeal" was subsequently received. Whilst I would permit Mr Garrett to file these submissions, in view of the conclusion I have reached, it is neither necessary nor appropriate to address them.

In this circumstance, I have not invited any responsive submissions from the respondents.

FEDERAL COURT OF AUSTRALIA

Garrett v Cahill [2015] FCA 664

Citation:	Garrett v Cahill [2015] FCA 664
Parties:	**ANDREW MORTON GARRETT v FRANCIS MICHAEL CAHILL AND OTHERS NAMED IN THE SCHEDULE**
File number:	VID 297 of 2015
Judge:	**KENNY J**
Date of judgment:	**2 JULY 2015**
Catchwords:	**PRACTICE AND PROCEDURE** – Application to institute proceedings under s 37AR of *Federal Court of Australia Act 1976* (Cth) – proposed extension of time application and proposed appeal against sequestration order – whether "vexatious proceeding" under Pt VAAA of *Federal Court of Australia Act 1976* (Cth) – no reasonable likelihood of success

Legislation:	*Federal Court of Australia Act 1976* (Cth) *Bankruptcy Act 1966* (Cth) *Federal Circuit Court of Australia Act 1999* (Cth) *Federal Court Rules 2011* (Cth) *Charter of Human Rights and Responsibilities Act 2006* (Vic) *Australian Human Rights Commission Act 1986* (Cth) *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
Cases cited:	*Garrett v Commissioner of Taxation* [2015] FCA 485 *Walton v Gardiner* [1993] HCA 77; 177 CLR 378 *Smits v Loel* [2014] FCA 1341 *Spain v Belcher* [2014] FCA 663 *SZQYP v Hannigan* [2012] FCA 723 *von Reisner v Commonwealth* (2009) 177 FCR 531 *Mehmood v Attorney-General (Cth)* [2013] FCA 406; 141 ALD 339 *Adam P Brown Male Fashions Pty v Philip Morris Inc* [1981] HCA 39; 148 CLR 170 *Wren v Mahony* (1972) 126 CLR 212 *Ling v Enrobook Pty Ltd* [1997] FCA 226; 74 FCR 19 *Australian & New Zealand Banking Group Pty Ltd v Foyster* [2000] FCA 400
Text cited:	*International Covenant on Civil and Political Rights*
Date of hearing:	19 June 2015

JUDGE: **KENNY J**
DATE OF ORDER: **2 JULY 2015**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The application under s 37AR of the *Federal Court of Australia Act 1976* (Cth) for leave to institute:
   (a) an application for an extension of time within which to seek leave to appeal and for leave to appeal against interlocutory orders made by a judge of the Federal Circuit Court of Australia on 27 April 2015; and
   (b) an appeal against a sequestration order made by a judge of the Federal Circuit Court of Australia on 15 May 2015 and against other claimed orders,

   be refused.

The proposed appeal

17 I now turn to Mr Garrett's proposed appeal. For the reasons I am about to state, the grounds that Mr Garrett seeks to raise in his draft notice of appeal have no reasonable likelihood of success or are bound to fail. I discuss first those of his grounds that either are irrelevant to the sequestration order against which Mr Garrett seeks to appeal or do not closely relate to the making of that order.

17.1 Proposed ground 1 relates to the contested orders of 27 April 2015 and is the subject of the extension of time application discussed above. As stated above, this ground is foredoomed to

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fail. Further, as the 27 April 2015 order was a different order from the sequestration order, the former order cannot be challenged on an appeal against the latter order.

17.2 Proposed ground 3 has no prospect of success because it mistakenly assumes that the judgment of Judge Burchardt on 19 January 2015 was the event of bankruptcy for the purposes of s 40 of the Bankruptcy Act. Judge Burchardt's judgment was not the event of bankruptcy for the purposes of s 40 of the Bankruptcy Act.

17.3 Proposed ground 10 does not arise because the Federal Court Rules 2011 (Cth) do not apply to the Federal Circuit Court.

17.4 Proposed ground 12 does not arise because s 179 of the Bankruptcy Act does not enable the Court to investigate applications made by creditors.

17.5 Proposed ground 13 is untenable because the alleged circumstances could not give rise to a duty on the part of the Federal Circuit Court to refer the relevant matters for prosecution.

17.6 Proposed grounds 14 and 15 are untenable in the context of the proposed appeal because Mr Cahill 's conduct as a legal practitioner was not relevant to the making of the sequestration order.

17.7 Proposed ground 20 does not arise because Judge Riethmuller has since published his written reasons and, in any event, their absence would not entitle Mr Garrett to summary judgment.

17.8 Proposed ground 21 is untenable because it does not state which of the Court's powers ought to have been exercised to ensure "complete justice".

17.9 Proposed ground 22 does not arise because matters relating to Mr Garrett's prior bankruptcy in 2004 were not relevant to the sequestration application before the primary judge.

17.10 Proposed ground 23 is untenable because there is no evidence or other material to show that any contempt was committed before the primary judge and the primary judge had no power to punish any contempt of court allegedly committed in any of the other proceedings identified by Mr Garrett.

17.11 Proposed ground 24 is untenable because a failure to file a genuine steps statement does not deprive the Court of the power to award costs.

17.12 Proposed ground 26 does not arise because this Court does not have jurisdiction under the Charter of Human Rights and Responsibilities Act 2006 (Vic). Further, the parts of Schedule 2 of the Australian Human Rights Commission Act 1986 (Cth) (previously the Human Rights and Equal Opportunity Commission Act 1986 (Cth)) on which Mr Garrett relies are articles of the International Covenant on Civil and Political Rights that have not been enacted as part of Australia's domestic law.

THE BETHCAR STRATEGY TRANSCRIPTS 14th OCTOBER 2014[9]

The Degrees to which the Crown will go to avoid financial liabilities justly payable to victims of crime or government maladministration have been summarised in the Crown's own words during the Royal Commission into Institutional Responses to Child Sex Abuse.

Some Exceprts of those transcripts a copy of which are served with this communique are as follows :

Q Could I ask page 2 to be shown, and particularly the second paragraph, and read to you this record of what was discussed:

[9] AMG 423

> At the conference, we also discussed the defendant's prospects on liability. It was generally felt by Counsel that the best bet for the defendant was to knock off as many plaintiffs as possible on the limitation question. Our investigation to date suggested some succour in this regard at least in relation to several of the plaintiffs.

Q And can I take you also, before asking you a question, to the final paragraph of that page:

> There was, however, unanimous agreement that the Department's best bet was to try and knock out as many as possible of the plaintiffs at the limitation hurdle.
>
> That indicates to you, does it not, that by 25 August 2010 the view held on the liability question, apart from the time bar issue, was fairly pessimistic - the view held by counsel, at least?

Q Could I ask you to go back up on page 2 and read this to you:

> Counsel was of the view that this aspect should have been investigated by the Department. They were on notice about something occurring which should have been investigated.

Q. There is no doubt about that. I'm asking you, though, about whether it was an appropriate strategy and, in particular, whether a more appropriate strategy at this time was to go off and try to mediate these cases?

A. No, I don't agree with you on the basis of what you've told me. I was not there. There was discussion. If they felt that they had reasonable prospects of success on the limitation motions, they were entitled to take that strategy.

Q. And not try to sit down with the plaintiffs, accept that both sides face some risks, and see if the case could be settled and for what amount? Is that really your view?

A. They're entitled to do that. They're entitled to go either way.

Q By May 2011, knowing what you know from the questions that you've been asked appearing at this Commission and from your review of the file, having regard to the fact that it was communicated from the other side, it appears, that all the plaintiffs want is an acknowledgment and a modest amount of money, what do you say about whether this was an appropriate time for the State to agree to sit down and have a mediation?

Q. Putting to one side the department's approach and just focusing on what would be appropriate advice from the Crown Solicitor's Office by this time, just let me see if I have this right in terms of the general situation that we had reached by 12 May 2011: you had 15 cases brought by plaintiffs alleging child sexual abuse. That much is obvious?

A. Yes.

Q. The costs involved on both sides by this time were starting to become enormous; that's right, isn't it?

A. I accept that, probably.

Q. There are references in the material that no doubt you would have seen in your review to estimates being given for the hearing of the trial of three months, and the like?

A. Yes.

Q. The costs were likely to be horrific; correct?

A. Yes.

Q. You had a situation where - I think you agreed with me yesterday - it was obvious that each of the plaintiffs was impecunious.

A. Yes.

Q. That is to say, every cent that the State continued to spend defending these cases was likely to be wasted in the sense that you were never going to get a costs recovery, even if you won.

A. That's not necessarily meaning it's wasted, however.

Q. Not wasted in the sense of, what, trying to make an example of a plaintiff who loses a case; is that what you mean?

A. It's not a question of making an example - trying to make an example of a plaintiff. It's a question of, in certain circumstances where a case is being run on the basis of a - on a legal basis that's not sustainable, it is sometimes important to run that matter.

Q. In addition, you also knew that a number of these plaintiffs had had their allegations tested in front of a jury, at least in relation to Mr Gibson.

A. Yes.

Q. And a jury had, it would appear, I suggest to you, accepted that they were witnesses of credit, in that Mr Gibson was convicted twice.

A. Yes.

Q. And I suggest to you that the documents available to the Crown Solicitor's Office at this time revealed that Kathleen Biles was one of those witnesses who gave tendency and coincidence evidence?

Q. But if you accept that there were serious risks on liability, that left you with the time bar defence.

A. Not entirely. I believe you've read my advice in relation to this. There were a couple of issues. The plaintiffs' claim essentially was from the time the children were put at Bethcar, there was a duty of care owed to them and everything that happened to the children was - the children were entitled to be compensated for. That was a serious issue in terms of when the duty of care arose, and I think we - I certainly would accept that a duty of care arose when notifications occurred, and that's what Mr Saidi I think was referring to in that conversation.

MR LLOYD: Q. Even quite apart from his Honour's point, Ms Allison, you know, don't you, from the statements that each of the Bethcar girls has given to this Commission that five of the six of them detail sexual abuse after the period of the notification to the department, which you've agreed occurred in 1980 in respect of Mr Gibson and 1983 in respect of Mr Gordon, and so at the very least in respect of the abuse which occurred after the department was on actual notice of the problems and did nothing, that was a liability risk of the highest order; correct?

A. Correct

MR MENZIES: Oh, yes. Your Honour, the passage that I was going to in the transcript is at page 88 line 20. Question from his Honour, "That is, you prepared your affidavit on the basis of the disadvantages which the Crown has faced in meeting this allegation." Question, "But you also are aware of 150 other people who may be able to fill in the gaps." Answer, "It's a combined total of 150 people, inclusive of these people." That's all I was saying, your Honour.

