The application of the United Nations Convention on the Rights of the Child by national courts

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Chapter 4: Australia

4. 1 Introduction

Australia is a jurisdiction with a complex interaction between the CRC and domestic law. This complexity arises from the unincorporated status of the CRC, the federal structure of the state and the variety of courts that apply the Convention. Australian cases reveal aspects not encountered in the other jurisdictions discussed in this work, and thus help conceptualise the role of the courts in giving domestic effect to the CRC.

The jurisprudence of three superior courts – the High Court of Australia ('the HCA'), the Full Court of the Family Court ('the FCFC') and the Victoria Supreme Court ('the VSC') – is analysed. The jurisprudence of the High Court is of interest considering that this is the highest Australian court[1] and the ultimate decision-maker concerning the relationship between treaties and domestic law. The FCFC and the VSC have distinct jurisdictions informed by special statutes (family law legislation and a human rights statute, respectively), which permit them to engage with the Convention differently from the HCA, and warranting therefore separate consideration.

The study proceeds with a general presentation of the relationship between international and Australian domestic law, followed by a discussion of the relationship between the domestic law and the CRC. Part 4.4 is dedicated to the case law, and it is followed by an analytical part and the conclusions.

4.2 The relationship between international treaties and Australian law[2]

Australia is a common law system of Anglo-American tradition, with a federal structure consisting of States and Territories. The legislative power is divided between State and federal legislatures, with the Commonwealth ('Cth') Parliament having the power to legislate only in

[1] Australian Law Reform Commission (2002) *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation ('ALRC Report 92')* at 98 (online).
[2] See generally, A Devereux and S McCosker 'International Law and Australian Law' in D Rothwell and E Crawford (eds) *International law in Australia* (2017) 23.

the domains explicitly provided in the Constitution.[3] States have residual legislative power but federal law prevails over inconsistent state law.[4]

Treaties are negotiated and entered into by the Commonwealth executive,[5] with limited involvement of the Commonwealth Parliament and the States/Territories.[6] The Commonwealth Parliament has the power to make laws in relation to 'external affairs',[7] including laws to give effect to treaties ratified by the Commonwealth executive. Legislating under the external affairs power allows the Commonwealth to make laws in matters which are otherwise under the jurisdiction of the States. The Commonwealth Parliament has not enacted special laws to give effect to human rights treaties[8] (save anti-discrimination treaties on grounds of race, sex and disability),[9] allegedly to avoid an interference into the legislative powers of the States.[10]

The government has been often criticised for its failure to enact a consolidated federal Bill of Rights.[11] The official view is that the existing law (legislation and common law) provides adequate human rights protection,[12] and that the passing of a Bill of Rights is not necessary.[13] However, the human rights protection system is 'hard to pin down'.[14] Very few rights are explicitly or implicitly protected in the Constitution,[15] and those which are, embody freedoms developed at common law, rather than 'general principles of broad statement'[16] like those found in human rights instruments. Federal statutes[17] and common law[18] provide some human

[3] Section 51 of the Commonwealth of Australia Constitution Act 1900/1901 ('the Constitution').
[4] Section 109 of the Constitution.
[5] Section 61 of the Constitution.
[6] The Constitution does not require their participation, but a policy has developed to allow for their input prior to the taking of binding treaty action. See Devereux and McCosker 2017 note 2 at 26.
[7] Section 51(xxix) of the Constitution.
[8] H Charlesworth and G Triggs 'Australia and the International Protection of Human Rights' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 11 at 129.
[9] Ibid at 128.
[10] Ibid at 129; H Charlesworth 'The UN and Mandatory Sentencing' 2000 (25) *Australian Children's Rights News* 1 at 4. But see *Commonwealth v Tasmania* (1983) 158 CLR 1.
[11] For unsuccessful efforts to introduce a federal human rights statute, see Charlesworth and Triggs 2017 note 8 at 125-127; A Pert 'The Good International Citizenship of the Rudd Government' 2012 (30) *Australian Year Book of International Law* 93 at 112-113. Two States (Australian Capital Territory and Victoria) have passed human rights statutes: Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).
[12] This view is criticised by, for example, G Triggs (2016) *Human rights across the Tasman: a widening gulf*, The Hotung Fellowship Public Lecture, 6 April 2016 (online) and D Otto 'From "reluctance" to "exceptionalism": The Australian approach to domestic implementation of human rights' 2001 (26) *Alternative Law Journal* 219 at 221.
[13] Commonwealth of Australia (2007) *Common Core Document forming part of the reports of States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights June 2006* para 83 (online). Similarly, Heydon J in *Momcilovic v The Queen* [2011] HCA 34.
[14] Otto 2001 note 12 at 221.
[15] P Bailey *The Human Rights Enterprise in Australia and Internationally* (2009) at 239.
[16] Ibid at 269-271.
[17] For example, the Family Law Act 1975 (Cth) protects some children's rights in the context of the relationship between parents and children.
[18] Charlesworth and Triggs 2017 note 8 at 121. See Australian Human Rights Commission ('the AHRC') (not dated) *Common law rights, human rights scrutiny and the rule of law* (online). For divergent views in relation to the effectiveness of human rights protection at common law, see R French (2009) *The Common Law and the Protection of Human Rights*, Paper presented at the Anglo Australasian Lawyers Society ('French 2009a'); J Southalan (2011) *Common Law v Human Rights: Which Better Protects Freedoms?* (online) cf A Nicholson 'The

rights protection that overlaps with human rights treaties, but there are differences in the scope and the nature of protection,[19] and the common law is vulnerable to statutory override.[20] None of the rights recognised at common law are socio-economic rights or are child-specific.[21]

Australia follows a dualist tradition to the relationship between national law and international treaties.[22] The Constitution has limited provisions concerning the relationship between international and domestic law, the issue being determined primarily by common law.[23] A transformation approach is taken in relation to treaty obligations,[24] under which ratified treaties do not become domestically binding unless incorporated by legislation.[25] Certain human rights instruments, including the CRC,[26] have been attached in schedules to the Australian Human Rights Commission Act 1986 ('the HRCA'; formerly known as the Human Rights and Equal Opportunity Commission Act 1986).[27] This process does not amount to incorporation,[28] but the Commission can inquire into acts and practices contrary to the human rights provided in the attached instruments.[29] This is a 'curious position'[30] that allows the Commission to draw attention to breaches of international human rights which are not of direct application domestically.[31] Some courts have stressed that the scheduling enhances the status of declared instruments,[32] but its concrete benefits remain uncertain.[33]

The lack of incorporation or transformation of a treaty does not deny its relevance for Australian law. Its effect is indirect, and includes influencing the development of the common law, informing statutory and, more controversially, constitutional interpretation, and influencing the exercise of administrative power and executive discretion.[34] Reliance on

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United Nations Convention on the Rights of the Child and the Need for Its Incorporation into a Bill of Rights' 2006 (44) *Family Court Review* 5 at 10.

[19] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth); Australian Law Reform Commission ('the ALRC') (2016) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report 129) paras 2.45 – 2.46 (online).

[20] Charlesworth and Triggs 2017 note 8 at 121.

[21] For the rights recognised at common law, see, for example, R French (2010) *Protecting Human Rights Without a Bill of Rights,* Paper presented at the John Marshal Law School, Chicago at 26-27 (e.g. right of access to courts; privilege against self-incrimination; no deprivation of liberty except by law, etc) (online).

[22] A 'clear cut dualism', according to R French (2009) *Oil and Water? – International Law and Domestic Law in Australia*, The Brennan Lecture, Bond University (online) ('French 2009b') at 30.

[23] Devereux and McCosker 2017 note 2 at 26.

[24] Ibid at 25.

[25] Ibid at 27. See Mason CJ and McHugh J in *Dietrich v R* [1992] HCA 57 ('*Dietrich'*) para 17.

[26] The CRC became a declared instrument on 22 December 1992 (A Twomey 'Minister for Immigration and Ethnic Affairs v Teoh' 1995 (23) *Federal Law Review* 348 at 360).

[27] See the Commission's website at https://www.humanrights.gov.au/our-work/legal/legislation.

[28] K Walker and P Mathew 'Minister for Immigration v Ah Hin Teoh'1995 (20) *Melbourne University Law Review* 236 at 249; I Shearer et al 'International Law Association Committee on International Law in National Courts: Report of the Australian Branch' 1994 *Australian Year Book of International Law* 231 n 37.

[29] On the nature and the extent of these powers, see Charlesworth and Triggs 2017 note 8 at 130.

[30] Ibid at 129. Some authors have called this 'quasi-incorporation' (Shearer et al 1994 note 28 at 240).

[31] Charlesworth and Triggs 2017 note 8 at 129.

[32] *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (see part 4.2.3 below) endorsing the position of Einfeld J in *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 ('*Magno*') that scheduled international instruments 'should have significant application in Australia' (para 48).

[33] J Single 'The Status of the UN Convention on the Rights of the Child in Australian Law' 1999 (9) *Polemic* 36 at 37.

[34] Devereux and McCosker 2017 note 2 at 36-44.

international law to interpret the Constitution is limited and controversial,[35] with only isolated judicial voices supporting it.[36] The impact of international human rights treaties on the common law has not been far-reaching,[37] and there are divergent judicial opinions especially in relation to the legitimacy of the influence exercised by unincorporated treaties.[38]

Various intersecting[39] presumptions of statutory interpretation allow for the influence of international treaties on domestic law. The presumption of consistent interpretation had its 'precise parameters ... stated differently in different cases',[40] with some judges expressing hostility toward it.[41] The presumption that legislation is to be interpreted as far as its language permits in conformity to an international treaty applies in relation to legislation which seeks to give effect to such treaty.[42] It also extends to other legislation, if the treaty precedes the legislation.[43] In *Teoh* it was said that the presumption applies 'because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law'.[44] The presumption may be fortified by the Parliament having expressed some domestic commitment to the treaty,[45] even when such commitment falls short of incorporating or transforming a treaty into domestic law.

For this presumption to apply, ambiguity in a statute is required.[46] While some authors have challenged this requirement,[47] others have defended its application as reflecting the parliamentary supremacy and the institutional role of the courts.[48] Some judges support a wider construction of the notion of 'ambiguity'[49] which is said to exist '[i]f the language of the

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[35] Ibid at 42.

[36] Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-658; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-418; *Al-Kateb v Godwin* [2004] HCA 37 ('*Al-Kateb*')). The position has been resisted by other High Court judges (*AMS v AIF* (1999) CLR 160, 180; see *Al-Kateb* per McHugh J).

[37] Devereux and McCosker 2017 note 2 at 38.

[38] It was supported by Brennan J in *Mabo and others v Queensland* (No. 2) [1992] HCA 23 ('*Mabo'*) para 42; Brennan J in *Dietrich* para 9. Mason CJ and Deane J in *Teoh* (para 28) were cautious in relation to unincorporated treaties, and Calinnan J in *Western Australia v Ward* [2002] HCA 28 ('*Ward'*) was averse to developing the common law in accordance to international law (para 958).

[39] B Horrigan 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' 2012 (37) *Alternative Law Journal* 228 at 230.

[40] Devereux and McCosker 2017 note 2 at 39.

[41] McHugh J, according to D Meagher 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' 2012 *New Zealand Law Review* 465 at 472-473. See McHugh J in *Al-Kateb* para 65.

[42] P Herzfeld and T Prince *Statutory Interpretation Principles: The Laws of Australia* (2014) at 179. Same presumption applies in relation to customary international law (*Polites v Commonwealth* (1945) 70 CLR 60, 68-69 (Latham CJ) ('*Polites'*)).

[43] Herzfeld and Prince 2014 note 42 at 180.

[44] *Teoh* per Mason CJ and Deane J para 26 fn omitted.

[45] See, generally, Meagher 2012 note 41.

[46] For a view that ambiguity is not required, see Meagher 2012 note 41 at 485. On the meaning of ambiguity, see J Spigelman 'Statutory Interpretation: Identifying the Linguistic Register' 1999 (4) *Newcastle Law Review* 1 at 2-3.

[47] D Dyzenhaus, M Hunt and M Taggart 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' 2001 (1) *Oxford University Commonwealth Journal* 5 at 25.

[48] W Lacey 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' 2004 (5) *Melbourne Journal of International Law* 108 at 123-124 ('Lacey 2004a').

[49] This approach was pioneered in *Teoh* (Walker and Mathew 1995 note 28 at 243). Other cases in which it was followed include *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5 (per Kirby J); *AMS v AIS* (per Gleeson CJ, McHugh and Gummow JJ para 50); *Minister for Immigration and Multicultural*

legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia'.[50] In such case, 'that construction should prevail'.[51] The wider meaning of 'ambiguity', which is predicated not on the linguistic clarity *per se* but on the existence of a choice of meanings, is more conducive to the use of international law. However, a wide view of 'ambiguity' is not endorsed by all judges, some rejecting the argument that a statute should be construed in line with international law 'wherever possible', and in the absence of 'genuine ambiguity'.[52]

A further presumption of statutory interpretation is that the Parliament is presumed not to intend to limit fundamental human rights, unless that intention is clearly and unequivocally expressed.[53] This presumption applies in relation to fundamental rights recognised at common law,[54] although the list of rights is not 'settled'.[55] The application of the presumption to unincorporated human rights is uncertain and controversial,[56] and ultimately unlikely in the absence of some statutory commitment to international human rights treaties.[57]

The caveat to both interpretive presumptions is that they do not operate when the will of the Parliament is clearly contrary to international law.[58]

Although not establishing presumptions of interpretation, the Acts Interpretation Act 1901 (Cth) creates opportunities to rely on international law as extrinsic statutory interpretation material.[59] Sections 15AB(1) and (2)(d) of the Act authorise reliance on an international treaty 'referred to' (section 15AB(2)(d)) in that statute, in order to confirm the ordinary meaning of the text or resolve an ambiguity.[60] When there is no ambiguity, a treaty 'referred to' in a statute may be relied on for interpretation purposes if the meaning of the statute is manifestly absurd or unreasonable.[61] Thus, when a treaty is mentioned in a statute, the courts can refer to it to interpret that statute even in the absence of ambiguity, if the treaty 'is capable of assisting in

and Indigenous Affairs v B [2004] HCA 20 (per Kirby J para 143); *Al-Kateb* per Kirby J para 168, but disapproved of by McHugh J para 65); *Kartinyeri v The Commonwealth* [1998] HCA 22 (per Gummow and Hayne JJ para 97).

[50] *Teoh* per Mason CJ and Deane J para 27 fn omitted. To paraphrase French CJ in *Momcilovic*, the *Teoh* ambiguity does not have 'negative connotations' (para 50).

[51] *Teoh* per Mason CJ and Deane J para 27 fn omitted.

[52] *Ward* per Callinan J para 955 (both quotes).

[53] AHRC (not dated) note 18; M Sanson *Statutory Interpretation* (2012) at 207. This is known as the 'principle of legality' (French CJ *in Momcilovic* para 43; Meagher 2012 note 41; Horrigan 2012 note 39 at 229).

[54] There may be some support from judges writing extrajudicially for extending the presumption beyond common law rights: M Kirby 'Chief Justice Nicholson, Australian Family Law and International Human Rights' 2004 (5) *Melbourne Journal of International Law* 221 at 230; French 2010 note 21 at 30; Spigelman 1999 note 46 at 15-16.

[55] ALRC 2016 note 19 para 2.29.

[56] Dyzenhaus, Hunt and Taggart 2001 note 47 at 6; French 2009b note 22 at 37; Meagher 2012 note 41; French CJ in *Momcilovic* para 43.

[57] Meagher 2012 note 41 at 483, 485.

[58] *Al-Kateb* at 581; *Momcilovic* per French CJ para 43. French 2010 note 21 at 27.

[59] Devereux and McCosker 2017 note 2 at 39.

[60] Section 15AB(1)(a) and (b)(i) read with section 15AB(2)(d).

[61] Section 15AB(1)(b)(ii) read with section 15AB(2)(d). See also Shearer et al 1994 note 28 at 239.

the ascertainment of the meaning of the provision'.[62] In order to make use of the interpretive opportunities provided in the Act, it is sufficient for the treaty to have been mentioned in the second reading speech in the Parliament,[63] even if it was not referred to in the final form of the Act.

Unincorporated treaties may also affect the exercise of administrative and executive discretion.[64] In *Teoh*, the HCA crafted a new method to give effect to an unincorporated treaty by extending the scope of the administrative law doctrine of legitimate expectation,[65] as discussed further in part 4.4.4 below.

According to some authors, a new form of engagement with unincorporated international treaties is emerging, namely the reliance on international treaties in the exercise of *judicial* discretion.[66] The substantial protection of rights continues to depend on their recognition at common law, and the exercise of discretion must comply with existing authorities.[67] The judicial officer has the option to take an incorporated treaty into account as a relevant factor, but has no legal obligation to ensure that the decision conforms with the treaty[68] or that the treaty is taken into account.[69]

Judges' attitude to international law is also relevant. The dominant judicial view is that legislation or official conduct is assessed against domestic standards, and potential breaches of international law are to be sanctioned in the international sphere.[70] Thus, for some judges, international law '"either binds fully or it does not bind"' or '"it is either relevant or irrelevant"'.[71] More nuanced views have also been expressed. The result is a kaleidoscope of judicial views that ranges from enthusiasm[72] to caution[73] and to strong opposition to what some call the 'often ambiguous'[74] or 'often vague and conflicting'[75] international norms.

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[62] *Magno* per Gummow para 20. See also M Allars 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' 1995 (17) *Sydney Law Review* 204 at 205.
[63] *Magno* per Gummow paras 19-20; Devereux and McCosker 2017 note 2 at 41.
[64] Ibid at 44.
[65] M Groves 'Treaties and Legitimate Expectations – The Rise and Fall of *Teoh* in Australia' 2010 *Monash University Law Research Series* 8; W Lacey 'In the Wake of *Teoh*: Finding an Appropriate Government Response' 2001 (29) *Federal Law Review* 219 at 232; M Taggart '"Australian Exceptionalism" in Judicial Review' 2008 (36) *Federal Law Review* 1 at 17.
[66] Discretion is 'the space between laws' in which judges and administrators can chose 'between several different, but equally valid, courses of action' in order to make just decisions in response to individual situations (Lacey 2004a note 48 at 110).
[67] Ibid at 116.
[68] *Kioa v West* (1985) 159 CLR 550 ('*Kioa'*) per Gibbs CJ para 21.
[69] *Kioa* per Brennan J para 40.
[70] Criticised by Charlesworth 2000 note 10 at 1.
[71] H Charlesworth 'The High Court and Human Rights' in P Cane (ed) *Centenary Essays for the High Court of Australia* (2004) 356 at 368. See Callinan J in *Ward* [2002] HCA 28 para 956
[72] Kirby J (former justice of the High Court 1996-2009); Nicholson CJ (former CJ of the Family Court 1988-2004).
[73] French (2009b note 22) raising concerns about international law being an 'elusive' concept, which still faces 'taxonomical challenges'.
[74] *Ward* per Callinan para 956.
[75] *Ward* per Callinan J para 958.

The effectiveness of human rights protection in Australia has often been criticised. Thus, common law or treaty rights may be superseded by statutes made by the Parliament,[76] which has also undone or pre-empted progressive human rights jurisprudence.[77] The very detailed legislation passed by the federal Parliament has prevented the application of rights-protective interpretive presumptions[78] and has curtailed administrative and judicial discretion by leaving no flexibility to dispense individualised justice or consider international human rights.[79] Superior courts 'have tended to respect the words of the statute, even where the consequence is an egregious breach of the most fundamental of human rights'.[80] In doing so, they show a concern about the legitimacy of judicial protection of unincorporated rights, which contrasts with their willingness to protect common law rights.[81] The context in which the human rights discourse operates is politicised,[82] and the absence of a legislative 'scaffolding on which to build a human rights culture'[83] leads to a weak general public support for human rights. Further, many human rights cases, including concerning children, relate to immigration matters, which are politically sensitive.[84]

The 'partial and porous'[85] protection of human rights creates a 'legacy of exceptionalism and isolation from global human rights jurisprudence'.[86] The relevance of international law 'is questioned and a sense of self-sufficiency is promoted within domestic legal discourse'.[87] Indeed the legal context is that 'such [international] instruments can safely be ignored in the determination of most legal issues under Australian law'.[88] There is habitual rejection of the views of international human rights bodies,[89] and a disappointing 'failure to face a reasoned

[76] Triggs 2016 note 12.
[77] See Bailey 2009 note 15 at 268, 343-344; Charlesworth and Triggs 2017 note 8 at 130-131. For changes to the immigration legislation following successful litigation against the government, see P Mathew 'Nationality, Asylum and Refugee Law in Australia' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 165 at 195-197; G Triggs 'An Interview with Professor Gillian Triggs on the Impact of International Human Rights on Domestic Law' 2013 (20) *Pandora's Box* 54 at 60.
[78] Charlesworth and Triggs 2017 note 8 at 137.
[79] Bailey 2009 note 15 at 218.
[80] Triggs 2016 note 12. It has been argued, however, that the courts have narrowed the meaning of non-justiciability under the influence, amongst others, of international standards (see, generally, R Thwaites 'The Changing Landscape of Non-Justiciability' 2016 *New Zealand Law Review* 31).
[81] Meagher 2012 note 41 at 478.
[82] For insights, see H Charlesworth (2006) *Human rights: Australia versus the UN* (Democratic Audit of Australia, Australian National University) at 5 (online); S Joseph 'The Howard Government's Record of Engagement with the International Human Rights System' 2008 *Australian Year Book of International Law* 45 at 48; A Pert and H Nasu 'Australia and International Organisations' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 95.
[83] Triggs 2016 note 12. Also, Charlesworth and Triggs 2017 note 8 at 118.
[84] Taggart 2008 note 65 at 6; Triggs 2016 note 12.
[85] Charlesworth and Triggs 2017 note 8 at 129.
[86] Triggs 2016 note 12. Also, Otto 2001 note 12; Taggart 2008 note 65.
[87] J Tobin 'Finding rights in the "wrongs" of our law: Bringing international law home' 2005 (30) *Alternative Law Journal* 164 at 164.
[88] A Nicholson (2002) 'Australian Judicial Approaches to International Human Rights Conventions and "Family Law"', Paper presented at The Miller Du Toit Conference, Cape Town ('Nicholson 2002a') at 15 (online).
[89] Joseph 2008 note 82 at 52-53. Also, Pert 2012 note 11 at 122; Charlesworth and Triggs 2017 note 8 at 133.

challenge'[90] from international bodies. This 'ultimately renders the Australian legal landscape increasingly barren and detached from evolving international developments'.[91]

It is in this legal and political context that the interaction between the CRC and judicial reasoning in Australia needs to be understood.

4.3 Australia and the CRC

Australia ratified the CRC in 1990,[92] but its position in relation to the CRC 'is more than a little uncertain'.[93] The country remains 'obstinate in its refusal to implement the CRC'[94] despite domestic and international calls for federal protection of Convention rights.[95] The official position is that the enactment of the CRC was not necessary because prior to ratification, the government ensured that domestic law complied with it.[96] Concerns have been expressed, however, including by the CRC Committee, over the conformity with the Convention of legislation and practices on issues such as immigration detention; mandatory sentencing in some States; alternative care; lack of prohibition of corporal punishment; right to privacy and protection of family life; the absence of a right to approach courts with claims of violation of CRC rights; the reservation to article 37(c); and the treatment of indigenous children.[97] The status of the CRC in the domestic law and opportunities for the courts to apply it have been also been queried by the Committee,[98] which expressed concern that the Convention 'cannot be used by the judiciary to override inconsistent provisions of domestic law'.[99]

[90] Bailey 2009 note 15 at 337.
[91] Tobin 2005 note 87 at 164.
[92] It ratified the CRC on 17 December 1990 (United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online). It made a reservation to article 37(c) (second sentence) (ibid note 92).
[93] F Bates 'Australia: The Certain Uncertainty' in E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (2012) 47 at 48.
[94] J Tobin 'The Development of Children's Rights' in L Young, M Kenny and G Monahan (eds) *Children and the Law in Australia* (2016) 25 at 26.
[95] Commonwealth of Australia (2009) *National Human Rights Consultation Report* at 347 (online); Charlesworth and Triggs 2017 note 8 at 127; CRC Committee (1997) *Concluding observations of the Committee on the Rights of the Child: Australia* para 9; CRC Committee (2012) *Concluding observations: Australia* paras 11, 12.
[96] Australia (1995) *Australia's Report under the Convention on the Rights of the Child* para 6; CRC Committee (2005) *Summary record of the 1054th meeting* para 30).
[97] Australian Human Rights Commission (2014) *The Forgotten Children: National Inquiry into Children in Immigration Detention* at 25-37 (online); CRC Committee (2005) *Concluding observations: Australia*. CRC Committee (2012) *Summary record of the 1708th meeting* para 22; CRC Committee (2012) *Concluding observations: Australia* para 80 (c); CRC Committee (1997) *Concluding observations: Australia* paras 7-9, 15, 20 and 22. The Australian delegation that presented the Australian country report to the Committee disagreed with the critical remarks of the latter in relation to corporal punishment and mandatory sentencing (CRC Committee (1997) *Summary record of the 404th meeting* para 19; (1997) *Summary record of the 405th meeting* para 78; (2005) *Summary record of the 1055th meeting* para 55).
[98] CRC Committee *Concluding Observations* 2005 paras 18, 19 and 58.
[99] Ibid para 9.

Issues covered by the CRC fall under the legislative powers of the State and the federal parliaments.[100] The Commonwealth has legislative powers in relation to marriage and parental rights ((sections 51(xxi) and 51(xxii) of the Constitution), while public law issues (child protection, juvenile justice and adoption, for example) belong to the States.[101] The Commonwealth may legislate on CRC-relevant issues that are normally under the States' competence by relying on its external affairs powers. However, it has been reluctant to do so,[102] even when State legislation was in conflict with the CRC.[103]

Although it remains un-incorporated, the CRC has influenced federal developments in law and policy.[104] It has had, for example, a significant impact on the reform of the Family Law Act in 1995,[105] including the import into the Act of the notion of the best interests of the child[106] and the formulation of some provisions in a rights language.[107] This reform has been 'extremely complex',[108] bringing up the concern that 'the erosion of judicial discretion by a continuing process of legislative specificity'[109] might undermine the rights of children. No explicit reference was made to the CRC in the Family Law Act until its amendment in 2011 (effective June 2012),[110] when section 60B(4) was introduced.[111] It reads:

> An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

The Parliament indicated that the amendment does not incorporate the Convention,[112] which is to be used as an interpretation aid for Part VII in case of ambiguity, with the Act prevailing in case of inconsistency.[113] Considering the government's insistence that its laws complied with the CRC at the time of ratification,[114] one may ask why was it necessary to amend the Act in

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[100] R Shackel 'The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations' in O Cvejić Jančić (ed) *The Rights of the Child in a Changing World, Ius Comparatum – Global Studies in Comparative Law* 13 (2016) 37 at 41.
[101] Nicholson 2002a note 88 at 1-2.
[102] M Rayner 'The state of children's rights in Australia' in B Franklin (ed) *The New Handbook of Children's Rights: Comparative policy and practice* (2002) 345 at 350; Single 1999 note 33 at 38.
[103] Nicholson 2006 note 18 at 23.
[104] Single 1999 note 33 at 37; Tobin 2016 note 94 at 31.
[105] J Behrens and P Tahmindjis 'Family Law and Human Rights' in D Kinley (ed) *Human Rights in Australian Law* (The Federation Press, Sydney 1998) 169.
[106] Single 1999 note 33 at 37. Also, A Dickey *Family Law* (2014) at 305.
[107] F Bates '"Out of Everywhere into Here" – The Disparate Bases of Childrens' (sic) Rights in Australia' 2007 (15) *Asia Pacific Law Review* 235 at 250; A Sifris 'Children in Immigration Detention: The Bakhtiyari family in the Family Court' 2004 (29) *Alternative Law Journal* 212 at 216. See sections 60(2)(b) and (c); 60B(2)(a) of the Family Law Act.
[108] Bates 2012 note 93 at 60.
[109] Ibid at 73.
[110] Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011. Also, M Fernando 'Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children's Participation?' 2013 (36) *UNSW Law Journal* 88 at 88 and 91.
[111] It was introduced in Part VII of the Act, titled 'Children', and dealing with the relationship between children and parents, or between parents.
[112] See the Parliament of the Commonwealth of Australia (2010-2011) *Replacement Family Law Legislation Amendment (Family Violence and other Measures) Bill, 2011 Replacement Explanatory Memorandum* para 24 (online) ('the *Replacement Memorandum'*). Also, Fernando 2013 note 110 at 91.
[113] *Replacement Memorandum* note 118 para 24.
[114] The last such statement was made in the 2018 report submitted to the Committee (Australia (2018) *Australia's joint fifth and sixth report under the Convention on the Rights of the Child* (online).

1995, and then again in 2011, the latter time even stating that the object of amended Part VII was 'to give effect' to the CRC?

In addition to the Family Law Act, other federal statutes have been influenced by and mention the CRC.[115] Further statutory protection exists in child protection, consumer protection, education, and anti-discrimination,[116] but it is 'limited and piecemeal'.[117] The status of the CRC as a declared instrument under the Human Rights Commission Act has prompted some judicial attention, as discussed in part 4.4.1 below.

In general, the CRC is not widely embraced, with misconceptions in relation to its effects on sovereignty, federal balance, and impact on child-parent relationships.[118] There is apprehension about its 'vague and general terms' and lack of 'sufficient detail to provide any real guidance'; the 'conditional language and qualified terms which are contained in many of the articles [and which] undermine any rights which may have been created …'.[119] The gulf between the likes and dislikes inspired by the CRC makes it 'highly unlikely that any genuine intellectual currency is likely to be transacted'[120] between its supporters and detractors. These difficulties are compounded by a lack of solid and uncontested domestic children's rights foundation.[121] Consequently, the rights of children 'play little part in the mundane operation of the law' and 'no coherent picture has emerged, is emerging, or is likely so to do'.[122] This is illustrated in the case law presented below.

4.4 The case law

This consideration of the relevant case law is structured according to the categories of engagement presented in part 4.2 above. Part 4.4.7 presents separately the case law of the VSC after the coming into force of the 2006 Victoria Charter to illustrate the impact of this statute on the engagement of domestic courts with the CRC. As discussed in Chapter 1, only cases in which there is some meaningful engagement with the Convention have been closely analysed.

[115] Sex Discrimination Act 1984 (section 4); Australian Human Rights Commission Act 1986 (sections 46C and 46MB); Privacy Act 1988 (amended; section 12B); Age Discrimination Act 2004 (section 10); Human Rights (Parliamentary Scrutiny) Act 2011 (section 3); Workplace and Gender Equality Act 2012 (section 5); National Disability Insurance Scheme Act 2013 (section 3); Enhancing Online Safety for Children Act 2015 (sections 4, 12).
[116] Shackel 2016 note 100 at 42.
[117] Tobin 2016 note 94 at 26. Similarly, Nicholson 2002a note 88 at 5.
[118] 51% of the submissions to the Joint Standing Committee on Treaties opposed the CRC on the grounds indicated above (Joint Standing Committee on Treaties, The Parliament of the Commonwealth of Australia (1998) *United Nations Convention on the Rights of the Child* at ix (online)). See also M Jones 'Myths and facts concerning the Convention on the Rights of the Child in Australia' 1999 (5) *Australian Journal of Human Rights* 126 at 128.
[119] Bates 2007 note 107 at 245.
[120] Ibid at 244.
[121] Bates argues that one of the problems with children's rights protection in Australia is their disparate sources such as the Constitution, the CRC, foreign case law or legislation, historical principles and even uncertain sources (ibid at 255).
[122] Ibid at 258.