Q. Do you remember that some time around May 2012 there was an estimate given by the Crown Solicitor's Office of costs, including damages and legal costs, of $4.4 million?

A. No, I don't recall that. I don't dispute it, but I don't recall it.

Q. Returning to the question of trying to sit down and settle all the cases, if it's right that the Crown Solicitor's Office were estimating costs and damages of $4.4 million and it was known that the plaintiffs might settle for some cash and an apology, at this time do you agree you should have gone off to mediation?

A. I think I've already agreed that we should have gone off to mediation.

Q. One of the reasons why it's important for the Crown Solicitor's Office to exercise their own judgment about matters, including matters counsel has advised upon, is that barristers, like everyone else, sometimes make errors; right?

A. Yes.

Q. It's a pretty important question, isn't it, at this time for the Crown Solicitor's Office, as to the issue of onus on this application, having regard to the fact that what is being considered is whether to put on any evidence in reply to the plaintiffs' evidence showing all this evidence which is available?

Q. And you later gave some advice that the offer that the State should make was to bear their own costs.

A. Yes.

Q. And for Ms Biles to walk away from the litigation.

A. Yes.

Q. Were you aware, when you prepared this advice, of the notice that the department was on from 1983 of allegations in respect of Mr Gordon?

A. Could I see the date of that, please?

Q. And at that point you weren't making any recommendations about making any monetary offers to the plaintiffs; right?

A. Yes.

Q. Was this the first time that you're aware in your review of the files that a comprehensive advice on liability and damages had been prepared by the Crown Solicitor's Office?

A. Yes, I - well, I think that's right.

Q. Again with the benefit of hindsight and the ability to reflect sitting there today, in circumstances where the Crown Solicitor's Office had held instructions for about four years and ten months, if my maths are correct, do you think that it was appropriate for that to be the first time that a comprehensive advice about liability and damages in proceedings of this sort was prepared?

A. Oh, I think it should have been done earlier.

Q. How much earlier?

A. Probably when all the evidence, or substantial evidence and particulars, had been received.

Q. Should it have been done within - at least a preliminary advice have been done within months of being instructed?

Q. I think you've adverted to this already: it was the department who came back and made the suggestion that the parties should go to mediation, wasn't it?

A. Correct.

Q. That was contrary to your advice?

A. Yes.

Q.

> Legal Services recommends that the conclusions of the CSO do not adequately consider the risks of proceeding to a hearing of the substantive matter. It is therefore recommended that advice be sought as to alternative methods to resolve the matter.

Q. And the case settled with the plaintiffs being paid about $107,000 each on that day?

A. Correct.

Q. In any event, if you have a look at clause 3.2, or the chapeau to it, the obligation there is on the State and its agencies to act honestly and fairly in handling claims and litigation. Then it sets out a number of particular respects in which the duty to act honestly and fairly will arise and there are nine subparagraphs there?

A. Yes, I can see that.

Q. Prior to clause 3.2, there is clause 3.1 which, amongst other things, requires the State and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards?

A. Yes.

Q. I should also take you to clause 3.3, which provides that nothing in the model litigant policy requires the State to be prevented from acting firmly and properly to protect its interests and, in particular, 3.4, the obligation does not prevent the State or agency from relying upon privilege claims and pleading limitation periods.

A. Yes, that's what it says.

Q. I want to ask you about six instances where the matters that you have given evidence about to this Commission might involve breaches of the model litigant policy and get your comment on that. First, do you accept that the State, in determining to not admit and put the plaintiffs to proof in the defence in respect of those plaintiffs who had complained about Mr Gibson and where there had been a conviction and also in respect of the plaintiff where there had been a guilty plea, involved a breach of clause 3.2(e)(i)?

A. Yes, I think I've already conceded that.

Q. And 3.2(e)(i) is an obligation to keep the costs of litigation to a minimum, including by not requiring the other party to prove a matter which the State or an agency knows to be true?

A. Yes.

Q. Secondly, do you agree that the State, in its attempt to run the permanent stay application on evidence which it knew omitted matters which were relevant to the determination of that application in circumstances where the State bore the onus of proof, involved a breach of clause 3.1 in that the

State did not act with complete propriety, fairness and in accordance with the highest professional standards?

MR MENZIES: I object to that question in that form, your Honour. I'm not cavilling that a question of this nature --

THE CHAIR: I will allow the question.

MR MENZIES: If your Honour pleases.

Q. So you don't feel that you're in a position to respond to whether the matter I've just raised involves a breach of clause 3.1; is that the position?

A. Yes, that's the position.

Q. Thirdly, may I ask whether you accept that the State, by failing to agree to go to a mediation at a time before December 2013, was in breach of this policy in, particularly, 3.2(a)?

A. No –

Q. Do you accept that the State, by failing to agree to attend a mediation by August 2010, was in breach of clause 3.2(a)?

A. No, I don't accept that.

Q. Do you accept that the State, by failing to agree to attend a mediation at any time after August 2010 but before December 2013, was in breach of 3.2(a)?

A. I accept, in hindsight, we should have gone to a mediation, but I don't accept that it was a breach of the model litigant policy.

Q. What about 3.2(b)?

A. But it's also in the context of the limitation argument being run.

Q. Do I take it that you don't accept that the failure to attend the mediation at a time between August 2010 and December 2013 was a breach of 3.2(b); is that the position?

A. Yes.

Q. And what about 3.2(d)?

A. I don't accept that it was a breach of that, either.

Q. Could I ask you about the fourth matter, that the State, in seeking particulars of matters such as the ones that his Honour raised with you yesterday going to matters known by the State, was in breach of clause 3.1?

A. No, I don't accept that.

Q. And also a breach of 3.2(a)?

A. No, I don't accept that.

Q. Fifthly, do you accept that the position that the State took in seeking to require the plaintiffs to each file a separate statement of claim was a breach of 3.2(a)?

A. I don't accept that.

Q. So by not accepting that, you don't accept that with the knowledge of the comment made by his Honour Judge Knox about whether the State's conduct was in accordance with the model litigant policy?

A. I don't accept that it was a breach of the model litigant policy.

THE CHAIR: Q. Ms Allison, I take it from the answers you've given that you don't see that the Crown asking a plaintiff or other person who is in contest in litigation with the Crown - you don't see the Crown asking for particulars of matters that are within the Crown's knowledge as a breach of the model litigant provisions?

A. Yes, that's correct.

MR LLOYD: Q. Sixthly, Ms Allison, do you accept that the fact that the State refused, until the mediation on 17 December 2013, to apologise for anything that the State had done - limiting your answer to this question to those plaintiffs in respect of whom there had been a conviction and in respect of the plaintiff in respect of whom there had been a guilty plea - was a breach of clause 3.2(i)?

A. That, I think, is a matter for the department.

Q. Do you not feel able to proffer an opinion in circumstances where you've seen material that I've taken you to where advice was given by the Crown Solicitor's Office that it wouldn't be appropriate to make an apology?

A. I'm not sure I understand your question. I don't agree with Mr Manollaras that it's not appropriate to make an apology. The timing of this apology, I don't – the nature and timing of the apology I think would be a matter for the department. Certainly in this case an apology was given, and there was no problem in - in another department providing that apology.

Q. You don't feel in this case that there was a breach by the Crown Solicitor's Office in respect of the approach that it took to advice being given to the department about whether it should make an apology?

A. Sorry, I misunderstood I think your question. Are you referring to Mr Manollaras' advice to the department?

Q. Yes.

A. Yes, no, I didn't understand that's what you were saying. I certainly don't agree with him. But a breach of the model litigant policy? Could you point me to where in particular you say it's a breach, please? Oh, I see where you're saying.

Q. Clause 3.2(i).

A. Yes, I see. Yes, I'd concede that.

Q. Sorry, you'd concede that?

A. Yes.

Q. When you say "probably", are you able to assist further and say whether you can positively say that was the case when Mr Manollaras was deciding what defence to plead on behalf of the State in answer to these claims?

A. I think I've already conceded the non-admission of the assaults as being a breach, so, yes, there can be a breach.

Q. In making a decision as to whether or not to plead the Limitation Act, were solicitors of the Crown Solicitor's Office required to turn their mind to the principles set out in the model litigant policy before deciding to plead the Limitation Act in answer to the claims?

A. Well, the model litigant policy provides for pleading limitation periods.

Q. Yes. Was there any requirement to consider a question beyond whether the remedy was available, so to turn your mind to whether it was proper or fair to plead the Limitation Act in defence to the claims?

A. In the context of 3.3, which is: The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

In that context, it's perfectly appropriate to plead the limitation period.

Q. So is the position, then, as far as you understand the policy, that you are permitted by the model litigant policy to plead the Limitation Act and, beyond that, you are not required to turn your mind to whether or not it is otherwise proper or fair that the State does plead the Limitation Act?

A. Well, unless there's a conflict with 3.1, presumably.

Q. So you accept that there is an overriding obligation to act fairly when representing the State in whatever steps are being taken?

A. That's what it says. I'm not sure exactly what it means, but that's what it says.

Q. Do you consider that in representing the State subject to a model litigant policy, solicitors should be required to consider whether it is proper and fair that a defence is pleaded in addition to considering whether that particular strategy is available to it?

A. I don't think that that is what we are required to do in this instance. I think we are entitled to rely on defences that are open to be relied on.

Q. On the plaintiffs' claims as advanced, they alleged that a duty of care existed in the State at the time each of them were placed with or commenced to live with Bert Gordon or with Bert Gordon and Colin Gibson; you understand that was what the plaintiffs alleged?

A. Yes.

Q. You're aware from the information you've read that the State at least funded part of or most of the construction

of Bethcar at one stage?

A. I don't know about that.

Q. That the State, for a period of time, entered into a licensing arrangement for Bethcar with the Gordons?

A. Yes.

Q. And for a period of time paid cash grants to the Gordons for the children in their care?

A. Yes.

Q. You're aware that a number of the children came to be placed with the Gordons pursuant to order of the court?

A. Yes.

Q. And on one view of the evidence, that is the plaintiffs', the State had failed to fulfil its obligations

to those children and, as a result of that, they had sustained physical, sexual, and emotional abuse?

A. Yes, I understand that.

Q. You understood at the time of the commencement of this litigation that children who are physically and sexually abused can sustain lifelong psychiatric damage as a result of that abuse?

A. That follows.

Q. You knew that, though, at the time of this litigation in 2008, 2009 and 2010?

A. Look, I think it would depend on the individual person.

Q. But you're a solicitor in the employ of the Crown Solicitor's Office with particular expertise in advising the State on claims against it, including claims arising from sexual assault, are you not?