A brief quantitative account of cases mentioning the CRC may be useful. On 26 October 2018 (last date of search on Australasian Legal Information Institute (*Austlii*) database), 26 HCA cases mentioned the CRC, of which six did not involve children or their rights and one was on appeal from the Supreme Court of Nauru.[123] There were 131 cases in the Family Court, 22 in the FCFC and 25 in the VSC that mentioned the CRC.[124]

4.4.1 Judicial consideration of the legal status of the CRC in Australian law

The HCA treats the CRC as an unincorporated treaty which cannot create domestic rights directly[125] and inconsistency with which does not affect the validity and the application of domestic law. In *Minister for Immigration and Multicultural and Indigenous Affairs v B,*[126] Kirby J was ready to accept that the Australian law breached the country's international obligations,[127] but decided that while the courts 'can note and call attention to the issue'[128] they are bound to act according to a valid statute and the Constitution.[129] When the language of a statute is clear, even 'intractable',[130] the courts must give it effect.[131] The Migration Act 1958 (in that case) was clear and reflected a 'deliberate decision'[132] to detain children who were illegal immigrants,[133] to which the courts were bound to give effect.

The importance of the Convention has been acknowledged by some judges. In *Teoh,* the existence of a legitimate expectation arising from the ratification of the Convention was linked with the fact that the 'instrument evidences internationally accepted standards'.[134] Gaudron J found the Convention significant because it 'gives expression to a fundamental human right which is taken for granted by Australian society'.[135] In *Re Woolley*, the CRC was thought to be 'unquestionably an important consideration of legislative policy',[136] albeit one that cannot prevail over a domestic statute. Bell J in the VSC found that '[o]f cardinal importance, it [the CRC] is now the primary source of international law on the human rights of children'.[137] By contrast, for other judges, its ratification 'is, by its very nature, a statement to the international community … How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament'.[138] Similarly, '[t]he non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it'.[139] The endorsements of the

[123] *DWN027 v The Republic of Nauru* [2018] HCA 2. The case is not discussed because in appeals from Nauru, the HCA applies Nauru laws. The *Austlii* database is available at http://www.austlii.edu.au/ .
[124] Date of search: 24 May 2017 (the reporting by *Austlii* in relation to the VSC only started in 1998).
[125] *Teoh* per Mason CJ and Deane J para 25; per McHugh para 35.
[126] [2004] HCA 20 ('*MIMIA v B'*) (discussed below).
[127] *MIMIA v B* per Kirby J paras 147, and 151-153.
[128] Kirby J para 171.
[129] Kirby J para 155.
[130] Kirby J para 159.
[131] Kirby J para 155 and 171.
[132] Kirby J para 188.
[133] Kirby J paras 157-158 and paras 160-169.
[134] *Teoh* per Mason CJ and Deane J para 34.
[135] *Teoh* per Gaudron J para 6. However, the same significance might not be attached to 'a treaty or convention that is not in harmony with community values and expectations' (ibid).
[136] *Re Woolley* per Gleeson CJ para 31.
[137] *ZZ v Secretary, Department of Justice* [2013] VSC 267 para 62.
[138] *Teoh* per McHugh J para 37.
[139] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 per Callinan J para 147.

domestic importance of the CRC by HCA judges have remained of only symbolic value, as positive outcomes have seldom arisen from its consideration by this Court.

The Family Court was keener to address the domestic status of the CRC even when this was not strictly necessary for the case at hand.[140] Except when incorporation views were expressed, the Court endorsed the classic position that the CRC cannot prevail over inconsistent domestic norms. In *Murray v Director, Family Services, ACT*[141] it was held that the CRC could not prevail over a treaty which was given some statutory recognition.[142] In *H v W,*[143] Fogarty and Kay JJ said that despite its importance, the CRC does not entitle a court to 'disregard or overrule' specific provisions of the Family Law Act (the paramountcy of a child's best interests) to give effect to article 12 of the CRC.[144] In *KN & SD & Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[145] a majority decided that the rights in the CRC (as incorporated domestically by the Family Law Act) could not be given effect because of their inconsistency with the Migration Act.[146]

A majority of the Full Court in *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs*[147] advanced the view that the CRC was incorporated into the domestic law through amendments to the Family Law Act. The decision was set aside unanimously by the High Court in *MIMIA v B*.

The case raised questions in relation to the scope of the welfare jurisdiction of the Family Court in section 67ZC(1) of the Family Law Act 1975 (Cth) following the amendments made by the Family Law Reform Act 1995.[148] The case was unusual because the applicants approached the Family Court under its welfare jurisdiction[149] rather than the Federal Court or the High Court that customarily decide immigration matters.[150] It was hoped that the Family Court would be

[140] In *Murray v Director, Family Services, ACT* [1993] FamCA 103, the CRC did not have 'a significant role to play' (Nicholson CJ and Fogarty J paras 153, 160). In *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 the extensive discussion on the CRC and its relationship with the Family Law Reform Act 1995 was *obiter*, and in *B and B v MIMIA*, the Court relied on the CRC in the alternative.
[141] [1993] FamCA 103 ('*Murray*').
[142] *Murray* per Nicholson CJ and Fogarty J paras 153, 160. It was argued that a conflict existed between article 3 of the CRC and the mandatory return provisions in the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ('the Hague Convention'), the latter being a Convention partially incorporated domestically. The majority found that no conflict existed, because both treaties sought the protection of children's best interests.
[143] *H v W* [1995] FamCA 30 ('*H v W'*).
[144] *H v W* Fogarty and Kay JJ para 64. The judges remarked that when a court is called on to make welfare decisions, the 'self-determination' of a mature child does not arise, and the wishes of the child can be rejected (para 57). In time, however, the position in relation to the best interests and the voice of the child has become more nuanced (see *Re Jamie* [2013] FamCAFC 110).
[145] [2003] FamCA 610 ('*KN & SD*').
[146] *KN & SD* per Nicholson CJ and O'Ryan J paras 75-76.
[147] [2003] FamCA 451 ('*B and B v MIMIA'*).
[148] Section 67ZC(1) reads: 'In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children'.
[149] Dickey 2014 note 106 at 301. Examples of matters in which the Family Court has exercised its welfare powers are the sterilisation of a child for non-therapeutic purposes; authorisation of treatment for a transgender child; disclosure of parentage; relocation; obtaining a child's passport; and child abduction (ibid at 301-302).
[150] Sifris 2004 note 107 at 213; *MIMIA v B* per Kirby J para 119.

able to use its wide discretion under the Family Law Act to exempt illegal immigrants children from detention under the Migration Act.[151]

The case concerned a family of illegal immigrants (two adults and five children) held in mandatory immigration detention, who sought the release of the children on grounds that detention was harmful to them. A majority of the FCFC (Nicholson CJ and O'Ryan J) found that its welfare jurisdiction was distinct from and extended beyond the Court's jurisdiction in parental responsibility matters,[152] to include immigration detention which was harmful to children.[153] The view of the Family Court was that its welfare jurisdiction was a general jurisdiction that enabled it to make orders for the welfare of children beyond the matters in which this jurisdiction was normally exercised and, implicitly, in relation to third parties such as the Minister for Immigration. A unanimous High Court disagreed, holding that the welfare jurisdiction of the Family Court did not extend to the immigration detention of children, and the Court had no power to order the release of the children or make orders against the Minister.[154] While the majority in the FCFC engaged extensively with the CRC, only Kirby J and Callinan J gave it attention in the High Court.

The primary reasoning of the majority of the Family Court did not concern the CRC.[155] The Court relied on the CRC only in the alternative and not as 'an essential aspect'[156] of the decision. The Court set out to demonstrate that the Commonwealth Parliament exercised its external affairs powers when it introduced section 67ZC in the Family Law Act, because the Family Reform Act 1995 sought to give effect to the CRC.[157] If successful, this would justify giving an expansive meaning to the welfare jurisdiction of the Court, beyond its traditional ambit,[158] to include making orders against third parties such as the Minister of Immigration. To decide that the Parliament has indeed exercised its external affairs powers, the Court relied on various aspects, such as the close relationship between the CRC and the changes introduced by the Family Reform Act;[159] the statement made in the country's report to the CRC

[151] Ibid note 112 at 213.
[152] Which encompassed '"traditional" areas of family law, namely [those] related to residence and contact and like matters' (Nicholson CJ and O'Ryan J paras 128, 174). For comments, see L Ruddle and S Nicholes 'B & B and Minister for Immigration and Multicultural and Indigenous Affairs: Can International Treaties Release Children from Immigration Detention Centres?' 2004 (5) *Melbourne Journal of International Law* 256.
[153] See extrajudicial views by Nicholson CJ (2002a note 88 (at 8 fn omitted)), later adopted by him in *B and B v MIMIA.*
[154] Nicholson 2006 note 18 at 11.
[155] See para 106 onwards Nicholson CJ and O'Ryan J. For more on the relevant domestic issues, see Dickey 2014 note 106 at 300; Ruddle and Nicholes 2004 note 152 at 259.
[156] Nicholson CJ and O'Ryan J para 249.
[157] Demonstrating this nexus was necessary because the validity of a law passed in the exercise of the external affairs powers 'depends on whether its purpose or object is to implement the treaty' (*Victoria v The Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34). It is worth mentioning that the Family Law Act 1975 was passed by the Cth Parliament under the constitutional heads of marriage, divorce and matrimonial causes (sections 51(xxi) and (xxii) of the Constitution; see Dickey 2014 note 106 at 13-15); Sifris 2004 note 107 at 214-215.
[158] Nicholson CJ and O'Ryan J para 249.
[159] Judges noted the references to the CRC in earlier Bills, the influence of the CRC on the wording of the Act, that certain articles reflected CRC standards, the use of the term 'best interests'; and the reference to the 'rights of children' in section 43(c) of the Act (per Nicholson CJ and O'Ryan J paras 272-273 endorsing the views expressed by the Full Family Court in *B and B: Family Law Reform Act 1995*).

Committee, where 'it was claimed that the Government had implemented the Convention in the area of (*inter alia*) family law';[160] and the references to the CRC in parliamentary documents preceding the Reform Act.[161] It also noted the close relationship between the object of Part VII of the Act (section 60B) and the CRC, which pleaded in favour of section 67ZC not being approached as 'simply a re-enactment of the original welfare jurisdiction'.[162] The Court referred to articles 3(2) and 19 of the CRC to support its view that the purpose of section 67ZC was to expand the protection which the Court can secure to children through an extension of its welfare jurisdiction.[163] These aspects were 'strongly supportive of the proposition that the 1995 amendments to Part VII did intentionally incorporate certain articles of UNCROC into municipal law',[164] and that the introducing of section 67ZC in the Family Law Act 'has implemented the relevant parts of UNCROC'.[165] In dissent, Ellis J disagreed that the Family Law Reform Act 1995 incorporated the CRC because the Act did not indicate so, did not mention the CRC and did not attach it as a schedule.[166]

As the CRC was used as an alternative reasoning by the FCFC, the High Court was not bound to consider it in appeal. Thus, only Callinan J addressed the incorporation reasons. He held that the CRC may have influenced the drafting of some FLA provisions[167] and that the FLA may not be inconsistent with the CRC[168] but argued that these do not prove incorporation. Part VII of the FLA reflected no intention of the Parliament to incorporate the Convention,[169] or to implement it 'by, in some way enlarging or creating an all-embracing welfare jurisdiction'.[170] Callinan J stated that the CRC does not require the protection of children 'by a conferral of jurisdiction upon the Family Court',[171] with article 4 of the Convention leaving state parties the freedom to choose domestic means of compliance.[172]

The majority of the FCFC (Nicholson CJ and O'Ryan J) reiterated their incorporation reasons in *KN & SD & Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[173] a case decided immediately after *B and B v MIMIA*. The decision was not appealed to the HCA. The mother (of an Australian child born in 2001 and living with the father since the mother's arrest), who entered Australia illegally, was placed in mandatory immigration detention and was awaiting deportation. The majority raised the issue of incorporation in interpreting section 60B of the Family Law Act. The section provided that the object of Part VII of the Act was to ensure that children receive appropriate parenting and that the parents are able to provide it. Section 60B(2) contained principles underlining these objects and provided

[160] Nicholson CJ and O'Ryan J para 281.
[161] Nicholson CJ and O'Ryan J paras 276-278.
[162] Nicholson CJ and O'Ryan J para 283.
[163] Nicholson CJ and O'Ryan J para 287.
[164] Nicholson CJ and O'Ryan J para 275.
[165] Nicholson CJ and O'Ryan J para 288.
[166] Ellis J para 423.
[167] *MIMIA v B* Callinan J paras 221-222.
[168] Callinan J para 220.
[169] Callinan J para 220.
[170] Callinan J para 222.
[171] Callinan J para 222.
[172] Callinan J para 222.
[173] [2003] FamCA 610 ('*KN & SD*'). The case differs from *B and B v MIMIA*, because it did not involve the welfare jurisdiction of the Court and the applicant was a parent rather than the children.

that children have the right to know and be cared for by their parents, and to have regular contact with them. One of the questions was whether the rights in section 60B(2) were fundamental rights that are protected by the principle of legality.[174] To decide the point, the majority reiterated its *B and B v MIMIA* view that the CRC was 'sufficiently incorporated' into the domestic law by the Family Law Reform Act.[175] To this, the majority added two supporting arguments: the almost universal ratification of the Convention and its recognition in the HRCA.[176] It concluded that 'UNCROC has been incorporated into Australian law by (*inter alia*) s. 60B of the Act'.[177] This finding then contributed to the majority view that the CRC rights are protected by the principle of legality.[178]

The incorporation views of the FCFC are not beyond criticism, and they were considered 'controversial and less capable of immediate justification'[179] at the time. The Court's conclusion was problematic considering that Australia declared before the CRC Committee that it had no intention of enacting the CRC as domestic law, a position known to the Court.[180] The Court made far-reaching statements about the incorporation of the CRC but did not spell out what CRC rights were incorporated by which Family Law Act provisions. In *B and B v MIMIA*, section 67ZC (the welfare jurisdiction) assumed the incorporating role,[181] while in *KN & SD* section 60B seems to have performed that role.[182] While one may guess the rights being given effect to,[183] having to do so weakens the incorporation argument in that it is unlikely that the Parliament would have been so vague when taking such a significant step. It is not surprising, therefore, that the HCA judges gave little attention to the incorporation arguments.

The introduction of section 60B(4)[184] in the Family Law Act in 2011 revives the incorporation discussion. Incorporation arguments based on section 60B(4) of the FLA have been made in *Langmeil & Grange.*[185] The Court conceptualised, without deciding, two possible approaches to this section:

> Whether ... s 60B(4) requires the Court to give effect to the Convention on the Rights of the Child in an application for parenting orders or does no more than confirm, in cases of ambiguity, the obligation to

[174] See discussion in part 5.2.
[175] Para 67.
[176] Para 68.
[177] Para 68.
[178] See further discussion in part 4.4.6.
[179] Bates 2007 note 107 at 239 in relation to *B and B v MIMIA.*
[180] *B and B: Family Reform Act* 1995 para 10.12.
[181] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 288.
[182] *KN & SD* para 68.
[183] The majority in *B and B v MIMIA* refers to the implementation of 'the relevant parts of UNCROC so far as this case is concerned' (para 288). Ruddle and Nicholes argue that in the light of various constitutional constraints, only CRC provisions concerned with parental responsibilities could be said to have been incorporated (2004 note 152 at 270-271). In relation to *KN & SD*, it can be argued that given the formulation of section 60B(2) of the Act, articles 7(1) and 9(3) may have been incorporated.
[184] Cited above.
[185] *Langmeil & Grange* [2013] FamCAFC 31. In *Ralton & Ralton* [2017] FamCAFC 182 it was argued that the trial judge breached section 60B(4) and thus the CRC. The Full Court answered that although the section refers to the CRC, 'the contents of the Convention are not enshrined as operative principles of law. Ratification itself has no direct legal effect upon domestic law and the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act. Accordingly, the Court applies the Family Law Act and not the Convention' (para 18).

> interpret Part VII of the Act to the extent its language permits, consistently with the Convention, does not require determination by us. We observe that in the Explanatory Memorandum the Attorney General explained that the provision is not the equivalent to incorporation of the Convention into domestic law.[186]

The Court distinguished therefore between 'giving effect' to the CRC and using the CRC for interpretation purposes in cases of ambiguity. The immediate questions are whether 'giving effect' to the CRC would mean that the Family Court may now be authorised by statute to apply the CRC directly; and whether 'giving effect' to and relying on the CRC to clarify ambiguities in the FLA are fundamentally different and/or mutually exclusive. In *Barret & Barrett*[187] one of the appeal reasons was that the decision of the lower court breached, *inter alia*, the human rights of the children under the CRC.[188] The Full Court answered tersely that '[t]he Act sets out how a court … determines the parenting dispute, not the United Nations Convention on the Rights of the Child'[189] which is 'not yet part of the domestic law of Australia'.[190] Thus, the CRC is given effect 'through the application of the Act itself' and unincorporated 'international treaty obligations can only give assistance in the interpretation of existing domestic law and in determining its proper application so as to avoid where possible conflict with treaty and international obligations'.[191] The latter case suggests that the 'incorporation' argument has lost currency even with its original promoter, despite a more supportive formulation of the Family Law Act after the 2011 amendments.[192] The subject is not, however, free of uncertainty. There are cases where the Court does not raise the absence of incorporation to reject parties' arguments that lower courts have disregarded the CRC, and even engages somewhat with the substance of Convention norms.[193]

The case of *AS by her litigation guardian Marie Theresa Arthur v Minister for Immigration and Border Protection and Commonwealth of Australia*[194] offers insights into the limitations of giving statutory recognition to the CRC in a system of parliamentary supremacy. At stake was the meaning of section 4AA(1) of the Migration Act 1958 (Cth) which states that '[t]he Parliament affirms as a principle that a minor shall only be detained as a measure of last resort', and especially whether this gave rise to an independent and actionable statutory duty (or it created justiciable rights). It was argued that the language of the section corresponded to that of article 37(b) of the CRC, which together with other materials supported the justiciability of the mentioned section.[195] The Court accepted that the section adopted the language of article 37(b) of the CRC,[196] and that in doing so, the Parliament 'enacted, as part of Australian domestic law, the proposition that the Parliament affirmed as a principle "that a minor shall

[186] *Langmeil & Grange* para 25.
[187] [2017] FamCAFC 4 ('*Barret*').
[188] *Barret* para 112.
[189] *Barret* para 112.
[190] *Barret* para 113.
[191] *Barret* para 113.
[192] The absence of support for the incorporation argument was acknowledged by its mastermind, the former CJ of the Family Court (Nicholson 2006 note 18 at 6.)
[193] *Langmeil & Grange* [2012] FamCAFC 39 paras 136 and 137 (where the Full Court decided that articles 34 and 19 of the CRC were not breached by the trial court); *Zlotnik & Gerasimov* [2015] FamCAFC 174; *Rilak & Tsokas* [2017] FamCAFC 26.
[194] [2016] VSCA 206 ('*AS v MIBP*').
[195] *AS v MIBP* para 18.
[196] *AS v MIBP* para 28.

only be detained as a measure of last resort"'.[197] However, the provision was not independently justiciable, and it could only inform the decision of relevant authorities from the position of a legal principle.[198] Thus, even when the standards of the CRC are enacted in domestic statutes, their normative significance is controlled by the Parliament.

The status of the CRC as a declared instrument under the HRCA has received some attention.[199] High Court judges saw it as having limited judicial significance.[200] As put by Callinan J, whatever the relevance of the declaration, it did not incorporate the CRC.[201] McHugh J in *Teoh* suggested that the declaration implied a lesser role for the courts because the state decided to give effect to the Convention through such declaration rather than through judicial application.[202] The Family Court, however, relied on the declaration to stress the importance of the CRC. A majority of the Full Court supported judicial statements that a declaration under the HRCA makes the CRC 'a source of Australian domestic law by reason of this legislation'.[203] The declaration also contributed to a majority finding that certain CRC articles have been domestically incorporated by the Family Law Act.[204] Other cases, however, see the Court retracting to the view that the declaration 'may give it [the CRC] a special significance in Australian law',[205] which nonetheless remains unclear.[206]

To conclude, in most judgements analysed in this study judges approach the CRC as an unincorporated treaty which bows to clear domestic standards. However, the Family Court under the leadership of the former Chief Justice Nicholson sought to demonstrate that the CRC had an enhanced domestic status by putting forward incorporation views or by noting the status of the CRC as a declared treaty under the HRCA. Its arguments were not unanimously supported by fellow judges of the Family Court, and have not been addressed by most HCA judges, leaving many issues without a definitive judicial answer.

4.4.2 The CRC as a source of external affairs power

As discussed in part 4.2, the ratification of an international treaty enables the Commonwealth Parliament to make laws to give effect to a treaty in domains which are otherwise the jurisdiction of the States. A valid exercise of the external affairs power requires that the treaty be sufficiently specific rather than aspirational;[207] that the law is 'reasonably capable of being

[197] *AS v MIBP* para 29.
[198] *AS v MIBP* para 29.
[199] *B v MIMIA* per Nicholson CJ and O'Ryan J para 252; *Teoh* per Mason CJ and Deane J (para 28) and Toohey J (para 28).
[200] The argument of the father that the lower court should have referred (*inter alia*) to the CRC as a declared instrument under the HRCA was not addressed by judges in *AMS v AIF*.
[201] *MIMIA v B* para 220
[202] *Teoh* McHugh paras 40-41.
[203] *Murray* per Nicholson CJ and Fogarty J para 140.
[204] *KN & SD* per Nicholson CJ and O'Ryan J para 68.
[205] *B and B: Family Reform Act 1995* para 10.20.
[206] *Murray* per Nicholson CJ and Fogarty J para 141; *B and B: Family Reform Act 1995* para 10.6; *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 263.
[207] Devereux and McCosker 2017 note 2 at 29. See *Victoria v The Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 33. In the *Commonwealth v Tasmania*, it was remarked that international agreements may create international obligations despite not being drafted with the precision of domestic norms (Deane J para 23). In *Pape v Commissioner of Taxation* [2009] HCA 23 Heydon J

considered appropriate and adapted to implementing the treaty'[208] and that 'its purpose or object is to implement the treaty'.[209]

Compliance by the CRC with the specificity requirement has not been decided by the courts, and the isolated judicial views expressed so far have been inconsistent. In *AMS v AIF* and *AIF v AMS,*[210] Gleeson CJ, McHugh and Gummow JJ referred to the international instruments, including the CRC, invoked by the parties 'as to some of their provisions [being] aspirational rather than normative'.[211] In *MIMIA v B,* Callinan J argued that there is a 'strong possibility … that the Convention may be aspirational only'.[212] On the other side, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[213] McHugh J and Gummow J pointed out that 'it was not suggested that *Teoh* concerned a treaty of this limited nature',[214] meaning a treaty of an aspirational nature,[215] while in *B and B v MIMIA*, a majority of the FCFC held that the CRC was sufficiently specific, especially its article 3(1), to enliven the external affairs power.[216] In *Hwang v The Commonwealth; Fu v The Commonwealth*[217] it was contended that when the Commonwealth Parliament made citizenship laws it exercised its external affairs power, and thus it had to comply with article 3(1) of the CRC.[218] McHugh J rejected the argument that citizenship laws are made in the exercise of external affairs power[219] but expressed no concern in relation to the potentially aspirational nature of the CRC in general, or of article 3(1) in particular.

Whether child-relevant matters can fall under the external affairs power is another potentially contentious issue. In *MIMIA v B,* Callinan J queried whether 'the welfare of children in this country can truly be an external affair',[220] and disagreed with the FCFC that changes to the Family Law Act were made in the exercise of external affairs power and in order to give effect to the CRC.[221]

Judicial pronouncements have therefore been sparse and inconclusive,[222] but recent legislative developments may strengthen the case for the CRC as a valid source of external affairs power. Section 60B(4) of the Family Law Act, introduced in 2011,[223] may serve as a counterargument

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explained that 'sufficient specificity' does not mean a specificity equivalent with the common law but that the treaty 'must avoid excessive generality' (para 475).

[208] *Victoria v The Commonwealth* per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34. Also, *Commonwealth v Tasmania*, Mason J para 48; Murphy J para 44; Deane J para 20.

[209] *Victoria v The Commonwealth* per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34.

[210] [1999] HCA 26 ('*AMS v AIF*').

[211] *AMS v AIF* Gleeson CJ, McHugh and Gummow JJ para 50.

[212] *MIMIA v B* and B per Callinan J para 222.

[213] [2003] HCA 6 ('*Lam*').

[214] *Lam* per McHugh and Gummow JJ para 99.

[215] *Lam* per McHugh and Gummow JJ para 98. In *B and B v MIMIA*, Nicholson CJ and O'Ryan J took the statement to mean that the CRC was clearly not aspirational (para 267).

[216] *B and B v MIMIA* 2003 per Nicholson CJ and O'Ryan J para 267.

[217] [2005] HCA 66 ('*Hwang*').

[218] *Hwang* para 6.

[219] *Hwang* para 8.

[220] *MIMIA v B* per Callinan J para 220.

[221] *MIMIA v B* per Callinan J paras 220-221.

[222] Compare the views in *AMS v AIF; Lam* and *MIMIA v B and B* with those in *B and B v MIMIA.*

[223] See the text quoted above.

to Callinan J's view in *MIMIA v B*, that the purpose of the Act was not to implement the CRC. Further, the Commonwealth Parliament relied on its external affairs power (amongst others) to reform the child care support legislation to give effect to unspecified Convention provisions.[224] It seems therefore that, contrary to Callinan J's concerns in *MIMIA v B*, the welfare of Australian children can be a matter of external affairs in the view of the Parliament.

Acceptance of the CRC as a source of external affairs power could be significant, at least theoretically. First, it would counter concerns that this treaty is aspirational only. Second, it would give the CRC constitutional relevance, being the only situation whereby a domestic statute or provisions thereof may be invalidated for reasons of inconsistency with the CRC. In *Victoria v The Commonwealth*, it was decided that a statute is invalid if the deficiency in implementing the treaty that enlivens external powers is so substantial that the law loses the character of a law implementing the treaty,[225] or if the law is 'substantially inconsistent with the Convention'.[226] These potential gains are curtailed by the rare reliance by the Parliament on its external affairs powers to give effect to the CRC. Further, inconsistency with some provisions of the CRC might not deny the law the character of an implementing measure of the Convention, as per the *Victoria v The Commonwealth*. Lastly, the open-ended nature of some CRC provisions, while not denying their binding nature, might make it difficult to establish a substantial inconsistency therewith. Despite these potential limitations, a confirmation that the CRC is a treaty able to enliven legislative powers under section 51 (xxix) of the Constitution should not be discounted in a legal context where the formal means to give judicial effect to the CRC are limited.

4.4.3 The CRC and statutory interpretation

4.4.3.1 High Court cases

De L v Director-General Department of Community Services (NSW) [227]

The case concerned the meaning of the phrase 'child objects to being returned'[228] which would enable a court to refuse to order a child abducted by a parent to the child's country of habitual residence. The phrase the 'child objects', as found in the Regulation which gave effect to the Hague Convention, was argued to require a strong opposition to return, while article 12 of the CRC required that the views of the child (however strongly expressed) be given weight according to the age and maturity of the child.

Only Kirby J (dissenting) engaged with the CRC in relation to the argument that the Hague Convention and the CRC took conflicting approaches to the relevance of the views of the child. He held that, in the context of child abduction, the views of children should be given weight

[224] Section 40 of the Schedule 1 to the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017 introduces Part IV (titled 'Child care subsidy'). Section 85AB of Part IV indicates the exercise of external power to give effect to the CRC.
[225] *Victoria v The Commonwealth* para 38.
[226] *Victoria v The Commonwealth* para 38.
[227] [1996] HCA 5 ('*De L*').
[228] The phrase appeared in regulation 16(3) of the Family Law (Child Abduction Convention) Regulations 1986 (that made the Hague Convention a part of the domestic law) and had a formulation identical with that in article 13(2) of the Hague Convention.

only when they amount to a strong opposition, while the majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) embraced the opposite view.[229] Kirby J accepted the statement in *Teoh* that Australian legislation is to be construed 'so far as possible, to conform with Australia's obligations under treaties which Australia has ratified', and proceeded to consider article 12 of the CRC on that basis. He opted for the narrower meaning of the term 'objects' as it arose from standards of the Hague Convention which were part of the Australian law and thus binding on the Court.

Kirby J did not engage extensively with the CRC, but in considering the wider meaning of the term 'objects' he acknowledged various factors which may prevent children from expressing feelings 'in terms of the adult notion of objection', such as differences in capacity, culture; loyalty conflict; lack of familiarity with those eliciting the child's objection. Article 12 of the CRC has been a trigger for this considerate discussion, and in rejecting the interpretation of the term 'objects' in line with this article, Kirby J did so only after considering the implications of such approach and after explaining why other serious competing objectives were to prevail.

Re Woolley; Ex parte Applicants M276/2003 by their next friend GS[230]

In *Re Woolley*, the constitutional validity of the Migration Act 1958 was challenged in as far as it authorised the prolonged detention of children who were illegal immigrants. The case concerned four children, aged 15, 13, 11 and seven, who entered Australia illegally with their parents in 2001. They were detained under the mandatory detention provisions of the Migration Act. It was argued on behalf of the children that the provisions of the Act were invalid if and to the extent that they authorised the prolonged detention of children.[231]

Two issues were raised: first, whether the Migration Act authorised the mandatory detention of children; and, second, whether, such detention was constitutionally valid if it was so authorised. The application was dismissed unanimously. The CRC played a limited role in the judgments written. It was mentioned generically by some judges,[232] and only Kirby J identified relevant provisions (articles 37, 2(1), 3(1), 3(2), 7(1), 9(1) and 18(1)).[233] Judges decided that the CRC could not be relied on to exclude children from a detention clearly mandated by the Migration Act. The Act did not distinguish between adults and children in terms of mandatory detention,[234] and it was 'impossible' to read down the statutory provisions so as to allow for an 'individual assessment of particular unlawful non-citizens'.[235] Further, the constitutional validity of the Migration Act was not affected by its inconsistency with the CRC,[236] which

[229] Kirby J's view is now endorsed in the revised formulation of the Regulations, which require that 'the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes' (regulation 16(3)(c)(ii)).
[230] [2004] HCA 49 ('*Re Woolley*').
[231] Gleeson CJ para 3. The provisions at stake were sections 189 (mandatory detention), 196 (duration of mandatory detention: until visa is granted or until the immigrant requests removal), 198 (removal as soon as reasonably possible after the visa was denied or upon the immigrant's request).
[232] Gleeson CJ paras 7, 11, 31; McHugh J paras 107, 114; Hayne J para 221 (Callinan J and Haydon J do not refer to the CRC).
[233] Kirby J para 200.
[234] Gleeson CJ para 7; McHugh J para 46 and Gummow J para 129.
[235] Gleeson CJ para 10.
[236] McHugh J para 115.