A. I don't consider myself to be an expert in the area of sexual assault.

Q. In those circumstances, do you consider that the model litigant policy should either be interpreted now or be amended to have regard to that knowledge when making a decision about whether or not to plead the Limitation Act in defence of any child sexual assault action?

MR MENZIES: I object to that, your Honour. That may or may not be a valid proposition. But let it be assumed that it is. It's not for this Witness to be asked that question. This is a policy issue for the State to decide, and if the State makes that decision, so be it, but your Honour is not going to be assisted by what a solicitor has to say about it.

THE CHAIR: She is an experienced solicitor. She can give us her view, Mr Menzies.

Q. You've already made a number of concessions that steps taken at various stages by the Crown Solicitor's Office were breaches of the model litigant policy.

A. I did say that.

Q. So coming back to my question, do you think it would be of benefit to your clients to have at least an assurance that solicitors conducting litigation on their behalf had turned their mind to the model litigant policy before determining what strategies to adopt and steps to take in the litigation?

A. No.

THE WITNESS: Thank you, your Honour. Can I just say, I've been in the witness box defending the actions of the State in this as a lawyer, but I do understand that what happened at Bethcar was horrible and, as I say, Ms Loughman and myself put a great deal of effort at the mediation into trying to handle that as sensitively as possible to give, as I said, some sort of closure to these plaintiffs.

MR LLOYD: Your Honour, in light of that, may I just ask one question.

MR LLOYD: Q. Ms Allison, knowing all the things you know now and with the benefit of hindsight, if you now were allocated the role of being the supervising solicitor in a case or cases like this one, would you behave differently?

A. Yes, I think so.

MR LLOYD: Q. You presently, Mr Coutts-Trotter, are the Secretary of the Department of Family and Community Services?

A. Yes, I am.

Q. In your capacity as the secretary, you have conducted a review of the way that the department conducted itself in relation to the Bethcar litigation?

A. Yes, I have.

Q. That review, it's obvious from your statement, was a very comprehensive one.

A. Yes, it was.

Q. Just to make it clear, you had no personal involvement with giving instructions during the course of the litigation?

A. No, I didn't.

Q. Could I take you to some aspects of your statement. Could it be brought up on the screen and if we could scroll down to paragraph 16. Could I just invite you, Mr Coutts-Trotter, to read, for the benefit of those who don't have the statement in front of them, what you say in paragraphs 16 to 20?

A. Certainly.

> 16. I acknowledge that the terrible physical and sexual abuse inflicted upon children and young people by those entrusted to care for them has had devastating and life-long impacts on many individuals.
>
> 17. I reiterate the apology we gave to the plaintiffs in the civil litigation matter discussed later in this statement and extend it to all victims of abuse in Bethcar.
>
> 18. The Department could have done more to protect those children in Bethcar once reports had been made.
>
> 19. I also believe the State could have managed the civil litigation process better and I go into this later in my statement.
>
> 20. The Department is genuinely trying to learn from the mistakes of the past and work out ways we can do better.

Q. Thank you. Could you go and we scroll down to paragraph 26 of your statement, please.

A. Yes.

Q. You talk there about some changes in the structure and operating model of the department relevant to the way litigation of this sort is handled.

A. Yes.

Q. Could you just tell the Commission about that?

A. We're making changes to create a much better structure to govern and manage all legal matters, including matters of civil litigation. The key change is to establish a position of general counsel and to have that position report through a deputy secretary directly to me. My review of this matter revealed that there are many things about how we govern litigation inside our agency that need to change, and there are some simple and obvious things we can do, like creating a general counsel position and giving that person clear responsibility, with me, to ensure that we meet the spirit and letter of the model litigation policy. That would dramatically reduce the risk that we ever repeat the mistakes of this matter.

Q. Just so I can understand, and in very broad terms without engaging with all the detail you've helpfully set out in your statement, the ultimate responsibility for the conduct of litigation, that would reside in the general counsel?

A. Yes.

Q. Yes, and is this because, in effect, the matter was left in the hands of the Crown, as you analyse it?

A. I think we have to accept our responsibility in this, which is that we have a role to instruct. We as an agency have a role to understand our obligations under model litigant policy. I have a responsibility to ensure that systemically we give effect to those responsibilities. And as I look back on that matter, we failed in that.

MR LLOYD: Q. In paragraph 40 of your statement, Mr Coutts-Trotter, you make reference to one aspect of the change in approach being to ensure that decisions on whether to commence, defend or settle a disputé are centralised in the Office of General Counsel?

A. Yes.

Q. And particularly that you would be informed of any potential non-compliance with the model litigant policy.

A. Yes.

Q. Is it your expectation that this change would mean that, for example, where a judicial officer makes an observation that there has been a breach or an apparent breach of the model litigant policy, that's something that you would be told about?

A. Yes, absolutely.

Q. Could I invite you to read that paragraph?

A.

> In accordance with the Model Litigant Policy, I will, on behalf of the Department, personally offer a written apology in all cases where it is clear that the Department has acted improperly.

Q. That statement that you just read out is one of the changes that you've fairly recently implemented?

A. Yes. We've introduced some guidance to interpret the application of the model litigant policy inside the agency.

Q. An early apology or acknowledgment in this case might have seen it settle years before it did?

A. And it would have been appropriate to provide an apology.

Q. Quite. Could I take you, please, to paragraph 60?

A. Yes.

Q. I think you've already told the Commission this, that the departmental officers first became aware of allegations of child sexual abuse at Bethcar on 5 March 1980 via Mr Madden?

A. Yes.

TEOH's CASE AND THE GOVERNEMENT REACTION TO IT (ANNEXURE 2)

> ***Teoh's Case*** **resulted in the ratification of international treaties and instruments by the Executive finally having some relevance to Australian citizens rather than purely being an act of grandstanding on the international stage. It is disappointing and damaging to the future of human rights in Australia that the Government has been unable to accept that the entry into such instruments should have consequences for Australia's decision-makers and has chosen to legislate itself out of the effects of this soundly based landmark decision.**

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It can only be concluded that in the Government's eyes these instruments are on an equal footing (that is, have little relevance to Australian citizens) with most of the other 920 international treaties that have not undergone any scheduling or declaration process.[63]

34 Years after the Crown became aware of serious liability and damage to human beings at Bethcar the apology and the payment of a pitance in compensation finally arrived……Fairbridge Farm and so many institutions including Banks are guilty of the same attrocities……and still no Redress for Victims of Bank Fraud…….the Evidence Shoes that the Crown has filled its coffers with fines of over AUD $2,000,000,000 and chooses not to add victimes of Bank Fraud to the beneficiaries of the National Redress Sceheme

In the 2019 Budget the Government used an underspend on the National Disability Insurance Scheme to Balance the Budget and retain Australia's AAA Credit Rating at the expense of the beneficiaries of that Scheme.

It was necessary to establish a Parliamentary Oversight Committee in respect to the administration of the National Redress Scheme as a consequence of that Sceheme failures of Public Administration.

Unclean Hands and Unjust enrichment to feed the Beast that is the Leech on our society.

The

This communique is being forwarded to OenoViva (France) amongst other Global Licensees.

There is nothing about the SYSTEM as it is today that should be protected and can only be CORRECTED by International Pressures being exerted on the individuals responsible rather than the country

Kind Regards,

Signature: _____

RESERVE BANK OF AUSTRALIA

Name / Title: Mr. Andrew Morton Garrett

CEO/ Chairman/ Managing Trustee of the Boards of Trustees of the Andrew Garrett Family Trust No 4 trading as OenoViva Capital Resources, and the Australian People Future Fund, The Crown Attorney General to Commonwealth of Nations, Managing Controller and Liquidator appointed to the Crown (Liquidator and Managing Controller Appointed)

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ANNEXURE 1

Australian Human Rights Commission

Our ref: 2015-10083

27 October 2015

Mr Andrew Garrett
Level 1, 2 Drewery Place
Melbourne VIC 3000

Sent via email to: andrew.garrett@taggc.com.au

Dear Mr Garrett

Closure of complaint

I am writing to advise you of my decision regarding your complaint against the Australian Taxation Office (ATO), the Federal Court of Australia (FCA), and Federal Circuit Court of Australia (FCCA) alleging a breach of human rights under the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA).

The complaint

As I understand it, your complaint relates to actions and decisions taken by the ATO in relation to you and the decisions and/or conduct of FCA and/or FCCA judges in proceedings in which you were involved.

Complaint against the ATO

In your complaint form dated 1 May 2015, you state that your complaint against the ATO relates to events that occurred from 11 February 2004 and are ongoing, as set out in your submissions to the Commonwealth House of Representatives Standing Committee on Tax and Revenue dated 26 January 2015. You also refer to the Statement of Claim you filed in MLG 2265 of 2014, Andrew Garrett v Deputy Commissioner of Taxation (DCOT), and you refer to the submissions you made in the following proceedings: VID 600 of 2014, Andrew Garrett v Commissioner of Taxation & Ors; VID 739 of 2014, Andrew Garrett v Commissioner of Taxation & Anor; SCI-2013-02968, DCOT v Andrew Garrett; SCI-2014-03380, DCOT v Andrew Garrett; DCCIV-2003-1666, DCOT v Andrew Garrett; and ADG 69 of 2004, DCOT v Andrew Garrett.

On 7 June 2015, you advised the Commission that the Statements of Claim and Notices to Admit Facts do not address the human rights components of your complaints, which you have now begun to address in your submissions to the Court.

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You state:

> *'It is my complaint that my Common Law and Constitutional Human Rights to proper and lawful government have been breached as part of a relentless campaign against me by the Commissioner of Taxation.*
>
> *The failures to act in accordance with the relevant Model Litigant obligations set out at Annexure B of the Legal Services Directions 2005 (Cth) give rise to an actionable cause of action under Human Rights'.*

Complaint against the FCA

You state that your complaint against the FCA relates to events that occurred between July 2014 and June 2015 in various proceedings. You state that you commenced proceedings in the FCA under s 39B of the *Judiciary Act 1903* (Cth) to review over 300 taxation and other decisions made by the Commissioner of Taxation against entities related to you.

You state that you received information from the ATO through freedom of information and that this information 'revealed significant unlawful administration issues and the issuing of Notices of Income Tax Assessment that were invalid'. You state:

> *'On 10 separate occasions that FOI material was placed before the Court and all of the Judicial Officers involved have chosen to be wilfully blind to that evidence that had not been in my possession and control at any earlier time. Written Submissions have been made in all proceedings relying on the evidence and without exception have thus far been ignored. As a consequence [I] have advised the Court that I seek to issue a Notice of Constitutional Matter within VID 739 of 2015.*
>
> *In order to make a reasoned decision I have first sought evidence to support my conclusions that in fact the Federal Court is actively seeking to frustrate my right of access to justice rather than simply making a decision on the merits by virtue of exercising my rights under the provisions of the FOI Act, FCR 2.32 and s 17 of the Federal Court of Australia Act 1976 (Cth)'.*

Complaint against the FCCA

In an email dated 6 October 2015 you advised that you wish to include the FCCA 'in respect to your complaint'.

I have accepted the FCCA as a respondent to your complaint under the AHRCA.

Opportunity to provide further information

In a letter dated 21 September 2015 an assessment of all the information before the Commission in relation to your complaint against the ATO and FCA was set out. In a letter dated 13 October 2015, an assessment of your complaint against the FCCA was set out. In each of these letters, you were invited to provide any further information or comments in support of your complaint.

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Therefore, I have decided not to continue to inquire into your complaint pursuant to section 20(2)(a) of the AHRCA.

My decision not to continue to inquire into your complaint is also based on the reasons set out below.

Allegations against the ATO

Section 20(2)(c)(v) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint where the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with by the Commission or by another statutory authority.

Section 20(2)(c)(vi) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint where the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority.

The subject matter of your allegations concerning the ATO appear to relate to actions and decisions taken by the ATO in relation to you.

I note that the Administrative Appeals Tribunal (AAT) is a statutory authority established by the *Administrative Appeals Tribunal Act 1975* (Cth) and it has jurisdiction to review ATO actions or decisions about tax affairs. I also note that the FCA is a statutory authority established by the *Federal Court of Australia 1976* (Cth) and the FCA also has jurisdiction to review ATO actions or decisions about tax affairs.

I note that you state that you commenced proceedings in FCA to review over 300 taxation and other decisions made by the Commissioner of Taxation and his personnel against entities related to you. I also note that in your email to the FCA Registry on 17 July 2015, you advise that you will also commence proceedings in the High Court of Australia.

On the basis of the information before the Commission, I am of the opinion that the subject matter of the complaint against the ATO has been adequately dealt with by another statutory authority and/or could be more effectively or conveniently dealt with by another statutory authority, being the AAT and/or FCA. Therefore, I have also decided not to continue to inquire into the complaint against the ATO on these grounds.

Allegations against the FCA and FCCA

Section 20(2)(c)(ii) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint if the Commission is of the opinion that the complaint is misconceived or lacking in substance.

I note that you claim that the FCA erred in considering your case against the Commissioner of Taxation and that this amounts of a breach of your human rights. You state that all of the judicial officers involved did not consider the evidence that was placed before the Court. The subject matter of your complaint against the FCA appears

You provided additional information on 6, 14, 15, 16 and 19 October 2015. You also copied the Commission in to several emails you sent to other organisations from 6 October 2015 to 27 October 2015.

The information you provided to the Commission has been reviewed.

My decision

Section 20(2)(a) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint if it is satisfied that the act or practice is not inconsistent with or contrary to any human right.

Section 20(2)(c)(v) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint where the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with by the Commission or by another statutory authority.

Section 20(2)(c)(vi) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint where the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority.

Section 20(2)(c)(ii) of the AHRCA says that the Commission may decide not to continue to inquire into a complaint if the Commission is of the opinion that the complaint is misconceived or lacking in substance.

I have considered all the information that has been provided and I wish to advise that I have decided not to continue to inquire into your complaint under sections 20(2)(a), 20(2)(c)(v), 20(2)(c)(vi) and/or 20(2)(c)(ii) of the AHRCA.

I understand you may be disappointed by my decision and I would like to explain the reasons for my decision.

Reasons for my decision

Human rights are strictly defined in the AHRCA and relate to those rights and freedoms recognised in the provisions of the international human rights instruments scheduled to or declared under the AHRCA, such as the *International Covenant on Civil and Political Rights* (ICCPR). These human rights instruments, such as the ICCPR, cover rights and freedoms including: freedom from torture, cruel inhuman or degrading treatment or punishment; freedom from arbitrary arrest or detention; people deprived of their liberty are treated humanely; right to a fair and public hearing in criminal matters, freedom of expression and opinion; and the right of peaceful assembly.

While you have provided the Commission with a large volume of information, you have not alleged any specific act or practice by or on behalf of the Commonwealth, including the ATO, FCA or FCCA that could arguably constitute a breach of human rights as defined in the AHRCA.

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to relate to the decisions and/or conduct of judicial officers in the course of exercising their judicial power.

Judicial immunity protects judicial officers and others performing their functions, or functions closely associated with judicial functions, from legal action. The issue of whether judicial immunity extends to the protection of judicial officers from claims brought under Commonwealth anti-discrimination and human rights laws was specifically considered by the High Court of Australia in *Re East: Ex Parte Nguyen (1998) 196 CLR 354*. In that decision, the High Court of Australia affirmed that 'the well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity' applies to the actions of judicial officers who are alleged to have breached Commonwealth anti-discrimination and human rights laws.

If a person is not satisfied with a decision made by a judge, it is generally open for them to pursue an appeal against it. In this respect, I note that you have stated that you plan to commence proceedings in the High Court of Australia.

For these reasons, I consider that the principle of judicial immunity applies in relation to your allegations against the FCA and FCCA and therefore fall outside of the Commission's human rights complaint handling jurisdiction.

Therefore, on the basis of the information before the Commission, I am of the opinion that your complaint against the FCA and FCCA is misconceived and/or lacking in substance and I have also decided not to continue to inquire into the complaint on this basis.

Possible further action

If you think that my decision is not legally correct you can apply to the FCA or FCCA for the decision to be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The court would not look at whether I made the correct decision. Rather, if the court thinks I made a legal error or did not exercise my powers correctly, it may refer the matter back to the Commission for further consideration. Any application to the court must be made within twenty eight (28) days of my decision.

Other concerns

In an email dated 14 October 2015 you advised that you also wished to raise concerns about:

1. The Commissioner of Taxation;
2. The Chief Executive of Austrade;
3. The Deputy Commissioner of Taxation;
4. The Board of Treasury Wine Estates Vintners Limited;
5. The Board of Fosters Brewing Group Limited;
6. The Board of International Vintners Pty Limited;
7. The Board of National Australia Bank Limited;
8. The South Australian Attorney General;
9. The Supreme Court of South Australia;
10. Justice Timothy Anderson (Retired) of the Supreme Court of South Australia;

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11. Master Lunn (Retired) of the Supreme Court of South Australia;
12. Justice Layton (Retired) of the Supreme Court of South Australia;
13. Justice Riordan of the Supreme Court of Victoria;
14. Associate Justice Derham of the Supreme Court of Victoria;
15. Associate Justice Mukhtar of the Supreme Court of Victoria;
16. Justice Lander of the Federal Court of Australia;
17. Registrar Caporale of the Federal Court of Australia;
18. Registrar Layton of the Federal Court of Australia;
19. Justice Davies of the Federal Court of Australia;
20. Justice Mortimer of the Federal Court of Australia;
21. Justice Tracey of the Federal Court of Australia;
22. Justice Pagone of the Federal Court of Australia;
23. Justice Jessup of the Federal Court of Australia;
24. Chief Justice Allsop of the Federal Court of Australia;
25. Justice Beach of the Federal Court of Australia;
26. Justice Kenny of the Federal Court of Australia;
27. Registrar Byrne of the Federal Circuit Court of Australia;
28. Judge Burchard of the Federal Circuit Court of Australia; and
29. Judge Reithmuller of the Federal Circuit Court of Australia.

You state 'it is my contention that the aforementioned parties have breached my Human Rights as expressed above, for the second time in my life I find myself confronted by;

1. a sequestration order made in respect to an alleged debt that could not lawfully exist within the meaning of the GST Act 1999 (Cth) the Findings of the High Court in Project Blue Sky
2. Misbehaviour of the Judiciary listed within the meaning of *the Federal Court of Australia Act* 1976 (Cth), *the Federal Circuit Court of Australia Act* 1976 (Cth), *the Supreme Court Act* 1935 (SA), *the Supreme Court Act* 1986 (Vic) and *the District Court Act 1991* (SA)
3. The Secret Society described in State Parliament
4. The Mafia Like Proportions of the South Australian Law Society and the Victorian Law Society'.

In relation to your concerns about the conduct of the Supreme Court of South Australia, a registrar and several retired and current judges. For the reasons outlined above, the Commission's human rights complaint handling jurisdiction does not cover the conduct of courts and/or tribunals when exercising judicial power.

In relation to your concerns about the Board of Treasury Wine Estates Vintners Limited, the Board of Fosters Brewing Group Limited, the Board of International Vintners Pty Limited, the Board of National Australia Bank Limited, and the South Australian Attorney General, the Commission can only investigate complaints about alleged breaches of human rights when it involves an act by or on behalf of the Commonwealth. It is not clear that any of the abovementioned agencies would be engaging in acts or practices in relation to you on behalf of the Commonwealth.

Additionally, in relation to the individuals and organisations listed from 1 to 29 you have not specified a specific act or practice that they have engaged that could arguably constitute a breach of your human rights as defined in the AHRCA.

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On the basis of the information you have provided to the Commission at this time, the Commission will not be taking any further action in relation to your concerns about these above listed individuals/organisations.

If you have any questions about this letter, please contact Caroline Tjoa by phone on (02) 9284 9630/1300 369 711 or by email at caroline.tjoa@humanrights.gov.au.

Yours sincerely

Jodie Ball
Delegate of the President

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ANNEXURE 2

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court decision and the Government's reaction to it

Susan Roberts[1]

Introduction

The recent High Court decision of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[2] (''*Teoh's Case*'') is notable for two principal reasons. First, it gives unprecedented significance to the ratification of international instruments by the Executive, in particular the *Convention on the Rights of the Child*[3] (''CROC''), by the majority stating that the ratification of such instruments creates the basis for a legitimate expectation. Secondly, it has provoked a swift and all encompassing reaction from the Government evincing an intention to reverse *Teoh's Case*.

These issues warrant close analysis for the purposes of assessing the true effect and ramifications of the decision and the appropriateness of the Government's reaction to it.

Position before the High Court Decision

Prior to the decision of the High Court in *Teoh's Case*, the domestic ramifications of Australia being a party to an international treaty were limited. The ramifications can effectively be summarised as being that:

- the provisions of a treaty were not part of Australian law unless they were incorporated into law by way of domestic legislation; [4]
- where there was ambiguity in a statute or subordinate legislation, a construction should be adopted that complies with Australia's obligations under international instruments;[5] and

---

1 Senior Legal Officer, Human Rights and Equal Opportunity Commission. The opinions expressed in this article are personal to the author and should not be taken to be the opinions of the Human Rights and Equal Opportunity Commission.

2 (1995) 128 ALR 353.