'would not justify a refusal by the Court to give effect to the legislation'.[237] As put by Kirby J, '[i]f the law is clear and constitutionally valid, it is the duty of Australian courts to apply its terms. This is so whatever judges or others may think about the content and effect of such law'[238] and 'whatever views might be urged about the wisdom, humanity and justice of that policy'.[239]

Re Woolley was an attempt to make the Court responsive to children's vulnerability in the interpretation of the Migration Act and the constitutional validity enquiry, relying on the CRC and the *parens patriae* jurisdiction.[240] The applicants sought to persuade the Court that although immigration detention was constitutionally valid for adults,[241] it was not so for children. Children's detention under the Act was indefinite (and thus unconstitutional) because, unlike adults, they lacked the capacity to request the removal from Australia and voluntarily end their detention.[242] A second argument was that the prolonged detention had severe consequences because of the children's inherent vulnerability. This made the detention punitive and thus unconstitutional, because punishment can only be applied by courts.[243]

Both arguments failed. In relation to children's capacity to end their detention, it was noted that not all children lack capacity to act in their own name,[244] and that children's capacity varies with the matter requiring decision, the maturity and the level of understanding of the child.[245] Further, when children lack competence to make decisions, their guardians have the power to decide for them.[246] On the punitive nature of immigration detention, it was said that children are a 'rather diverse class' and while for some purposes they 'might be treated conveniently as a single group', it was not so for the purposes of deciding whether immigration detention was punitive or not.[247] Children's vulnerability did not determine the constitutionality of the Act,[248] which depended on the purpose of the Act.[249] The Act was not punitive but sought to make individuals available for deportation and to prevent their insertion into the Australian community.[250] Thus, the argument in relation to children's '"special status"' and '"distinctive

[237] Gleeson CJ para 11. Other judges shared the view that the task of the Court is to assess the validity of legislation against the Constitution and not international treaties (McHugh J para 115; Hayne J para 122; Kirby J para 201).
[238] Kirby J para 173.
[239] Kirby J para 198 fn omitted.
[240] Gleeson CJ para 31. *Parens patriae* jurisdiction is a protective common law jurisdiction which entitles Supreme Courts of States and Territories to make decisions for the care, protection and welfare of children (Dickey 2014 note 106 at 299). The welfare jurisdiction of the Family Court is a statutory protective jurisdiction, currently reflected in section 67ZC(1) of the Family Law Act (ibid at 301; *B and B v MIMIA* para 128). This section gives the Family Court 'a power that is virtually equivalent to the traditional *parens patriae* power' (Dickey 2014 note 106 at 299; *AMS v AIF* per Gaudron J para 85). The *parens patriae* jurisdiction is wide, and its limits have not and cannot be established (*AMS v AIF* per Gaudron J paras 85-89; per Hayne J para 213).
[241] As decided in *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1.
[242] See section 198 of the Migration Act 1958.
[243] Gleeson CJ para 13.
[244] Gleeson CJ para 30.
[245] McHugh J para 102.
[246] McHugh J para 103; Gummow J paras 153, 157; Callinan J para 266.
[247] Gleeson CJ para 13.
[248] Gleeson CJ para 29.
[249] McHugh J para 60; Callinan J para 257.
[250] McHugh J para 71; Gummow J para 164.

interests and vulnerabilities"',[251] 'wrongly fixes upon the nature of the person detained, absent a consideration of the purpose for which detention is authorised'.[252] The nature of detention does not change because the applicants are children,[253] and thus vulnerable, or because of the protection duties owed to them by the state.[254]

The arguments that *parens patriae* jurisdiction made it possible for the Court to distinguish between children and adults in relation to immigration detention also failed. Kirby J and Callinan J shared the view that *parens patriae* jurisdiction (as a common law institution) was overridden by the clear and precise provisions of the Migration Act.[255] Kirby J suggested, however, that the *parens patriae* jurisdiction may have an impact on the validity of the Act if 'rooted in the Constitution itself'.[256] Gummow J commented that it was not argued that the *parens patriae* jurisdiction could limit the power of the Commonwealth to make laws,[257] and McHugh J accepted that the *parens patriae* jurisdiction may be used to avoid the detention of children if the purpose of the Act were to use such detention to punish the children or their parents,[258] which was not the case here. The statements made by Kirby, Gummow and McHugh JJ we made *obiter*.

Re Woolley reads like a 'terminus point' for the CRC in relation to immigration detention, making it clear that the Convention bows to legislative intransigence, independently or in association with domestic 'carrier' concepts such as *parens patriae*.

4.4.3.2 Family Court cases appealed to the High Court

Northern Territory of Australia v GPAO[259]

Central to the case was whether several best interests provisions of the Family Law Act 1975[260] informed an enquiry into the validity of territory legislation and the interpretation of other federal statutes. These legal issues arose because, as discussed in part 4.3 above, legislative competence in relation to child-related matters is split between States/Territories and the Commonwealth, and in case of inconsistency between statutes, the federal statute (i.e., the Family Law Act) prevails. Despite this legislative fragmentation in relation to children,

[251] Gummow J para 162.
[252] Gummow J para 163. For Kirby J, however, the conditions of detention could also render the detention punitive (paras 184-186 and 189).
[253] McHugh J para 99.
[254] McHugh J para 100.
[255] Kirby J para 193; Callinan J para 259, 267.
[256] Kirby J para 193.
[257] Gummow J para 168.
[258] McHugh J para 101.
[259] [1999] HCA 8 ('*GPAO*'). For comments, see D Sandor 'Disclosure of Child Protection Information' 1996 (45) *Family Matters* 31; G Watts 'Is the Family Court bound by the Rules of Evidence in Children's Matters?' 1999 (13) *Australian Family Lawyer* 8.
[260] Section 43 which provided that the Family Court exercised jurisdiction under that Act by having regard to the need to protect the rights of children and their welfare; and section 64 which provided that in custody, guardianship, welfare and access applications, the welfare of the child must be regarded as the paramount consideration. The Family Law Reform Act 1995 came into force after the Court heard the case but before judgment was given. The change did not materially affect the judgments because section 43 remained unchanged and section 64 was repealed and replaced with, amongst others, sections 65E and 67ZC(2) which had the same effect as the repealed section in that they made the best interests of the child the paramount consideration in certain matters (*GPAO* per McHugh and Callinan JJ para 156).

legislatures share a basic concern for the welfare of the child albeit they may pursue it in different, and potentially conflicting, ways.

The case came before the FCFC as *Re Z*[261] – a dispute concerning parental rights, during which Northern Territory authorities refused to share information with the Court because a Territory child protection statute prevented them from doing so. This was so although allegations of abuse were made against one of the parents. It was argued, amongst other things, that this prevented the Court to give paramount importance to the interests of children, and was therefore inconsistent with the Family Law Act.

Fogarty J (dissenting) held, *inter alia*, that the Territory legislation was not inconsistent with the Family Law Act because the two statutes regulated different aspects in relation to the welfare of children.[262] Nicholson CJ and Frederico J differed. They opted for the view that Territory legislation was in conflict with those Family Law Act provisions which required the Court to consider giving paramountcy to the best interests of the child. The CRC reasoning was *obiter* but provided support for the argument that the relevant best interests of the child provisions had a wider scope than the traditional concept of 'welfare'. First, the majority noted the change in terminology, which 'reflects the wording' of the CRC,[263] from 'welfare' to the 'best interests' of the child, and it approved of academic suggestions that the term 'welfare' was narrower than the 'best interests'.[264] Second, the external affairs power enlivened by the CRC 'would provide' another source for the Commonwealth's power to make laws for the overall welfare of the children,[265] meaning matters covered both by state and federal competence. Thus, section 67ZC of the FLA provided for the welfare jurisdiction of the Family Court as a 'separate jurisdiction', which extended not only to traditional matters covered by this type of jurisdiction (i.e., parent-child relationship) but also to child protection issues.[266] As a provision in a federal statute, section 67ZC informed the validity of State/Territory child protection legislation[267] and the interpretation of rules of evidence in other federal statutes.[268] For these judges, the welfare of children cannot be compartmentalised,[269] and the welfare jurisdiction of the Family Court provided a unifying tool to ensure a holistic consideration of the best interests of the child. Notably, all judges were in favour of 'more satisfactory'[270] legislative effect to be given to the CRC as a way to address the fragmentation of domestic law in relation to children and to ensure a holistic consideration of the best interests of the child.[271]

[261] *Re Z* [1996] FamCA 89.
[262] Territory/State legislation aimed at securing the best interests of children collectively, while the Family Law Act sought to ensure the best interests of the child subject of concrete proceedings. See Fogarty J para 66-67; 83-91.
[263] Para 307, where the majority refers to articles 9(1), 3, 18(1) and (2) but without further discussion.
[264] Paras 308-309.
[265] Para 317.
[266] Paras 323-324. Fogarty J expressed concern with the potential intrusion of this jurisdiction 'into such areas as ASIO secrecy, taxation or social security confidential information, or Cabinet discussions – the consequences of such a finding would be significant …'. (para 29).
[267] Paras 323-324.
[268] Para 375.
[269] Para 325. I.e., in family law and child protection matters respectively.
[270] Nicholson CJ and Frederico J para 357.
[271] Fogarty J para 58; Nicholson CJ and Frederico J para 357.

On appeal, in *Northern Territory of Australia v GPAO,*[272] the majority of the High Court opted for a narrow application of the paramountcy principle limited to the final/merits decisions on parenting orders and not to the preliminary orders relating to producing evidence.[273] The reasoning of the majority focused on the relationship between federal and territory laws and the jurisdiction of the Family Court as a federal court. Kirby J, in dissent, identified a further legal issue:

> the extent to which ambiguities in the meaning of that federal law, concerning its ambit and operation, should be resolved in a way compatible with international law and so as to ensure that Australian law conforms, as far as it properly can, to international law.[274]

Kirby J supported the view in *Teoh*, that ambiguity is not to be construed narrowly,[275] which meant that the CRC could be utilised to clarify the *ambit* of the federal statute[276] rather than the meaning of its substantial terms. The ambiguities in this case concerned the scope of the best interests of the child in section 65E of the Family Law Act. Kirby J identified the CRC (and specifically article 9)[277] as one of 'those considerations which have most influenced'[278] him in reaching his decision, but it constituted 'an additional reason' for employing an approach that was already grounded in domestic law.[279] Kirby J stressed that Part VII of the Family Law Act was enacted to give effect to the CRC and thus ambiguities in relation to the scope of application of the best interests should be interpreted in a way that upholds international law.[280] The Convention makes no distinction between interlocutory and final decisions, requiring instead that the best interests of the child be considered throughout the judicial process.[281] Kirby J endorsed the view of the majority of the FCFC that the change from 'welfare' to 'best interests' in the FLA under the influence of the CRC gives the latter 'probably … a wider connotation'.[282]

B and B v Minister for Immigration and Multicultural and Indigenous Affairs[283]

Finding that it had jurisdiction in relation to immigration detention of children under this Act,[284] the FCFC considered the lawfulness of the detention. The Migration Act provided no limit for the detention of illegal immigrants (adults or children), although it was possible for a detained person to end the detention by requesting the return to the country of origin. The Court was of the view that on the face of it, the Act authorised the indefinite detention of children because it was unrealistic to expect that children have the capacity validly to request the Minister to end

[272] [1999] HCA 8 ('*GPAO*').
[273] The reasoning was based on a literal interpretation of section 65E of the Family Law Act.
[274] *GPAO* per Kirby J para 203 fn omitted.
[275] Kirby J para 232.
[276] Section 65E at the time.
[277] Kirby J para 231.
[278] Kirby J para 223.
[279] Kirby J para 232.
[280] Kirby J para 232.
[281] Kirby J para 231.
[282] Kirby J para 230 (fn omitted).
[283] This case also raised issues about the potential incorporation of the CRC by the Family Law Act. These issues were addressed in part 4.4.1.
[284] As discussed in part 4.4.1.

their detention.[285] The contention that parents could make the relevant request in their children's name was rejected because it 'effectively involve[s] treating the children as the chattels of their parents'.[286] According to the majority, an indefinite detention would be incompatible with article 37 of the CRC and 'serious breach' of Australia's obligations under the Convention.[287] Thus, considering the presumption that a statute should not be interpreted so as to curtail fundamental freedoms[288] and that statutes are to be construed as far as possible in conformity with international treaties,[289] the majority said that the Act could not be interpreted as authorising the indefinite detention of children.[290] Such detention would be unlawful,[291] and would justify the Court's exercise of welfare jurisdiction and an order for the release of the children.[292] In the alternative, the Court said that should the detention be considered lawful but harmful,[293] the court could give directions in relation to the nature and type of detention, medical care and education.[294] The case was remitted for a decision on the best interest of the children, and the children were eventually released.[295]

The HCA judges did not address the interpretation reasoning above, preferring to decide the case on constitutional grounds.

4.4.3.3 Family Court cases not appealed to the High Court

B and B: Family Law Reform Act 1995[296]

In *B and B: Family Law Reform Act 1995*,[297] the Family Court extensively discusses (*obiter*[298]) the significance of the CRC for family law cases. The Court's position centred on the impact which the CRC has had on the Family Law Reform Act 1995.[299] Two of the principles in the newly introduced section 60B (the object clause) of Part VII of the Act, titled 'Children',

[285] Nicholson CJ and O'Ryan J para 380. For discussion on capacity, see paras 370-377.
[286] Nicholson CJ and O'Ryan J para 382.
[287] Nicholson CJ and O'Ryan J para 388.
[288] Nicholson CJ and O'Ryan J para 357.
[289] Nicholson CJ and O'Ryan J para 363.
[290] If the Act could be interpreted to authorise indefinite detention, then it may be unconstitutional (Nicholson CJ and O'Ryan para 384).
[291] Nicholson CJ and O'Ryan J para 381.
[292] Nicholson CJ and O'Ryan J para 389.
[293] Nicholson CJ and O'Ryan J para 391.
[294] Per Nicholson CJ and O'Ryan J para 400.
[295] On the litigation following the decision of the FCFC, see Ruddle and Nicholes 2004 note 152 at 261-262. See also *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v Australia* Communication No. 1069/2002 (2003) (after the FCFC but before the HCA judgments) in which the Human Rights Committee found Australia in breach of several provisions of the International Covenant on Civil and Political Rights, 1966 ('the ICCPR').
[296] *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 ('*B and B: Family Law Reform Act 1995'*).
[297] The ex-wife wished to relocate to another Australian state with the children of the marriage. The relocation would have limited the time the children spent with their father. The father argued that legal reform under the influence of the CRC has recognised to children the right to know and have regular contact with him, in section 60B(2) FLA, and that such rights could only be interfered with/limited if exercising those rights was not in the best interests of the child (paras 6.2-6.3). The Court decided, however, that the above section did not create enforceable rights for children, a position which the Court retracted in *KN & SD* discussed below. For a comment, see L Young 'B and B: Family Law Reform Act 1995 (Cth) – Relocating the Rights Debate 1997 (21) *Melbourne University Law Review* 722.
[298] Para 10.1.
[299] Para 3.3.

reflected CRC articles,[300] with the 'more directly relevant' being articles 2.1; 3.1; 3.2; 7.1; 9.3; 18.1,[301] and articles 5, 9 and 12.[302] The change in terminology from 'welfare' to 'best interests' appeared to have been justified *inter alia* by the use of the later term in the CRC.[303]

In terms of the judicial relevance of the CRC, the Court supported the view that the Convention did not create domestic rights,[304] but embraced an earlier view that courts should not be 'too restrictive' in their use of the Convention, and they could rely on it even to fill *lacunae* in legislation.[305] It stated that the CRC can be used to interpret the Family Law Act even if the Act made no explicit reference to it.[306] The Convention 'is likely to be … relevant in the absence of any inconsistent statutory provision' and it may be considered 'in the exercise of a discretion, which the Family Court clearly exercises in determining matters of parenting responsibility and the best interests of children'.[307] In the area of family law, it 'may gain further strength from s. 43(c) of the Family Law Act'[308] which contains a mandatory direction that when a court exercises jurisdiction under the Act, it shall have regard to the need to protect the rights and welfare of children.[309] While this section pre-dated the ratification of the CRC, in its first report to the CRC Committee Australia indicated that it does not plan to incorporate the Convention domestically because it ensured that legislation, policies and practice complied with it prior to ratification.[310] Section 43 was taken therefore to indicate the government's recognition of the rights of children, and a gateway for the use of the CRC by the Family Court.

Against this background, the Court rejected arguments that the CRC cannot be relied on for the interpretation of Part VII of the Act because, allegedly, the Act was 'comprehensive, stands alone and does not need the assistance by anything that was only of general origin',[311] was not ambiguous or obscure, and was '"effectively" a code'.[312] On the contrary, the relevant provisions of the Act were 'statements of broad general principle, consistent with UNCROC but lacking the sort of precision that would be expected if they were intended to constitute part of a code'.[313] For the Court, it was 'hard to see how the Convention can be considered not to be relevant,'[314] and '[i]t is difficult … to imagine a better starting point' than the CRC in defining the rights to which section 43 refers, since the Convention has acquired almost

[300] Para 3.28.
[301] Para 3.30.
[302] Para 3.32.
[303] Para 9.34.
[304] Para 10.2.
[305] Para 10.5.
[306] It was argued, *inter alia*, that the CRC was irrelevant because the statute did not refer to it (para 6.35). The Court analysed the content of the Act, relevant parliamentary documents, Bills that preceded the Family Law Reform Act, the Explanatory Memorandum and parliamentary speeches. It pointed out that although the explicit references to the CRC in earlier drafts of the Bill were dropped, the CRC was referred to in second reading speeches in the Parliament (see paras 3.4-3.8), which made it a relevant extrinsic material for the interpretation of the Family Law Act (per section 15AB(2)(f) of the Acts Interpretation Act).
[307] Para 10.18.
[308] Para 10.7.
[309] Para 10.7.
[310] Para 10.12.
[311] Para 6.35.
[312] Para 6.35.
[313] Para 10.16.
[314] Para 10.13.

universal ratification and appears in a schedule to the HRCA.[315] The CRC 'must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends'.[316] Nonetheless, the interpretation of the relevant statutory provision could not be informed by the CRC *as a whole* because it did 'not represent anything like the full quotient of rights of children provided by UNCROC' which extends well beyond issues dealt with in that section.[317]

These comprehensive statements regarding the role of the CRC were only made in the abstract by the Court, as they were not directly relevant to the case. They contribute, however, to an accumulation of *dicta* supporting the relevance of the CRC for domestic adjudication.

A similarly generous view in relation to the role of the CRC in relation to the Family Law Act was taken in *Re Jamie*.[318] Embracing the *Teoh* view of ambiguity,[319] Bryant CJ noted that as the CRC and the FLA 'share an underlying common purpose or object, namely a concern that decisions are made in a child's best interests, in an application under s 67ZC [welfare jurisdiction], it is appropriate for the court to have regard to the relevant provisions of the Convention on the Rights of the Child'.[320] The Act did not prescribe the issues to be taken into account by the Court when exercising the welfare jurisdiction and thus, the Court found it useful to turn to the CRC for guidance. The CRC 'makes it clear that it is important that children have input into decisions that affect them and that parents have special responsibility for assisting their children in making these decisions …'.[321] Thus, in the case of a competent child who considers stage 2 treatment for gender dysphoria, the authorisation of the Family Court is not required. The views of the child should be given weight according to the age and maturity of the child, and the state should respect the guidance given by the parents, as required by articles 12 and 5 CRC.[322]

Earlier, in *Murray*[323] a majority of the Full Court (Nicholson CJ and Fogarty J) went even further. They rejected the 'too restrictive'[324] position that unincorporated treaties can only be used to resolve ambiguities in legislation, and stated that the CRC

[315] Para 10.14.
[316] Para 10.19.
[317] Para 10.25.
[318] [2013] FamCAFC 110. This judgment is now superseded by *Re: Kelvin* [2017] FamCAFC 258 (which made no reference to the CRC).
[319] *Re Jamie* para 120.
[320] *Re Jamie* para 120.
[321] *Re Jamie* para 122.
[322] *Re Jamie* paras 129, 134.
[323] It was argued that by ordering the immediate return under the 1980 Hague Convention on the Civil Aspects of Child Abduction, the trial judge erred by not considering and applying article 3 of the CRC (*Murray* para 80). To the argument that there was a conflict between the Hague Convention and the CRC, the Court responded in the negative (para 156).
[324] *Murray* para 147.

> can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children.[325]

This was a 'more controversial'[326] position, which has received only limited support[327] possibly because it conflicts with the dualist stance taken by Australia.

To conclude, the CRC has been relied on to interpret relevant statutes. Its impact in the interpretive process has been prevented by its conflict with some statutes and enhanced by its convergence with others.

4.4.4 The CRC and the exercise of administrative discretion

The case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[328] remains the highest point of the High Court's engagement with the CRC, although its domestic relevance has been diminished by subsequent developments.[329] It is the only case in which all High Court judges engaged with the Convention and a positive outcome for children was unequivocally connected to the CRC.[330]

Mr Teoh, a Malaysian citizen, came to Australia and was granted a temporary entry permit. He married an Australian citizen with whom he had three children. He applied for permanent residence, and while his application was pending, he was convicted of drug trafficking and sentenced to a custodial sentence. As a result, Mr Teoh was denied permanent residence and was liable to deportation. He sought the reassessment of this decision because his deportation would severely affect his family. The relevant authorities considered the family hardship argument,[331] but in the light of the seriousness of the crime, the visa was denied.[332] The majority of the Full Federal Court ordered that the denial of visa be set aside; the judgment was appealed to the High Court.

Amongst other things, the High Court had to decide on the role of the CRC as an unincorporated treaty in the making of discretionary administrative decisions, and establish whether the ratification of the Convention created a legitimate expectation that the interests of children were to be given a primary consideration in the deportation of a parent. The intricacies of the doctrine of legitimate expectation are primarily of domestic relevance and are not addressed here. Instead, the focus is on how judges engaged with the CRC in the four written judgments.

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[325] *Murray* per Nicholson CJ and Fogarty J para 149.
[326] Kirby 2004 note 54 at 232.
[327] Kirby J supported this approach, but the Hight Court was 'cautious' (Shearer et al 1994 note 28 at 263).
[328] (1995) 183 CLR 273 ('*Teoh*').
[329] Subsequent migration guidelines which formally required administrative decision-makers to consider the best interests of children have made the substance of *Teoh* moot (Groves 2010 note 65 at 15). See also N Sharp 'Procedural fairness: The age of legitimate expectation is over' 2016 (90) *Australian Law Journal* 797; Taggart 2008 note 65.
[330] For comments, see Allars 1995 note 62; Groves 2010 note 65 at 8; Lacey 2001 note 65; Twomey 1995 note 26; Walker and Mathew 1995 note 28. For some critical views, see Dyzenhaus, Hunt and Taggart 2001 note 47 at 11. On the influence of *Teoh* abroad, see L Katz 'A *Teoh* FAQ' 1998 (16) *AIAL Forum* 1 at 11; Taggart 2008 note 65 at 16; Groves 2010 note 65 at 1.
[331] *Teoh* per Mason CJ and Deane J para 7.
[332] Mason CJ and Deane J para 7.

The leading judgment was written by Mason CJ and Deane J, with whom Toohey J in a separate judgment largely agreed. Being unincorporated, the CRC was not a direct source of domestic rights and obligations;[333] the case was not concerned with an ambiguity in a statute or with the development of the common law. Thus, Mason CJ and Deane J explored new ways to give effect to the CRC. Mason CJ and Deane J found the Convention to be relevant for the discharge of statutory discretion.[334] The administrative decision-makers were therefore entitled, although not obliged, to consider it.[335] The 'crucial question' for the relevance of the CRC to the case was whether the decision not to grant Mr Teoh a visa was an action 'concerning children' in the sense of article 3(1).[336] The two justices embraced the ordinary meaning of 'concerning' as meaning 'regarding, touching, in reference or relation to; about'[337] and rejected a narrower construction, according to which although the decision affected children, it did 'not touch or relate to them'.[338] In relation to the weight attached to the interests of the child, Mason CJ and Deane J stressed that they need not be automatically prioritised:

> The article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight.[339]

Mason CJ and Deane J indicated that the ratification of the CRC gives rise to a legitimate expectation that 'absent statutory or executive indications to the contrary, administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration"'.[340] A legitimate expectation does not compel a decision-maker to act according to a treaty.[341] Instead, if a decision contrary to the treaty is envisaged, those affected should be given the opportunity to be heard.[342] Mason CJ and Deane J found that the decision-maker took the interests of the children into account, but she did not treat them as a primary consideration. For this, it was necessary for the decision-maker to ask 'whether the force of any other consideration outweighed it'.[343] Instead, the decision-maker treated

> the policy requirement as paramount unless it can be displaced by other considerations…A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.[344]

Gaudron J, concurring, took the view that the CRC was only of 'subsidiary significance in this case' and instead '[w]hat is significant is the status of the children as Australian citizens' and

[333] Mason CJ and Deane J para 25.
[334] Mason CJ and Deane J para 22.
[335] Mason CJ and Deane J para 22. McHugh J para 36 agreed.
[336] Mason CJ and Deane J para 30.
[337] Mason CJ and Deane J para 30 fn omitted. This approach was also shared by Toohey J (para 31).
[338] Mason CJ and Deane J para 30.
[339] Mason CJ and Deane J para 31.
[340] Mason CJ and Deane J Mason CJ and Deane J para 34 fn omitted. Also, Toohey J para 29.
[341] Mason CJ and Deane J para 36.
[342] Mason CJ and Deane J para 37. Also, Toohey J para 32.
[343] Mason CJ and Deane J para 39.
[344] Mason CJ and Deane J para 39.

the 'obligations [of the state] to the child citizen in need of protection'.[345] *Obiter*, Gaudron J said that

> 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.[346]

This was a 'novel'[347] independent right whose possible source was the *parens patriae* jurisdiction of the courts to protect a citizen child.[348] The CRC simply 'gives expression to a fundamental human right which is taken for granted by Australian society'[349] and which arises from the 'special vulnerability of children'.[350] Should there be any doubts about the existence of such domestic right, 'ratification would tend to confirm the significance of the right within our society'.[351] As the CRC gives expression to 'an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect'.[352] Put differently, the CRC *gives effect* to an Australian expectation, rather than *creates* one.

McHugh J, in dissent, disagreed with the application of the legitimate expectation doctrine to international treaties.[353] For this judge, international treaties are 'agreements between States',[354] whose breach is sanctioned in the international sphere;[355] and, in this case, upon reporting to the CRC Committee.[356] Giving force to international commitments are matters for the federal Parliament,[357] which chose to do so through the Human Rights and Equal Opportunity Commission Act 1986 (Cth), and the remedial mechanisms provided therein.[358] McHugh J further questioned the application of article 3 to immigration decisions, and more generally, to measures 'concerning' children rather than directed at them. In his view, extending the net of article 3 so wide 'will have enormous consequences for decision-making in this country if it applies to actions that are not directed at but merely have consequences for children'.[359]

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[345] *Teoh* per Gaudron J para 3.
[346] Gaudron J para 4.
[347] Allars 1995 note 62 at 225.
[348] Ibid.
[349] *Teoh* per Gaudron J para 6.
[350] Gaudron J para 5.
[351] Gaudron J para 6.
[352] Gaudron J para 6.
[353] A concern for this justice was the 'enormous' impact on the administrative decision-makers of a legitimate expectation arising from the significant number of treaties ratified by Australia (*Teoh* per McHugh J para 38).
[354] *Teoh* per McHugh J para 37.
[355] This view is later supported by McHugh and Gummow JJ in *Lam* para 98.
[356] *Teoh* per McHugh J para 37.
[357] McHugh J para 37.
[358] McHugh J para 40, 41.
[359] McHugh J para 43. This Justice questioned whether article 3 ought to be a primary consideration when sentencing a parent, repossessing the property of a parent, or taxation issues. Similar concerns were also raised by Callinan J in *Lam* para 147.

Teoh was controversial because of its unusual approach to the doctrine of legitimate expectation.[360] It did not recognise a right to an outcome guaranteed by the CRC,[361] and decisions contrary to it could still be made provided certain procedural guarantees were ensured.[362] *Teoh* only applied to executive federal decision-makers[363] who enjoyed some statutory discretion; and that legislation and/or explicit statements of policy contrary to the CRC could displace the *Teoh* legitimate expectation.[364] Although the case still captures the attention of international lawyers, it now has a limited domestic scope.[365] Ministerial directions require that the best interests of the children affected be considered when decisions are made in relation to denial or cancelation of parents/carers' visa on character ground,[366] displacing therefore the application of the judicially-created legitimate expectations doctrine.[367]

Nonetheless, the judgments in *Teoh* remain significant repositories of judicial opinion on the interaction between Australian law and the CRC, and on the interpretation of the CRC more generally, as discussed in part 4.5 below.

The decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[368] retreated from the *Teoh* approach to legitimate expectation without, however, overruling *Teoh*.[369] The engagement by the Court with the CRC is limited, and only Callinan J gives it some independent consideration. This judge noted the unincorporated status of the CRC, suggesting that '[t]he non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it'.[370] This resistance may have been generated by a concern that the enactment of the CRC might 'distort the fine balance in criminal sentencing generally between deterrence of recidivism by adult criminals many of whom have children' and might be a 'disincentive … in relation to abstention from crime by those non-citizens who are minded to commit it'.[371]

[360] For attempts to displace *Teoh* see, Lacey 2001 note 65 especially at 224 and Katz 1998 note 330 at 9.
[361] Allars 1995 note 62 at 231-232.
[362] W Lacey 'A Prelude to the Demise of Teoh: The High Court Decision in Re Minister for Immigration and Multicultural Affairs, Ex parte Lam' 2004 (26) *Sydney Law Review* 130 ('Lacey 2004b') at 135.
[363] Katz 1998 note 330 at 8-9; Walker and Mathew 1995 note 28 at 248.
[364] Allars 1995 note 62 at 233. *Teoh* per Mason CJ and Deane J para 34 ('statutory or executive indications to the contrary').
[365] A Edgar and R Thwaites 'Implementing treaties in domestic law: Translation, enforcement and administrative law' 2018 (19) *Melbourne Journal of International Law* 24.
[366] The latest direction is *Minister for Immigration and Border Protection Direction no. 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501 CA, 22 December 2014* (see para 9.2). This was preceded by several other directions (Edgar and Thwaites 2018 note 365 at 38 fn 68).
[367] Ibid at 35, 37. The authors argue that article 3 was incorporated 'by reference' in these ministerial directions (at 39), giving it an enhanced protection by being now transformed into a mandatory (rather than discretionary) consideration for decision-makers
[368] [2003] HCA 6 ('*Lam*'). For an extensive commentary, see Lacey 2004b note 362. The case concerned a Vietnamese permanent resident (father of two Australian children) whose permanent residence visa was cancelled because of his criminal activity.
[369] Groves 2010 note 65 (see fn 40); Lacey 2004b note 362 at 156.
[370] *Lam* per Callinan J para 147.
[371] Callinan J para 147 (both quotes).

4.4.5 The CRC and the principle of legality

This principle has so far found endorsement in relation to the CRC only in the Family Court. In *B and B v MIMIA*, the Full Court stated that indefinite immigration detention of children would be incompatible with article 37 of the CRC.[372] Thus, considering the presumptions that the Parliament does not intend to limit rights[373] and that statutes are to be construed as far as possible in conformity with international treaties,[374] the Court supported an interpretation of the Migration Act that would not authorise the indefinite detention of children. The consideration of the principle of legality seems justified here by the fact that at stake was a CRC right which had a common law correspondent.[375]

In *KN & SD*[376] the application of the principle was extended beyond the rights with common law correspondent. Relevant was the relationship between the Migration Act (which permitted the deportation of the mother) and section 60B(2) of the Family Law Act, which provided that children have the right to know and be cared for by their parents, and to have regular contact with them. The question was whether the mentioned rights were *fundamental* rights and thus protected by the presumption that the Parliament does not intend to limit fundamental rights unless it clearly indicates its intention to do so. As mentioned in part 4.4.1, the majority decided that the CRC was incorporated by section 60B.[377] Although the rights in section 60B(2)[378] and the CRC can be limited by the application of the best interests of the child, they remain fundamental and thus protected by the principle of legality:

> We reject the proposition that fundamental rights are limited to those conferred by the common law. We are of the view that the terms of s.60B itself confers fundamental rights on a child. We also think that fundamental rights and freedoms are also grounded in international law and in Instruments such as … UNCROC …[379]

The extension of the principle of legality to rights other than common law rights to include unincorporated rights in international instruments with or without domestic correspondence, was disagreed with by Ellis J.[380] Nonetheless, the majority decided that because the Migration Act was clear and precise, it negated the fundamental rights arising from the Family Law Act and the CRC.[381]

While the position in *KN & SD* is favourable to CRC rights, it runs counter to precedents that applied the presumption only in relation to rights recognised at common law. The judgment

[372] Nicholson CJ and O'Ryan J para 388.
[373] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 357.
[374] Nicholson CJ and O'Ryan J para 363.
[375] Rights in relation to personal liberty. See discussion of the principle of legality in part 4.2 above.
[376] The facts are briefly presented in part 4.4.1 above.
[377] Para 68.
[378] Nicholson CJ and O'Ryan J swiftly reversed the *obiter* position in *B and B: Family Law Reform Act 1995*, that section 60B contains broad general principles but does not confer enforceable rights, and declared it 'incorrect' (*KN & SD* para 70).
[379] Para 69.
[380] Ellis J disagreed as to the meaning of 'fundamental right', holding that a right is 'fundamental' if it has some 'common law recognition' and not simply because the right is 'important' (para 133).
[381] Para 76.

was not appealed to the High Court, and the application of the principle of legality to unincorporated treaty rights remains controversial.