3 CROC was ratified by Australia on 17 December 1990 and entered into force in Australia on 16 January 1991. By an instrument of declaration on 22 December 1992, the Attorney-General declared CROC to be an international instrument relating to human rights and freedoms pursuant to s 47(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOCA).

4 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Kioa v West* (1985) 159 CLR 550 at 570; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418 at 500.

5 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Dietrich v The Queen* (1992) 177 CLR 292 at 306.

- the principles contained in an international instrument may be used by courts as a guide to developing the common law in Australia.[6]

As will be shown below, the decision of the High Court extended the impact of Australia ratifying an international instrument beyond these established classes and into the arena of administrative decision-making and procedural fairness.

Facts

Ah Hin Teoh, a Malaysian citizen, came to Australia in May 1988 and was granted a temporary entry permit. In July 1988, Mr Teoh married Ms Jean Lim, an Australian citizen and the de facto spouse of Mr Teoh's deceased brother. At the time of their marriage, Mrs Teoh had four children, one from her first marriage and three from the de facto relationship. Subsequently, Mr and Mrs Teoh had three children together.

In October 1988, Mr Teoh applied for and was granted a further temporary entry permit that enabled him to remain in Australia until February 1989. Prior to the expiry of the permit, Mr Teoh applied for a grant of resident status. In November 1990, whilst this application was being processed, Mr Teoh was convicted on six counts of being knowingly concerned in the importation of heroin and on three counts of being in possession of heroin. He was sentenced to six year's imprisonment with a non-parole period of two years and eight months. It was acknowledged by the court that Mr Teoh's offences were connected to the fact that his wife had a heroin addiction.

In January 1991, Mr Teoh was notified pursuant to the *Migration Act* 1958 (Cth) that his application for resident status had been refused on the ground that he could not meet the good character requirement as he had a criminal record.[7] In February 1991, Mr Teoh applied for a review of the decision. In support of the application, he provided several documents including a testimonial from Mr Teoh's mother-in-law who stated that Mr Teoh was the only person who could keep the family together.

The Immigration Review Panel ("the Panel") rejected the review in July 1991 stating that:

> All the evidence for this Application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.

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6 *Dietrich v The Queen* (1992) 177 CLR 292 at 321 per Brennan J, at 360 per Toohey J; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J. See also the cases referred to in Kirby M, "The Australian Use of International Human Rights Norms: from Bangalore to Balliol - a view from the Antipodes" (1993) 16 UNSWLJ 363 and the text of a lecture, "Treaties in Australian Law: Role of International Standards in Australian Courts", a paper delivered by Justice Kirby at the University of New South Wales Faculty of Law on 10 May 1995.

7 (1995) 128 ALR 353 at 356.

> However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The Compassionate [sic] claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record.[8]

This recommendation was accepted by the delegate of the Minister (''the delegate'') in July 1991 and in February 1992 an order was made that Mr Teoh be deported. Mr Teoh sought a review of both the acceptance of the recommendation and the decision to deport.

Federal Court Decisions

The case was heard at first instance by French J in September 1993.[9] His Honour dismissed the appeal, finding that the acceptance of the Panel's recommendation and the ordering of deportation had not, as alleged by the appellant, been an improper exercise of power, a denial of natural justice, nor did it involve the consideration of irrelevant factors by the decision-makers.

The appeal against the decision at first instance was heard by Black CJ, Lee and Carr JJ.[10] The appellant was granted leave by the Full Court to amend the grounds of review to include the further particular that the respondent failed to make appropriate investigations into the hardship to the [appellant's] wife and her children were the [appellant] refused resident status.[11]

It was on this ground alone that the Full Court accepted that the decision-maker's power had been improperly exercised. Black CJ found that the existence of CROC emphasised the need for special care to be taken in respect of decisions that separate children from a parent[12] and that the decision-maker had failed to obtain more information in respect of the welfare of the family unit prior to making the decision to refuse the appellant resident status.[13]

Lee and Carr JJ held that the ratification of CROC created a legitimate expectation in parents and children, whose interests would be affected by the actions of the Commonwealth relating to children, that the Commonwealth's actions would be of a nature that complied with the principles of CROC.[14]

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8 *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 at 441.
9 *Ah Hin Teoh v Minister for Immigration, Local Government and Ethnic Affairs*, (Unreported, Federal Court, French J, 3 September 1993).
10 (1994) 121 ALR 436.
11 (1994) 121 ALR 436 at 440 per Black CJ at 445-446 per Lee J, at 456-458 per Carr J.
12 (1994) 121 ALR 436 at 443 per Black CJ. See Carr J who expressly rejected the existence of a fiduciary obligation at 462. Lee J at 447 referred to the submission but did not directly address the issue.
13 (1994) 121 ALR 443 at 442-443.
14 (1994) 121 ALR 443 at 449 per Lee J and at 466 per Carr J.

The Full Court ordered a stay of the deportation order until the decision had been reconsidered in light of the Court's finding. The respondent appealed against the decision to the High Court of Australia.

High Court Decision

The appeal was heard by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.[15] The main issue to be considered by the Court was whether a legitimate expectation existed as found by Lee and Carr JJ and, if so, the consequences of the legitimate expectation.[16]

Legitimate Expectation

The doctrine of legitimate expectation was considered by Mason CJ, Deane, Toohey and McHugh JJ. Mason CJ, Deane and Toohey JJ accepted as correct the finding of Carr and Lee JJ that the ratification of an international convention can be a basis for the existence of a legitimate expectation and that, in this instance, there had been a want of procedural fairness. McHugh J dissented on this point and Gaudron J did not rely upon it in her reasons.

Mason CJ and Deane J (in a joint judgment) held that:

> ...ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'.[17]

Toohey J agreed that:

> ...by ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' make 'the best interests of the child a primary consideration'.[18]

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15 (1995) 128 ALR 353. With leave of the High Court, the Human Rights and Equal Opportunity Commission intervened in the appeal.
16 (1995) 128 ALR 353 at 358 per Mason CJ and Deane J.
17 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J.
18 (1995) 128 ALR 353 at 373.

It was held by Mason CJ, Deane and Toohey JJ that it is not necessary for persons seeking to rely upon such a legitimate expectation (or in the case of a child, for their parent or guardian) to actually have the expectation themselves, but rather that the existence of the expectation be reasonable in the circumstances.[19]

Their Honours held, however, that the presence of the legitimate expectation does not compel the decision-maker to act in a way that complies with that expectation. To require compliance would be to incorporate "the provisions of the unincorporated convention into our municipal law".[20] All that the decision-maker is required to do by way of procedural fairness, if he or she is proposing to make a decision inconsistent with the legitimate expectation, is to provide the affected person with the opportunity to present a case for not adopting the proposed course.[21]

Toohey J was more prepared to entertain the notion that the decision-maker actually initiate inquiries. His Honour found that if the decision-maker had made inquiries of the institution where the children had been placed in care and of the Department of Community Welfare, she would have been in a better position to meet the legitimate expectation that arises from CROC.[22]

In his dissenting judgment, McHugh J found that the Full Court erred on all the grounds submitted by the appellant. Putting to one side the question of whether the doctrine of legitimate expectation "still has a useful role to play",[23] McHugh J held that to find a legitimate expectation in this instance would erroneously expand the doctrine. His Honour made the following points as he considered the issues before him:

- the ratification of an international convention by the Executive only gives undertakings to other parties to the convention and it does not give any sort of undertaking (on which a legitimate expectation could be based) to residents or citizens of Australia;[24] and

- if it is the case that a legitimate expectation does exist then that expectation must actually be entertained by the affected person [25] and the decision-maker need only inform the affected person that the convention will not be considered, if the decision has led the affected person to believe it will be applied.[26]

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19 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J; at 373 per Toohey J.
20 (1995) 128 ALR 353 at 365 per Mason CJ and Deane J. Mason CJ and Deane J found that Carr and Lee JJ had been requiring such compliance by requiring the decision-maker to initiate inquiries and seek reports in respect of the children and had erred in doing so.
21 *Ibid*.
22 (1995) 127 ALR 353 at 374.
23 (1995) 128 ALR 353 at 381. His Honour relied upon *Kioa v West* (1985) 159 CLR 550 and *Annetts v McCann* (1990) 170 CLR 596 as leaving little room for the continued application of the doctrine.
24 (1995) 128 ALR 353 at 385.
25 (1995) 128 ALR 353 at 383.
26 *Ibid*.

His Honour held that there was no lack of procedural fairness as the decision-maker had given no indication that the principles of CROC would be applied and had not been requested to apply them. McHugh J's basic position is that:

> It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision had no knowledge.[27]

Consideration of the Practical Consequences of a Legitimate Expectation Existing

Only Toohey and McHugh JJ specifically addressed the question of the practical impact on administrative decision-makers of the finding that a legitimate expectation may arise from the ratification of a convention.

In respect of the appellant's submission that the sheer number of conventions which Australia has ratified will impose an unrealistic burden on decision-makers, Toohey J commented that:

> ...particular conventions will generally have an impact on particular decision-makers and often no great practical difficulties will arise in giving effect to the principles which they acknowledge.[28]

McHugh J was not so confident that the practical difficulties could be overcome:

> If the result of ratifying an international convention would give rise to a legitimate expectation...[i]t would follow that the convention would apply to every decision made by a federal official unless the official stated that he or she would not comply with the convention. If the expectation were held to apply to decisions made by State officials, it would mean that the Executive Government's action in ratifying a convention had also altered the duties of State government officials. The consequences for administrative decision-making in this country would be enormous. Junior counsel for the minister informed the court that Australia is a party to about 900 treaties. Only a small percentage of them has been enacted into law. Administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would not be complying with those conventions.[29]

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27 (1995) 128 ALR 353 at 383.
28 (1995) 128 ALR 353 at 373.
29 (1995) 128 ALR 353 at 385.

As noted below, McHugh J's concern as to the practical consequences of the decision has been shared by the Federal Government and provoked a strong reaction from it.

Common Law Rights of Children

Gaudron J found in favour of Mr Teoh but for reasons different than those relied upon by Mason CJ, Deane and Toohey JJ. In a novel and far-reaching judgment, her Honour found that it is not necessary to rely upon CROC to establish that the best interests of children should be a primary consideration in the making of administrative decisions. The fact that the child is an Australian citizen is enough to establish the principle:

> ...it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child s best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare.[30]

Accordingly, CROC is only relevant to the extent that its ratification gives expression to "a fundamental human right which is taken for granted by Australian society".[31]

Her Honour held that whilst the decision-maker was not required to initiate inquiries, procedural fairness required her to inform Mr Teoh that the children s best interests were not being taken into account as a primary consideration and offer him the opportunity to persuade her otherwise.[32]

The Government's Reaction to Teoh's Case

The High Court's decision in *Teoh's Case* was met with interest by the media [33] and with comment from the Federal Government that it would result in a review by the Government of all international treaties.[34]

A detailed response from the Government was released in the form of a joint statement by the Minister for Foreign Affairs and the Attorney-General on 10 May

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30 (1995) 128 ALR 353 at 375.

31 (1995) 128 ALR 353 at 376. Mason CJ and Deane J also at 336 comment that the "principle expressed in Article 3.1 of CROC may have a counterpart in the common law as it applies to cases where the welfare of a child is matter relevant to the determination to be made".

32 *Ibid.*

33 Unfortunately some of the media reports choose to attribute inappropriate and unnecessary relevance to the dynamics of the Teoh family: see "Extraordinary judgment", Padraic McGuinness, *The Sydney Morning Herald*, 11 April 1995 where it was remarked that CROC "has been interpreted to protect a drug runner married to a heroin addict, simply because they have children who have the misfortune to have them as parents".

34 "Court puts spotlight on treaties", *The Sydney Morning Herald*, 15 April 1995, p 3.

1995 (''the Joint Statement'').[35] It notes that whilst only a small number of the 920 treaties Australia has ratified may give rise to a legitimate expectation:

> ...the High Court gives little if any guidance on how decision-makers are to determine which of those treaty provisions will be relevant and to what decisions the provisions might be relevant, and because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced into government activity. It is not in anybody's interests to allow such uncertainty to continue.[36]

The Government announced its intention to rectify the perceived uncertainty by restoring the pre-*Teoh Case* position by statutory amendment.[37] The Government also made the following ''clear and express statement'':

> We state on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. ... Any expectation that may arise does not provide a ground for review of a decision. This is so, both for existing treaties and for future treaties that Australia may join.[38]

On 28 June 1995, legislation was introduced into Parliament to reverse the position created by *Teoh's Case*.[39] The Administrative Decisions (Effect of International Instruments) Bill 1995 (''the Bill'') provides that:

> The fact that Australia is bound by, or a party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument, does not give rise to a legitimate expectation, on the part of any person, that:
>
> (a) an administrative decision will be made in conformity with the requirements of that instrument; or
>
> (b) if the decision were to be contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course.[40] The

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35 Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995. A statement in similar terms was released by the Attorney-General of South Australia on 8 June 1995.

36 Joint Statement at p 2.

37 In taking this course, the Government relies upon the statement by Mason CJ and Deane JJ that the legitimate expectation may be displaced by ''statutory or executive indications to the contrary'', see (1995) 128 ALR 353 at 365

38 Joint Statement at p 2.

39 It should be noted that such an intention would not appear to defeat the ''common law right'' referred to by Gaudron J *op cit* at note 30.

40 The Bill, cl 5.

> legislation is to be taken as having commenced on 10 May 1995, the date of the Government's Joint Statement.[41]

It is important to analyse whether *Teoh's Case* warranted such an Executive and legislative reaction and the possible consequences of the reaction.

Commentary on Teoh's Case and the Government's Reaction

How far does Teoh's Case really go?

The primary issue to consider when assessing *Teoh's Case* and the majority's finding of legitimate expectation, is whether it really represents any more than one would expect from the fact that Australia enters into international conventions? If the entering into such conventions is to have no impact on the way in which Australian citizens are treated then is the ratification of such instruments really a nonsense; an outcome that, it is submitted, to use the words of the New Zealand Court of Appeal in *Tavita v Minister for Immigration*, would be "an unattractive argument, apparently implying that...adherence to the international instruments has been at least partly window dressing."[42]

It is submitted that it is necessary that the entering into of international instruments by Australia will have some direct significance to Australian citizens. The consequences of ratification should not just be limited to providing a tool of interpretation or assisting in the development by the courts of the common law.[43] If a legitimate expectation can be created by a statement to the House of Representatives by the Minister for Immigration as to deportation policy [44] or by press releases concerning an amnesty for prohibited immigrants,[45] then it would appear inconsistent if a legitimate expectation could not arise from the ratification by the Executive of a treaty before the international community.

In reacting to *Teoh's Case*, the Government has appeared to misinterpret the fact that the effect of the decision is to find that the consequence of ratification is limited to the creation of a legitimate expectation. It is implied in the Joint Statement that the effect of *Teoh's Case* is to confer rights and obligations on individuals:

> ...the Government remains fully committed to observing its treaty obligations. However, we believe it is appropriate to retain the long-standing, widely accepted and well-understood distinction between treaty action undertaken by the Executive which creates international rights and obligations and the implementation of treaty obligations in Australian law. The implementation of

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41 The Bill, cl 2.

42 [1994] 2 NZLR 257 at 266. This case raised the point (which the Court did not have to determine) of whether in the making of a decision to deport, the decision-maker had to take into account CROC and the *International Convention on Civil and Political Rights*.

43 *op cit* notes 4 and 5.

44 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 655 per Deane J and at 682 per McHugh J.

45 *Salemi v Mackellar [No 2]* (1977) 137 CLR 396 at 440 per Stephen J.

> treaties by legislation is the way that the rights, benefits and obligations set out in treaties to which Australia is a party are conferred or imposed on individuals in Australian law.[46]

If this is the Government's understanding of the decision then it is ill-founded. The High Court expressly rejects the suggestion that the ratification of international instruments by the Executive can be a direct source of individual rights or impose obligations on individuals.[47] The existence of a legitimate expectation is not the bestowing of rights, benefits or obligations upon an individual. It does not compel the decision-maker to act in accordance with the expectation.[48] It only gives rise to a requirement of procedural fairness. Given that this is the effect of *Teoh's Case*, it is suggested that the Government's response to the decision is misguided. Such a view has also been expressed by the Human Rights and Equal Opportunity Commission,[49] the Opposition,[50] academics[51] and the Honourable Elizabeth Evatt, a member of the United Nations Human Rights Committee.[52]

Practical ramifications of Teoh's Case

The main reason[53] relied upon by the Government in justification of its intention to reverse *Teoh's Case* is the perceived administrative difficulties, as highlighted by McHugh J, that will flow from the decision.[54] It is interesting to note this concern of the Government for two reasons. First, as acknowledged by the Government itself, only a small number of international treaties may actually be relevant. Secondly, it is telling to note some instances where the Government itself has actually legislated to create the very obligation upon decision-makers that it now claims requires a reversal of *Teoh's Case*:[55]

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46 Joint Statement at p 3.

47 (1995) 128 ALR 353 at 362 per Mason CJ and Deane J; at 371 per Toohey; at 382 per McHugh J. The analysis used by Gaudron J is that there is an individual right but that it springs from citizenship and not the act of ratification.

48 For consideration of the concept of legitimate expectation, see Forsyth, "The Provence and Protection of Legitimate Expectations" (1988) 47 *Cambridge Law Journal* 238; Hadfield, "Judicial Review and the Concept of Legitimate Expectation" (1988) 39 *The Northern Ireland Legal Quarterly* 103; Tate, "The Coherence of Legitimate Expectations and the Foundations of Natural Justice" (1988) 14 *Monash University Law Review* 15.

49 See statement of Sir Ronald Wilson, President of HREOC, tabled on 16 May 1995 at the hearing of the Senate Standing Committee on Legal and Constitutional Affairs; see also "Rights chief condemns bid to neutralise Teoh ruling", *The Australian* 17 May 1995, p 2.

50 Media Release from Alexander Downer MP "Retreat by Evans and Lavarch over Treaties", 10 May 1995; "Keating to close treaties loophole" *The Sydney Morning Herald*, 11 May 1995, p 5.

51 "Treaties must be recognised: lawyers" *The Australian*, 18 May 1995 p 4.

52 "Evatt hits Canberra's treatment of treaties" *The Australian*, 25 May 1995, p 5.

53 A further hidden reason may be that it enables the Executive to retain the freedom it has had in entering into international treaties without being limited by the impact that they may have domestically. See also "Treatics require prudence", *Courier Mail* 8 May 1995, p 13.

54 Joint Statement at p 2.

55 This point was made as part of HREOC's submissions to the High Court.

- s 28(c) of the *Australian Postal Corporation Act* 1989 (Cth) provides that Australia Post is to perform its functions in a way consistent with Australia's obligations under any convention to which Australia is a party or any agreement or arrangement between Australia and a foreign country.
- s 7 of the *Australian Maritime Safety Authority Act* 1990 (Cth) provides that the Australian Maritime Safety Authority is to perform its functions in a manner consistent with Australia's obligations under any agreement between Australia and another country.
- s 160(d) of the *Broadcasting Services Act* 1992 (Cth) provides that the Australian Broadcasting Authority is to perform its functions in a way consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

It is difficult to see why the administrative implications of *Teoh's Case* are stated so highly when it is clear that decision-makers of the above organisations must perform a task identical to that required by the decision.

Other options to the Government's reaction

If the Government felt it was necessary to confine the consequences of *Teoh's Case*, it is disappointing that a more circumspect and limited response was not preferred. For instance, an option may have been for the Government to exclude from the operation of the Bill particular international instruments,[56] specifically those instruments scheduled to HREOCA[57] and declared pursuant to s 47(1) of HREOCA.[58]

Whilst it is accepted that the scheduling and declaration of these instruments under HREOCA does not incorporate them into domestic law,[59] it appears difficult to claim that the fact that they are scheduled to domestic legislation and, in the case of CROC, have been the subject of parliamentary consideration and debate[60] does not

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56 Other options may have been to read the decision as being limited to personal rights (such as those contained in CROC or HREOCA) or to legislate to shift the onus of raising the international instrument from the decision-maker to the affected person. Both of these options have their disadvantages but they would have at least enabled the spirit of *Teoh's Case* to survive.

57 *Convention concerning Discrimination in respect of Employment and Occupation* (Schedule 1), *International Covenant on Civil and Political Rights* (Schedule 2), *Declaration on the Rights of the Child* (Schedule 3), *Declaration on the Rights of Mentally Retarded Persons* (Schedule 4) and *Declaration on the Rights of Disabled Persons*.

58 CROC and *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.

59 (1995) 128 ALR 353 at 362; see also *Dietrich v The Queen* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J and at 360 per Toohey J. See also House of Representatives, Administrative Decisions (Effect of International Instruments) Bill 1995, Explanatory Memorandum, p 4.

60 After being declared by the Attorney-General pursuant to s 47(1) of HREOCA on 13 January 1993, there were unsuccessful attempts in both Houses of Parliament to have the declaration disallowed: see House of Representatives Hansard, 1 September 1993, pp 691-701; Senate Hansard, 30

give rise to a legitimate expectation. Indeed it could be argued that it would have been sufficient for the High Court to limit the finding in *Teoh's Case* to the HREOCA instruments given that it is these instruments that have the greatest relevance to Australians in their every day lives. If the Government had exempted such instruments from its response to the decision then it would have limited the perceived burden on decision-makers to consideration of just seven instruments.