4.4.6 The CRC and the exercise of judicial discretion

As mentioned in part 4.2, the consideration of the CRC in the exercise of judicial discretion has not yet been endorsed by the HCA. Other courts have, however, expressed some support for giving effect to the Convention in this way. In *B and B: Family Law Reform Act 1995*, for example, the FCFC said that 'regard may be had to a convention or treaty in the exercise of a discretion, which the Family Court clearly exercises in determining matters of parenting responsibility and the best interests of children'.[382] In *Re K*,[383] the Court issued discretionary guidelines for the appointment of separate legal representatives for children, having regard to articles 9 and 12 of the CRC.

Clearer is the use of the CRC to guide judicial discretion in the case law of the VSC. Relying on the CRC for these purposes was appropriate

> if the subject matter of the case before the court comes within its scope, which is a test of relevance; if taking the human right into account is not inconsistent with any applicable legislation, the operation of which such a convention obviously does not impair; and if doing so is not inconsistent with the common law (broadly defined), the content of which, equally obviously, such a convention does not alter.[384]

In *DPP v TY*, in sentencing proceedings concerning a juvenile offender, Bell J noted the relevance of article 40(1) of the CRC,[385] and that 'the Convention runs with the grain of the Court's sentencing discretion, not against it'.[386] Accordingly, 'the exercise of the sentencing discretion will be the better for it'.[387] As put by Bell J:

> In practical terms, the main significance of considering this matter will be to supply a further basis for, and to reinforce the existing principle of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children. Article 40(1) also brings home that, by the way the courts deal with children in the sentencing process, they can promote both their positive development and the growth of their understanding of, and respect for, the human rights of others.[388]

In Re TLB,[389] the father of a seven month old baby, a mentally impaired man who had committed a violent crime, applied for an extension of his leave to remain in the community and not to be separated from his child.[390] The statutory framework allowed the Court to consider, alongside prescribed factors concerning community safety, any other matters that it found relevant.[391] In extending the leave, Bell J considered that the best interests of the child not to be separated from his father was relevant.[392] The Court stressed that although the CRC

[382] Para 10.18.
[383] [1994] FamCA 21 para 11.
[384] *DPP v TY* (No 3) [2007] VSC 489 ('*DPP v TY*') para 49.
[385] *DPP v TY* para 50.
[386] *DPP v TY* para 50.
[387] *DPP v TY* para 51.
[388] *DPP v TY* para 51.
[389] [2007] VSC 439.
[390] *In Re TLB* paras 5-6.
[391] *In Re TLB* para 14, 18.
[392] *In Re TLB* para 18.

was not incorporated in the Australian law, it was a relevant consideration for the exercise of judicial powers,[393] because article 9(1) dealt with the separation of children from their parents.[394] The Court referred to the CRC as an 'an additional basis on which the best interests of the applicant's son should be taken into account'.[395] Although Bell J refers to the CRC as an add-on reasoning, the Convention was essential for the identification of the best interests of the child as a relevant consideration not explicitly mentioned in the relevant legislation.[396]

4.4.7 The CRC and human rights statutes: A Victoria case-study

4.4.7.1 Introduction

The state of Victoria passed a human rights act[397] in the form of the Charter of Human Rights and Responsibilities Act 2006 ('the Charter').[398] The Charter only applies in relation to state legislation or exercise of official power under the State law, but it is relevant for the rights of children because States, as opposed to the Commonwealth, have the power to regulate important matters such as juvenile justice, child protection or education, to name just a few.

The Charter binds the courts to the extent that they have functions under the substantive part of the Charter (in relation to the right to a fair hearing and other rights in criminal proceedings, etc)[399] and in relation to the interpretation of laws.[400] The Charter makes it unlawful for public authorities to act contrary to the Charter or to make decisions without considering relevant human rights.[401] For the purposes of the Charter, human rights are 'the civil and political rights set out in Part 2 [of the Charter]'.[402]

A feature of the human rights acts inspired by the British Human Rights Act 1998 is their interpretation clauses, which allow the courts to interpret legislation, where possible, in a way compatible with human rights, without, however, giving them the power to invalidate incompatible legislation.[403] In cases of incompatibility, courts may be empowered to issue declarations of incompatibility,[404] which the political branches can act upon.[405] Section 32(1) of the Victorian Charter mandates therefore that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Section 32(2) enables the courts to consider ('may be considered') in the interpretation of statutes, international law as well as domestic, foreign and international

[393] *In Re TLB* para 20.
[394] *In Re TLB* para 20.
[395] *In Re TLB* para 20.
[396] *In Re TLB* para 14.
[397] For an overview of human rights acts as a 'new genre of rights protection', see Bailey 2009 note 15 at 173 onwards.
[398] Most Charter provisions concerning the role of the courts and the obligations of the public authorities under the Charter came into force in January 2008, with the balance of provisions coming into force in January 2007 (section 2 of the Charter).
[399] Section 6(2)(b) of the Charter
[400] Section 32 of the Charter.
[401] Section 38(1) of the Charter. But see the exoneration clause in section 38(2) of the Charter.
[402] Section 3(1) of the Charter.
[403] Bailey 2009 note 15 at 179-181.
[404] Ibid at 180.
[405] For the mechanism in Victoria, see section 37 of the Charter.

judgments relevant to a human right. In *Momcilovic v The Queen*,[406] French CJ stated that section 32(2) 'does not authorise a court to do anything which it cannot already do',[407] and that '[s]ection 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application'.[408] French CJ further said about the operation of section 32(1) that

> It operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.[409]

If a statutory provision cannot be interpreted consistently with a human right, the VSC 'may make' a declaration of inconsistent interpretation.[410] Such declaration does not affect the validity of the statutory provision and does not create additional remedial rights for individuals.[411]

The Charter has a limited number of sections explicitly referring to children. Section 17 (2) provides that 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. Section 23 addresses the rights of children in the criminal process, and section 25(3) provides for a right to a criminal law procedure that considers a child's age and promotes the rehabilitation of child offenders. According to the Explanatory Memorandum, the rights protected in the Charter, including the child-specific rights, derive primarily from the ICCPR rather than the CRC.[412] The operation of the Charter was reviewed after four and eight years respectively of operation.[413] The four year review process had to consider, *inter alia*, the desirability of including CRC rights as human rights under the Charter,[414] and it recommended that additional rights *not* be introduced into the Charter.[415] The eight years review gave no attention to the CRC, but recommended that the Charter be amended to include a provision recognising to all persons born in Victoria the right to a name and to be registered as soon as practicable after birth.[416]

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[406] *Momcilovic v The Queen* [2011] HCA 34 ('*Momcilovic'*). For comments, see S Tully 'Momcilovic v The Queen (2012) 245 CLR 1' 2011 *Australian International Law Journal* 279.
[407] *Momcilovic* para 18.
[408] French CJ para 51 (also paras 49-50); Crennan and Kiefel JJ paras 565, 566, 684. According to Tully, the approach taken by the High Court adheres to 'orthodox principles of statutory construction', with the Charter yielding to statutory provisions (Tully 2011 note 406 at 281).
[409] French CJ para 50.
[410] Section 36(2) of the Charter.
[411] Section 36(5) of the Charter. Section 39(3) excludes awards of damages for breaches of the Charter.
[412] Parliament of Victoria (2006) *Charter of Human Rights and Responsibilities Bill Explanatory Memorandum* at 1, 14, 17 and 18 (online).
[413] As required by sections 44 and 45 of the Charter respectively.
[414] Section 44(2)(a)(ii) of the Charter.
[415] Scrutiny of Acts and Regulations Committee (2011) *Review of the Charter of Human Rights and Responsibilities Act 2006*, Recommendation 2 at 52 (online). For submissions in relation to the CRC, see paras 236-249.
[416] M Brett Young (2015) *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* at 222 (online). The recommendation was grounded in article 24(2) of the ICCPR rather than article 7 of the CRC.

The following paragraphs turn to the presentation of the relevant case law, focusing on cases in which the CRC was meaningfully engaged with.

4.4.7.2 The CRC and the exercise of judicial powers under the Charter

In two cases, Bell J relied on section 6(2)(b) of the Charter to issue directions for the adaptation of sentencing and bail proceedings concerning children. This section reads:

> This Charter applies to … (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3.

The Children, Youth and Families Act 2005 (Vic) ('the CYFA') adapted the proceedings in the children's courts to suit children's needs. Although most children are dealt with in the children's courts, some appear before the VSC because of the seriousness of their crimes. This was the case in *DPP v SL*[417] and *DPP v SE*.[418] Bell J held that under section 6(2)(b), he was obliged to apply the relevant Charter rights when exercising his functional responsibilities in relation to sentencing, bail proceedings and detention at court and trial.[419] The Charter reflected the standards of the ICCPR and the CRC,[420] which could also be taken into account as discretionary considerations to justify the directions otherwise made according to the Charter.[421] As stated by Bell J:

> These requirements [enabling a more child-friendly process] arise as a matter of human rights under the Charter and, on a discretionary basis, under certain international obligations. They especially arise under the fundamental principle of the best interests of the child.[422]

This enabled the Court to issue directions for child-friendly procedures at sentencing and bail.[423] The Court directed, therefore, that, *inter alia*, the children be separated from accused adults[424] when at court and not be handcuffed; that a more child-friendly and less intimidating courtroom be used; that the judge and the counsels do not robe; and that the child does not sit in the dock.[425] The Court gave special attention to securing an effective participation of the child in the sentencing process, resting its reasoning on sections 8(3) (equal protection under the law) and 25(3) of the Charter (right to procedures which take into account a child's age and the desirability of rehabilitation), and, in relation to the later section, 'its counterparts in the ICCPR and CROC',[426] including the views of the CRC Committee on ensuring an effective participation by children in legal processes.[427]

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[417] [2016] VSC 714.
[418] [2017] VSC 13.
[419] *DPP v SL* paras 5-6.
[420] *DPP v SL* para 7.
[421] *DPP v SL* para 10.
[422] *DPP v SE* para 11, summarising the reasoning in *DPP v SL* fns omitted. The Court acknowledged that its reasoning in *DPP v SL* was based on 'ss 6(2)(b), 8(3), 17(2), 23(1), (2) and (3) and 25(3) of the Charter, arts 10(2)(b), 14(4) and 24(1) of the ICCPR and arts 37(c) and 40(1) and (2) of CROC' (*DPP v SE* fn 10).
[423] DPP v SL (sentencing); *DPP v SE* (bail).
[424] To support the need to detain children separately from adults, Bell J referred to the interpretation of article 37(c) by the CRC Committee in *General Comment 10* (*DPP v SL* para 8).
[425] For the full set of directions, see *DPP v SL* para 25. Similar directions were given in relation to the bail hearing in *DPP v SE* paras 16-17.
[426] *DPP v SL* para 11 fn omitted. The reference to the CRC sent to art 40(1) CRC.
[427] *DPP v SL* para 11.

A notable feature of Bell J's approach in *DPP v SL* and *DPP v SE,* was the consistency with which he stressed that the directions were issued as an *obligation* under the Charter but arose also from taking the CRC and ICCPR into consideration as *discretionary considerations*.[428] This two-pronged justification is important. First, preserving the autonomy of the CRC is useful for cases where the complementarity with the Charter is less pronounced. The VSC can then rely on the CRC as a discretionary consideration. Second, it cements the jurisprudence which supports the use of the CRC in the exercise of courts' discretion. For Australian jurisdictions lacking legislation which explicitly enables courts to resort to international treaties, the above cases have persuasive value, and encourage the courts to resort to the CRC in the exercise of their discretion. The degree of influence of the CRC in these cases is difficult to establish with certainty because convergent guidance derived from other sources was also relied on.[429] While this is an issue warranting further consideration, it is telling that Bell J uses language similar to that of the CRC Committee,[430] and his directions respond specifically to the issues raised by the latter in its relevant general comments.

4.4.7.3 The CRC and interpretation of the Charter

The first two cases concern the detention of children in a separate unit of an adult prison in Melbourne. On 12-13 November 2016 riots occurred at one of the two detention facilities for children, resulting in significant damage and consequent loss of accommodation, and the subsequent housing of children in inadequate conditions. On 17 November 2016, by way of an executive order, a part (Grevillea unit) of an adult prison was excised from the rest of the prison (Barwon prison), with Grevillea being immediately declared a youth remand and youth justice centre. Grevillea and Barwon shared a roof, but the units were completely separate. After establishing Grevillea, on 21 November 2016 the first young offenders (aged 15-18) were transferred there, despite the unit being unsuitable for accommodating children.[431]

In *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*,[432] the plaintiff children challenged, amongst others, the conformity with the Charter of the orders which established Grevillea as a youth detention facility.[433] The CRC was relied on by Garde J to decide that section 17(2) (the right to protection as is in his/her best interests)[434] was engaged.[435] Referring to section 32(2) of the Charter,[436] Garde J decided

[428] *DPP v SL* paras 9, 11, 14, 16; *DPP v SE* para 12.
[429] Bell J refers also to ECtHR decisions (*DPP v SL* para 12), CYFA 2005 (para 13), and practice directions from the UK (paras 15-16).
[430] Bell J cites CRC Committee *General Comment 12 (2011): The Right of the Child to be Heard* (*DPP v SL* para 11).
[431] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 paras 57-92; 108; 121-125 (for example, lengthy lock-down periods, limited outdoor time, poor education services, reduced opportunities for family visits, harsh treatment by staff, absence of adequate medical and psychosocial support, etc).
[432] [2016] VSC 796 ('*Certain Children* 2016').
[433] *Certain Children* 2016 para 142.
[434] Section 17(2) reads: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.
[435] A right is engaged when a decision limits a right, regardless as to whether such limitation is justifiable under section 7(2) or not (*Certain Children* 2016 para 143). For the purposes of the 'engagement' stage of the inquiry, the rights are to be construed as widely as possible (para 143).
[436] *Certain Children* 2016 para 146.

that the CRC and 'materials from the United Nations inform the scope of the rights protected by s 17(2) of the Charter',[437] and they provide 'an established international framework by which substance and standards can be given to s 17(2)'.[438] Articles 3, 6(2), 12 and 40(1) of the CRC were found to be relevant for this purpose. Article 3(1) of the CRC creates special protective obligations 'because "children differ from adults in their physical and psychological development, and their emotional and educational needs"'.[439] Article 6(2) of the CRC, as interpreted by the CRC Committee, goes against the incarceration of children, which has negative effects on their development.[440] Article 40(1) of the CRC, also as interpreted by the Committee, requires a treatment consistent with children's vulnerability, which respects and promotes their dignity and rehabilitation.[441] Garde J then referred extensively to other requirements arising from the CRC, as interpreted by the Committee.[442] When it decided that section 17(2) of the Charter was engaged, the Court did so on the basis that the orders to establish Grevillea directly affected the children in various ways, contrary to guidance derived from the CRC and the Beijing Rules.[443]

The Court found that in making the impugned orders, the decision-makers did not take into account the rights of the affected children, as required by section 38 of the Charter, and that the ensuing decisions were incompatible with the rights of the detained children.[444] The orders did not impose a reasonable limitation on the rights of children,[445] and were declared invalid,[446] with the consequent obligation for the children to be transferred to a lawfully established detention facility.