The Government's failure to exempt the HREOCA instruments from the intended legislative scheme also creates confusion in respect of the operation of HREOCA itself. HREOCA defines human rights as the rights and freedoms recognised in the Covenant and the Declarations or recognised or declared by any relevant international instrument .[61] The functions of the Commission include inquiring into any act contrary to human rights and the promotion and protection of human rights in various manners.[62] It seems contradictory for the legislature to establish a mechanism for the protection of the human rights of Australian citizens on the one hand and then on the other hand, for the Government to announce that the ratification of the very instruments that define the relevant human rights have no domestic significance in themselves, nor by virtue of the fact that the instruments are related to HREOCA.

It can only be concluded that in the Government's eyes these instruments are on an equal footing (that is, have little relevance to Australian citizens) with most of the other 920 international treaties that have not undergone any scheduling or declaration process.[63]

Conclusion

Teoh's Case resulted in the ratification of international treaties and instruments by the Executive finally having some relevance to Australian citizens rather than purely being an act of grandstanding on the international stage. It is disappointing and damaging to the future of human rights in Australia that the Government has been unable to accept that the entry into such instruments should have consequences for Australia's decision-makers and has chosen to legislate itself out of the effects of this soundly based landmark decision.

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60 — *Continued*
September 1993, pp 1473-98 and 1595-8; 5 October 1993, pp 1682-5.

61 Section 3(1) of HREOCA.

62 Section 11(1)(e) to (o) of HREOCA.

63 See footnotes 49 and 51 above for comments as to the failure of the Government to exempt the HREOCA instruments from the Joint Statement.

Gilbert +Tobin

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General

Legislation

The Corporations Act 2001 (Cth) (the Act) is the primary piece of federal legislation that governs the registration, administration, insolvency and reorganisation of companies incorporated in Australia. The Act prescribes, among other things, the manner to administer and regulate the winding up, liquidation,

Excluded entities and excluded assets

The Act governs the insolvency proceedings for all companies incorporated in Australia and companies incorporated or possessing separate legal personality in foreign jurisdictions that carry on business in Australia. It also governs building societies, credit unions and managed investment schemes. The provisions of the Act do not govern the potential insolvency proceedings for government agencies, state or federal corporate bodies, or entities created by statute that are not companies. The individual statutes creating these bodies will normally provide for their dissolution or winding up.

Public enterprises

There is no precedent in Australia for a government-owned enterprise becoming insolvent. Generally, each government- owned enterprise is established under a specific piece of legislation separate to the Act (be it federal or at a state or territory level). The relevant legislation will provide for the winding-up procedure and remedies creditors may have available (noting they are limited compared to a corporate insolvency). Creditors of public enterprises do have remedies; however, as the provisions vary from enterprise to enterprise, and as there has never been an actual example of these provisions being tested, it is difficult to generally comment on how such remedies work in practice.

Protection for large financial institutions

No.

Courts and appeals

The Federal Court of Australia and the supreme court of each state and territory have jurisdiction to hear matters relating to companies incorporated in Australia (which include insolvency matters and the prosecution of both civil and criminal offences arising from insolvency proceedings). Matters pertaining to debt recovery and monetary compensation can also be dealt with by other courts such as district courts, county courts and magistrates' courts within their jurisdictional limits. The judicial institutions have discretion to transfer matters between them if considered appropriate. It is generally only the Federal Court and the supreme courts that have jurisdiction to wind up a company. An appellant has an automatic right to appeal any final decision of the court, including an order for the winding up of a company. Three of the more common insolvency processes (voluntary administration, deeds of company arrangement and receivership) often have no court involvement.

amount to be provided by way of security is part of the court's discretion. The security may take a form that the court considers adequate to provide protection to the defendant and permits guarantees, charges or the provision of a bank bond to be made in lieu of more traditional payments.

Types of liquidation and reorganisation processes

Voluntary liquidations

Under the Corporations Act 2001 (Cth) (the Act), both the members of the company and the creditors have the option, under certain circumstances, to commence a voluntary winding up of a company. Neither procedure requires court sanction. The determinative factor for which a voluntary regime may be pursued is the company's solvency position.

A members' voluntary liquidation is a solvent winding up. It requires that the directors of the company make a declaration of solvency under section 494 of the Act. The declaration of solvency requires that the directors of the company must form the opinion, after an inquiry into the affairs of the company, that the company will be able to discharge its debts in full within 12 months of the commencement of winding up. This is coupled with a special resolution (ie, at least 75 per cent of votes cast by members entitled to vote on the resolution) of the members to wind up the company. A copy of this resolution must be lodged with the Australian Securities and Investments Commission (ASIC) within seven days.

A creditors' voluntary winding up arises when the company is in fact insolvent. It can occur in a number of circumstances, including in situations where a liquidator appointed by the members forms the opinion that the company is in fact insolvent. This will convert the process from a members' voluntary winding up into a creditors' voluntary winding up. A company may also enter a creditors' voluntary winding up where the directors determine that the company is insolvent and should be wound up or at the end of an administration if the creditors pass a resolution at the second creditors' meeting that the company should be wound up.

Voluntary reorganisations

The purpose and operation of voluntary administration is outlined in Part 5.3A of the Act. Voluntary administration has been compared to the Chapter 11 process in the United States; however, unlike the Chapter 11 process, voluntary administration is not an 'in situ' debtor process. In a voluntary administration, the creditors control the outcome to the exclusion of management and members. The creditors ultimately decide on the outcome of the company, and in practice, it rarely involves returning management of the company back to the former directors.

maximises the chances of the company, or as much as possible of its business, continuing in existence; or

results in a better return for the company's creditors and members than would result from an immediate winding up, if it is not possible for the company or its business to continue in existence.

There are three possible ways an administrator may be appointed under the Act:

by resolution of the board of directors that in their opinion the company is, or is likely to become, insolvent;

a liquidator or provisional liquidator of a company may, by writing, appoint an administrator of the company if he or she is of the opinion the company is, or is likely to become, insolvent; and

a secured creditor who is entitled to enforce security over the whole or substantially whole of a company's property may, by writing, appoint an administrator if the security interest is over the property and is enforceable.

An administrator has wide powers and will manage the company to the exclusion of the existing board of directors. Once an administrator is appointed, a statutory moratorium is activated that restricts the exercise of rights by third parties under leases and security interests and in respect of litigation claims. The purpose of this statutory moratorium is to allow the administrator the opportunity to investigate the affairs of the company, and either implement change or be in a position to realise value, with protection from certain claims against the company. A secured creditor with security over the whole or substantially the whole of the assets of the company has 13 business days following the appointment of the administrator to exercise its right under the security granted in its favour (ie, appoint a receiver).

There are two meetings over the course of an administration that are critical to the outcome of the administration. Once appointed, an administrator must convene the first meeting of creditors within eight

meeting is normally convened 20 business days after the commencement of the administration (this may be extended by application to the court). At the second meeting, the administrator provides a report on the affairs of the company to the creditors and outlines the administrator's views as to the best option available to maximise returns. There are three possible outcomes that canbe put to the meeting:

enter into a deed of company arrangement (DOCA) with creditors;

wind the company up; or

terminate the administration.

The administration will terminate according to the outcome of the second meeting (ie, either by progressing to liquidation, entry into a DOCA or returning the business to operate as a going concern (although this is rare)). When the voluntary administration terminates, a secured creditor that was estopped from enforcing a security interest because of the statutory moratorium becomes entitled to commence steps to enforce that security interest unless the termination is because of the implementation of a DOCA approved by that secured creditor.

A DOCA is effectively a contract or compromise between the company and its creditors. Although closely related to voluntary administration, it should in fact be viewed as a distinct regime, where the rights and obligations of the creditors and company differ from those under a voluntary administration.

A DOCA may incorporate terms that make its operation similar to a voluntary administration (giving similar rights to a deed administrator as a voluntary administrator), but may also provide for, inter alia, a moratorium of debt repayments, a reduction in outstanding debt and the forgiveness of all, or a portion of, the outstanding debt. It may also involve the issuance of shares and can be used to achieve a debt-for-equity swap.

Entering into a DOCA requires the approval of a bare majority of creditors, both by value and number voting at the second creditors' meeting. A DOCA will bind the company, its shareholders, directors and unsecured creditors. A validly passed DOCA can bind all creditors but does not prevent a secured creditor from dealing with their security interest so long as the secured creditor does not vote in favour of the DOCA.

Upon the execution of a DOCA, the voluntary administration terminates.

The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Typically, however, once a DOCA has achieved its goal it will terminate. If a DOCA does not achieve its goals or is challenged by

A scheme of arrangement is a restructuring tool that sits outside of formal insolvency. The company may become subject to a scheme of arrangement whether it is solvent or insolvent.

A scheme of arrangement is a proposal put forward (with input from management, the company or its creditors) to restructure the company in a manner that includes a compromise of rights by any or all stakeholders. The process is overseen by the courts and requires approval by all classes of creditors. The pre-existing management retains control of the company during the process (and also depending on the terms of the scheme itself after its implementation). In recent times, schemes of arrangement have become more common, in particular, for complex restructures involving debt-for-equity swaps in circumstances where the number of creditors within creditor stakeholder groups may make a contractual and consensual restructure difficult.

A scheme of arrangement must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditor. Classes are determined by reference to commonality of legal rights and only those creditors whose rights will be affected, compromised or amended by the scheme need be included. It must also be approved by the court to become effective. The test for identifying classes of creditors for the purposes of a scheme is that a class should include those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a 'common interest'. The outcome of a scheme of arrangement is dependent on the terms of the arrangement or compromise agreed with the creditors, but most commonly, upon implementation, a company is returned to its normal state as a going concern but with the relevant compromises having taken effect.

The scheme of arrangement process does, however, have a number of limiting factors associated with it, including cost, complexity of arrangements (ie, class issues), uncertainty of implementation, timing issues (ie, because of various procedural requirements for holding the meetings, and as it must be approved by the court it is subject to the court timetable and can only be expedited to a certain extent) and the overriding issue of court approval (ie, a court may exercise its discretion to not approve a scheme of arrangement, despite a successful vote, if it is of the view that the scheme of arrangement is not equitable).

These factors explain why schemes of arrangement tend only to be undertaken in large corporate restructures and in scenarios with sufficient time for execution and implementation to accommodate the procedural and courts' requirements.

Successful reorganisation

A scheme of arrangement must be approved by a majority of creditors voting on the resolution and holding at least 75 per cent in value and 50 per cent in number of voting creditors in each class. Classes are

supplementary approval by the court is required at the second court hearing. Schemes of arrangement may provide for the release of third parties (as opposed to DOCAs where the courts have held that such releases are not possible).

In the context of a voluntary administration, a majority of creditors with at least 50 per cent in number and 50 per cent in value may resolve that the company should execute a DOCA. The company must execute the instrument within 15 business days of such a resolution. A DOCA can be varied by either a subsequent resolution of creditors or by the court. A DOCA will bind the company, its shareholders, directors and unsecured creditors. Unlike a scheme of arrangement, court approval is not required for a DOCA to be implemented provided it is approved by the requisite majority of creditors.

The High Court in Lehman Brothers Holdings Inc v City of Swan & Ors [2010] HCA 11 (Lehman Brothers), held that creditors were not bound by provisions in a DOCA that involved releases of claims against entities other than the company the subject of the DOCA.

This position was later followed by the Supreme Court of New South Wales in In the matter of Eastmark Holdings Pty Limited (receivers and managers appointed (subject to a deed of company arrangement) & ors [2015] NSWSC 2070, where the Court determined that third-party release clauses were severable for the following reasons:

the third-party releases were never intended to be part of the DOCA proposal in the first place and they were not in the proposal or discussed at the meeting of creditors;

Accordingly, the Court held that the third-party releases were void but severable, which allowed the DOCA to continue. These decisions support the general notion that claims against third parties cannot be released under a DOCA. Therefore, it is unlikely that a creditor will be bound by a DOCA to give up claims save for other than claims against the company the subject of the DOCA.

Involuntary liquidations

Under Australian law, a compulsory liquidation involves the application to, and orders from, the court. A creditor or other eligible applicant must lodge an application with the court to wind up a company. On an

There are two situations in which a company will be held to be unable to pay its debts:

if the company has not paid a claim for a sum due to a creditor exceeding A$4,000 within 21 days of service of a prescribed written statutory demand (the Act sets out specific requirements); or

if it is proved to the court as a question of fact that the company is unable to pay its debts as and when they fall due.

Grounds are also available for a creditor to apply to the court for winding-up orders against a company not necessarily related to solvency, including that it is 'just and equitable' to do so or because of a deadlock at shareholder or director level affecting the ability to manage the company.

After a winding-up order, management of the company is removed from the directors and the company will likely cease as a going concern (except as is necessary to proceed with the winding up). The liquidator appointed will take control of the affairs of the company, and his or her other duties include realising the company's assets for the benefit of the creditors as a whole.

There are no material differences between a liquidation ordered by the court and a creditors' voluntary liquidation.

In response to the covid-19 pandemic, the federal government introduced significant amendments to Australia's insolvency landscape via the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth) (the Insolvency Reform Act). These amendments to the Act came into effect on 1 January 2021 and relate specifically to small businesses. As part of these amendments, a liquidator may adopt a new small business liquidation (SBL) process under section 500A of the Act instead of the general creditor's voluntary liquidation process, which is aimed at providing a quick alternative to a creditor's voluntary winding up.

This may be undertaken if the company has resolved to be wound up voluntarily, the directors have given the liquidator a report as to the company's affairs and declared that the company is eligible for the SBL process, the total liabilities of the company do not exceed A$1 million and the company has made all required tax lodgements.

In circumstances where the liquidator becomes aware that the eligibility criteria is no longer met or where the liquidator has reasonable grounds to believe that the company or any of its directors have engaged in

Involuntary reorganisations

Unlike in the United Kingdom, receivership is still an option available to secured creditors in Australia. Receiverships, particularly coordinated appointments at a holding company level, can and have been used to effect corporate restructures and reorganisations.

There are two ways in which a receiver or receiver and manager may be appointed to a debtor company. The most common manner is pursuant to the relevant security document granted in favour of the secured creditor when a company has defaulted and the security has become enforceable. Far less common in practice is the appointment of a receiver pursuant to an application made to the court. Court appointmen are usually done to preserve the assets of the company in circumstances where it may not be possible to otherwise trigger a formal insolvency process. However, given the infrequency of court-appointed receivers, this chapter focuses on privately appointed receivers.

For a privately appointed receiver, the security document itself will entitle a secured party to appoint a receiver and will also outline the powers available (supplemented by the statutory powers set out in section 420 of the Act). Generally, a receiver has wide-ranging powers including the ability to operate, sell or borrow against the secured assets. The appointment is normally effected contractually through a deed of appointment and indemnity, and the receiver will be the agent of the debtor company, not the appointing secured party.

On appointment, a receiver will immediately take possession of the assets subject to the security. Once in control of the assets, the receiver may elect to run the business if the receiver is appointed over all or substantially all of the assets of a company. Alternatively, and depending on financial circumstances, a receiver may engage in a sale process immediately. While engaging in a sale process, a receiver is under a statutory obligation to obtain market value, or in the absence of a market, the best price obtainable in the circumstances. This obligation is enshrined in section 420A of the Act.

It is this duty under section 420A of the Act that has traditionally posed the most significant stumbling block to the adoption of prepackaged restructure processes through external administration. Often referred to as a ‘prepack’, this is where a restructuring is developed by the secured lenders before the appointment of a receiver and is implemented immediately or very shortly after the appointment is made. There is a concern that a prepackaged restructuring that involves a sale of any asset without testing against the market could be seen to be in breach of the duty under section 420A. Sales processes conducted immediately before appointment or the potential for immediate dilution of value are increasingly facilitating receivership sales without a full testing of the market.

course.

The appointment of a receiver to all or substantially all of the assets of a company will usually lead to, or will closely follow, the appointment of voluntary administrators by the directors, with both processes proceeding in tandem.

A secured creditor can often appoint an administrator to effect a reorganisation as an alternative to exercising its security. Once the voluntary administration occurs, the creditors are in control of the company's fate (including any restructuring or reorganisation), the success of which will be dependent on the relevant majority, by number and dollar value, voting in favour of it.

Further to the SBL process, recent amendments to the Act also establish the framework for the small business restructuring (SBR) process under Part 5.3B. The SBR process enables eligible companies to engage a small business restructuring practitioner to develop and propose to creditors a restructuring plan that, if accepted, will bind the company and certain creditors. A company's eligibility for this process is dependent on whether it has liabilities of less than A$1 million, the company has paid the entitlements of its employees that are payable, its current or former directors (in the preceding 12 months) have not engaged the SBR process or SBL process (in respect of another company) within the past seven years and it is not currently subject to another form of external administration under the Act or other restructuring arrangements.

The SBR process follows the general structure and key features of voluntary administration under Part 5.3A of the Act but differs in that it follows a 'debtor-in-possession' model, which allows the directors to maintain control of the company.

Expedited reorganisations

There is no legislation that specifically facilitates prepackaged reorganisation in Australia.

That being said, it is possible under certain circumstances for an administrator or a receiver to give effect to sale transactions that have been negotiated to near completion before their appointment.

The voluntary administration regime was introduced into the Act to provide distressed companies with a process to initiate an expedited reorganisation without court approval. A voluntary administrator is required to complete the investigations relating to the company's business, property, affairs and financial circumstances about four to six weeks after his or her appointment. The administrator is then required to

The creditors then decide between three alternatives:

to execute a DOCA;

to wind up the company; or

to end the administration.

As administrators have the power to dispose of a debtor company's property under section 437A of the Act, it is possible for an administrator to effect prepackaged transactions in certain circumstances; that is transactions that have been negotiated to near completion before their appointment, before convening the second meeting of creditors. However, the scope of that power is subject to the objects of Part 5.3A of the Act, being that the sale maximises the chances of the company continuing or, if that is not possible, results in a better return for creditors and members than a liquidation. As such, practitioners are often reluctant to effect a quick sale where that sale may not meet these objectives.

As receivers also have the power to dispose of a debtor company's property under section 420(2)(b) of the Act, it is possible, in certain circumstances, to implement a prepackaged reorganisation. However, section 420A of the Act is the single largest impediment to receivers giving effect to a prepackaged reorganisation where Australian courts have construed that section with a focus on the process undertaken by the receiver to sell the property. The very nature, and indeed the key benefit, of a prepackaged transaction, is that it is a quick sale of the debtor company carried out soon after the appointment of the insolvency practitioner. This, therefore, poses two difficulties for a receiver. The first relates to timing. If the receiver had no pre-appointment involvement with the prepackaged transaction, it would be difficult to demonstrate they complied with their obligations as set out in section 420A of the Act. On the other hand, if the receiver did have pre-appointment involvement, that might contravene the strict independence requirements for insolvency practitioners in Australia. The second difficulty is the requirement to achieve market value or otherwise achieve the best price that is reasonably attainable, having regard to the circumstances existing when the property is sold. It may be difficult to demonstrate that market value has been achieved in an expedited prepackaged sale. This requirement places a heavier burden than that placed on receivers in the United Kingdom, who are only required to show they were not negligent in exercising their power of sale.

Unsuccessful reorganisations

A scheme of arrangement may either be defeated by a creditors' vote or if it is not sanctioned by the court. Should either of these occur, there is no automatic process that occurs; rather, the company reverts to its

A proposed reorganisation through a DOCA may be defeated by a majority of creditors at the second meeting. At this meeting, the creditors may vote for the company to be wound up or to give back control of the company to the directors, thus ending the administration, rather than executing a DOCA. Further, if the company fails to execute a DOCA within 15 business days of a successful resolution at a second creditors' meeting, the company will enter into a creditors' voluntary winding up. Once executed, if there is a material contravention of the DOCA by the debtor company, a creditor or other interested person may apply for the termination of an executed DOCA by an order of the court. If an order is granted, the company again enters into a creditors' voluntary winding up.

An aggrieved creditor might also look to terminate a DOCA on the grounds of, for example, unfair prejudice.

Corporate procedures

Deregistration can be voluntary upon the application of the company, a director, a member or a liquidator, and can be initiated by ASIC or court-ordered in circumstances where the company has no assets or liabilities, or its winding up has been finalised. Upon the deregistration of the company, it ceases to exist as a corporate identity.

Also, ASIC may unilaterally deregister a corporation if it has reason to believe that the company is no longer carrying on its business, has been fully wound up, has been at least six months late in lodging its annual return or has not lodged the relevant corporate documentation (including financial reports) required by the Act in the preceding 18 months. There is, however, a process under the Act for the reinstatement of deregistered companies in certain circumstances.

Conclusion of case

There are three outcomes of a voluntary administration upon which the creditors decide:

- entering into a DOCA;
- winding the company up; or
- terminating the administration.

The outcome chosen will dictate how the voluntary administration ends. Once a DOCA is executed, the company comes out of voluntary administration, and if the administration terminates, the administrative