Pending the appeal, new executive orders were made once more establishing Grevillea as a remand and youth justice centre.[447] An additional order authorised the use of oleoresin capsicum spray (OC spray) and extendable batons at Grevillea in order to ensure security, good order and the safety of children and staff.[448] The children detained in Grevillea challenged the validity of the new orders, including their transfer to the unit. Under section 38(1) of the Charter, the orders to re-establish Grevillea (and some transfer orders) were again found unlawful. Dixon J found that the rights in sections 17 and 22(1) of the Charter were limited by children being placed in a maximum security adult prison unit, which had a demoralising and

[437] *Certain Children* 2016 para 146. The UN materials to which the Court refers include CRC Committee *General Comment 10 (2007): Children's rights in juvenile justice* and the Beijing Rules (paras 152-153).
[438] *Certain Children* 2016 para 154.
[439] *Certain Children* 2016 para 149 quoting *General Comment 10* para 10.
[440] *Certain Children* 2016 para 149 quoting *General Comment 10* para 11.
[441] *Certain Children* 2016 para 151 referring to *General Comment 10* para 13.
[442] *Certain Children* 2016 para 155 referring to *General Comment 10* paras 87, 89. *Certain Children v Minister for Families and Children & Ors* (NO 2) [2017] VSC 251 ('*Certain Children* 2017') para 263 (per Dixon J).
[443] *Certain Children* 2016 at 157-158; compare with para 155, which refers to guidance from *General Comment 10.*
[444] *Certain Children* 2016 paras 197-203; 223.
[445] *Certain Children* 2016 para 230.
[446] This aspect of the order was maintained in appeal in *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343.
[447] *Certain Children* 2017 para 9. Certain measures were taken to address some of the concerns identified by Garde J in *Certain Children* 2016 prior to the new orders being issued (*Certain Children* 2017 para 300). Garde J's judgement, the appeal against it and the new orders occurred between 21 December and 30 December 2016.
[448] *Certain Children* 2017 para 11.

dehumanising effect on them,[449] and by authorising the use of OC spray at Grevillea, with negative consequences on the children detained.[450] Dixon J found these limitations not to be proportionate with the important values which sections 17(2) and 22(1) protected.[451]

It was once more in giving content to section 17 that the Court turned to the CRC. Dixon J noted the similarity between articles 24(1) of the ICCPR and article 3 of the CRC, and section 17 of the Charter respectively.[452] In relation to the content of section 17(2), Dixon J found that the best interests of the child requires hearing and giving due weight to the views of the child in a wide range of matters, including the decisions of transfer to Grevillea. The Court referred to *General Comment 12* of the CRC Committee to support its wide approach to matters which require the hearing of the concerned child.[453] For Dixon J, the international instruments stressed that children require different treatment in the criminal justice process for reasons of their age and continuing development.[454] In the administration of juvenile justice, article 3 requires that the best interests should be a paramount consideration, because, as the Committee stressed, children differ from adults in their development and needs.[455] Dixon J endorsed the views of Garde J in terms of various requirements arising from the CRC in relation to the detention of children, which informed the content of section 17(2) of the Charter, such as maintaining family contact, quality of physical environment, education opportunities, securing children's developmental needs, medical care, and disciplinary measures consistent with the dignity of the child.[456] It is not surprising, therefore, that the limitations identified by Dixon J in relation to section 17(2),[457] largely constitute contraventions to the CRC standards as interpreted by the Committee, and which Garde J and Dixon J have embraced in defining the content of this section.[458]

The next case shows that the Court continues to engage with the Convention independently of the Charter.[459] In *ZZ v Secretary, Department of Justice*[460] an assessment notice was refused to the applicant who wished to become a bus driver, as he was found to pose a risk to children due to his criminal record consisting of serious offences (not related to children and not sex offences). Bell J referred to several provisions of the CRC to stress that one of its purposes was to protect children against harm and, correlatively, to impose positive obligations on states to ensure their protection.[461] The Court engaged with the Charter and the CRC independently. In relation to the CRC, it applied the common law principle that, as far as possible, domestic

[449] *Certain Children* 2017 para 424
[450] *Certain Children* 2017 para 433.
[451] *Certain Children* 2017 para 455.
[452] *Certain Children* 2017 para 260. Dixon J endorsed Garde J's reliance on the ICCPR, the CRC and the Beijing Rules in giving content to s 17(2) of the Charter (*Certain Children* 2017 para 262).
[453] *Certain Children* 2017 para 262 (fn 179).
[454] *Certain Children* 2017 para 265.
[455] *Certain Children* 2017 para 262 (fn 181). The Court also referred to articles 6(2) and 40(1) of the CRC.
[456] *Certain Children* 2017 para 263.
[457] *Certain Children* 2017 paras 424, 453.
[458] *Certain Children* 2017 para 263.
[459] In *Tomasevic v Travaglini* [2007] VSC 337, Bell J said in relation to ICCPR that it has 'an independent and ongoing legal significance', which 'is not diminished, but can only be enhanced, by the enactment of the Charter' (para 72).
[460] [2013] VSC 267 ('*ZZ*').
[461] *ZZ* paras 63-66 (articles 3, 19, 34 and 36).

legislation should be construed in conformity with Australia's obligations under international treaties.[462] The application of the Charter and the CRC in this case led to overlapping outcomes: both supported the existence of a positive obligation for the state to protect children against harm, but neither justified a severe limitation of the rights of others (*in casu* the right to work) if no real risk to children existed.[463]

To conclude, the Charter has contributed to the VSC engaging with the Convention by enabling judges to detect the harmony between their standards. Unlike the High Court cases, the relevance and the legitimacy of references to the CRC has not been contested, and positive consequences arose from its application.

4.5 Analysis

4.5.1 The methods of engagement

The engagement of the Australian courts with the CRC is marked by the status of the Convention as an unincorporated treaty, the absence of legal obligation to engage with it, and the CRC yielding to domestic law when a conflict exists. Although incorporation arguments have been put forward by the FCFC, they were legally vulnerable,[464] and were not endorsed by the HCA. The exploration of the incorporation route by the Family Court was possible because of the general convergence, rather than conflict,[465] between the CRC and the Family Law Act. This is a relationship which cannot be taken for granted, as illustrated by the immigration cases discussed in part 4.4.3 above. As important as incorporation or legislative effect may be, it does not secure full effect to the CRC because the Parliament may still deprive the enacted provisions of full effect, including their justiciability.[466]

The use of the CRC in judicial reasoning is discretionary,[467] resulting in an erratic use of the Convention by judges. The willingness of individual judges to integrate it in their reasoning becomes therefore determinant. Illustrative is the contrast between the close attention given to the CRC by the FCFC in several judgments and its marginalisation in the HCA,[468] where the Convention is considered primarily in the separate or dissenting judgments of Kirby J. Tellingly, after his departure from the Court in 2009, except for a 2018 case on appeal from the Supreme Court of Nauru,[469] the HCA last mentioned the CRC in a 2011 judgment.[470]

Some judges have shown concern about the potential conflict between the CRC and domestic laws,[471] while others argued that responsibility for such conflict is to be exacted at international

[462] *ZZ* para 67.
[463] *ZZ* para 68 in relation to the CRC; paras 70-71, in relation to section 17(2) of the Charter.
[464] See discussion in part 4.4.1.
[465] Cases of potential conflict are rare, but an example is *H v W* discussed in part 4.4.1.
[466] *AS v MIBP* discussed in part 4.4.1.
[467] Unless mandated by a statute.
[468] Compare *Re Z* and *B and B v MIMIA* (Family Court) with *GPAO* and *MIMIA v B* (High Court).
[469] *DWN027 v The Republic of Nauru* [2018] HCA 2.
[470] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[471] *B and B v MIMIA*; *Re Jamie*; *DPP v SL*.

level and not by domestic judges.[472] The legal position is that if a potential conflict between domestic norms and the CRC cannot be resolved by applying statutory interpretation rules and presumptions, the courts have to apply the domestic law irrespective of its inconsistency with the Convention. Courts seem therefore powerless in cases of overt conflict between the CRC and domestic Australian law. However, engagement with the exercise of external affairs power potentially enlivened by the CRC would allow the courts directly to consider this conflict and possibly declare federal laws invalid because of inconsistency with the CRC. In this way, although CRC rights are not protected in the Constitution, they may acquire some constitutional relevance, however limited.[473] So far, there has been little judicial engagement with the external affairs power in the context of the CRC, and conflicting views have been expressed.[474] Recent legislative developments could revive the debate, and the CRC may find itself in a strengthened position: a recent statute has enlivened the exercise of external affairs power[475] and the Parliament has explicitly indicated its intention to give effect to the CRC in recent family law reform.[476]

Courts have accepted, in principle, that the CRC can be relied on to interpret statutes in conformity with it.[477] In *AMS v AIF*, Gleeson CJ, Gummow and McHugh JJ suggested that the CRC contains 'aspirational rather than normative'[478] provisions, and questioned its interpretive role, considering that a statute 'is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established *rules* of international law'.[479] As *aspirations* are not *rules*, this reasoning throws some doubt over the interpretive role of the CRC. This may have been, however, an isolated pronouncement, considering that in *Re Woolley* some of the same judges seemed prepared to accept the interpretive role of the Convention, without expressing concerns about its alleged aspirational nature.[480] The interpretive relevance of the CRC was also limited where no statutory ambiguity was identified,[481] or where the matter was essentially one of constitutional law, such as the division of legislative competence between states and the Commonwealth or the jurisdiction of federal courts.[482]

None of the cases identified in this work show a majority of the HCA interpreting statutes in conformity with the CRC, despite the 'in principle' support for the possibility. On the other hand, and without departing from the position that the CRC does not prevail over conflicting

[472] *Teoh* per McHugh J para 37; *Lam* per McHugh and Gummow JJ para 98
[473] As discussed in part 4.4.2, the legislation would only be invalidated in case of substantial inconsistency with the treaty. Further, the legislation could be reintroduced under other heads of powers (if relevant) to circumvent issues arising from a potential inconsistency with the CRC.
[474] See discussion in part 4.4.2.
[475] See note 224.
[476] Part 4.4.2.
[477] *De L* (Kirby J); GPAO (Kirby J); *Re Woolley* per Gleeson CJ, McHugh J and Kirby J writing separately.
[478] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50.
[479] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50 (my emphasis).
[480] See the separate judgments of Gleeson CJ and McHugh J in *Re Woolley*, where the interpretive role of the CRC is implicitly accepted.
[481] *AMS v AIF* per Callinan J paras 280-281; *Re Z* per Fogarty J para 183.
[482] *AMS v AIF* per Gleeson CJ, McHugh and Gummow J para 50; Kirby J paras 168 & 169; Hayne J para 222; *GPAO* (scope of the best interests provision in the FLA); *MIMIA v B* (the scope of the welfare power of the Family Court).

domestic law,[483] the Family Court has embraced the CRC in the interpretation of the FLA. Once more, this was facilitated by the close relationship between the two.[484] Positive is also the practice of the VSC, that, relying on section 32(1) of the 2006 Charter, used the CRC and the Committee's general comments to give meaning to various provisions of the Charter.[485] It seems therefore that legislative endorsements of the 'domestic value'[486] of the CRC, reflected in the convergence of its standards with domestic law, and statutory authorisation to rely on the CRC have facilitated the use of the CRC by courts.

Only the Family Court has so far engaged with the CRC and its relationship with the principle of legality. A majority of the Court supported its application to protect CRC rights in *B and B v MIMIA* and *KN & SD,* as discussed in part 4.4.5. As the view has not been endorsed by the HCA and it departs from the existing case law, it remains controversial. Further developments are not excluded, however. CRC rights may be protected under the Victoria Charter by a rule akin to the principle of legality, unless a clear contrary intention is present in a statute. In *Momcilovic*, Gleeson CJ said that '[s]ection 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application'.[487] Thus, to the extent that CRC rights influence the interpretation of the Charter rights, they may be protected by a presumption with similar impact with the principle of legality.

In *Teoh*, engagement with the CRC occasioned the Court to develop a new avenue to engage with unincorporated treaties. It is difficult to say whether this was conjectural or depended on special features of the CRC, but the reasoning of the majority suggests that the latter may be true. Mason CJ and Deane J stated that a legitimate expectation arose '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'.[488] Gaudron J's reasoning also implies that a legitimate expectation would not arise from a treaty which did not correspond to domestic values.[489] Analyses of recent cases show that lower courts continue to apply this doctrine but only in relation to the CRC,[490] albeit without discussing its potentially special features.[491] Nonetheless, it remains significant that it was the CRC which moved judges to create a new method to give effect to treaties when the existing ones were considered by the High Court insufficient to give effect to the Convention.

The 2006 Victoria Charter created additional avenues for the CRC to be applied by the courts in that State. It permitted the CRC to be relied on for the interpretation of the Charter itself and

[483] *Murray*; *Re Z* per Nicholson CJ and Frederico J para 416.
[484] *B and B: Family Law Reform Act* 1995; *B and B v MIMIA*; *Murray*; *Re Jamie*.
[485] *Certain Children* cases.
[486] M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 701.
[487] French CJ para 51 (also paras 49-50); Crennan and Kiefel JJ paras 565, 566, 684. According to Tully, the approach taken by the High Court adheres to 'orthodox principles of statutory construction', with the Charter yielding to statutory provisions (2011 note 406 at 281).
[488] *Teoh* per Mason CJ and Deane J para 34. The wide ratification of the CRC as a justification for it creating a legitimate expectation is also mentioned by Toohey J para 29.
[489] *Teoh* per Gaudron para 6.
[490] Edgar and Thwaites 2018 note 365 at 43.
[491] *Amohanga v Minister for Immigration and Citizenship* [2013] FCA 31.

of Victorian statutes. The Charter leaves undisturbed the primacy of the will of the legislature, and as yet, no declaration of inconsistent interpretation[492] with the Charter (interpreted with reference to the CRC) has been made. Nonetheless, the CRC contributed significantly to the far-reaching judgements in *Certain Children*, where the VSC found decisions of public authorities in relation to the detention of juvenile offenders incompatible with section 17(2) of the Charter, whose content was based on relevant CRC provisions.

The potential for CRC impact on statutory interpretation may be limited by the requirement in section 32(2) of the Charter that only international law 'relevant to a human right' as defined in the Charter may be relied on. This may result in socio-economic or protection rights in the CRC being excluded from playing an interpretive function. This is so because the definition of 'human rights' under the Charter is limited to civil and political rights,[493] and some CRC rights have no immediate equivalent in the Charter's catalogue of rights. It is, however, encouraging that the VSC has given the phrase 'relevant to a human right' a wide meaning, and it relied for the interpretation of the Charter on articles such as 6(2), 19, 34 and 36, whose nature extends beyond civil or political rights.[494] A further limitation is that while the CRC may contribute to defining the scope/legal content of Charter rights (at the 'engagement' stage), it has no role in the remainder of Charter inquiry (the limitation and justification stage, under section 7(2)). [495] On one side, the interpretive absorption of the CRC standards into the content of the Charter gives them added protection because limitations to Charter rights need to pass a stringent test under section 7(2). On the other side, a trespass to a Charter provision which has absorbed a CRC norm is permissible if its limitation can be justified under the Charter, irrespective of it contravening the CRC.

The most penetrating effects of the CRC are seen in the Victorian jurisprudence through the mediation of the Charter, which has clearly emboldened the courts to make extensive use of the CRC and the Committee's general comments,[496] the latter being absent in the reasoning of the other two courts. Reliance on general comments widened the reference framework for the interpretation of relevant domestic laws, often in ways which maximised the protection of rights.

Importantly, the VSC has sometimes preserved the autonomy of the CRC, engaging with it independently of the Charter when this was relevant.[497] The Court did not need to take this course, but by doing so, its jurisprudence becomes relevant for Australian jurisdictions which do not have human rights statutes, and it creates precedents for the application of the CRC when the Charter and the Convention do not overlap or converge.

The traditional methods of engaging with unincorporated treaties expose the vulnerability of the CRC especially before the High Court. There is some judicial wariness about the CRC.

[492] Section 36(2) of the Charter.
[493] Section 3 of the Charter.
[494] *Certain Children* 2016 and *ZZ.*
[495] *Certain Children* cases and *ZZ.*
[496] See especially the *Certain Children* cases.
[497] *DPP v SL; DPP v SE; ZZ.* In these cases, the Court distinguished between the CRC and Charter-reasoning, although the outcome of the two approaches was ultimately the same.

Legislative intransigence, especially in immigration legislation, left no space for creative consistent interpretation by some courts; and constitutional arrangements prevented best interests-associated concepts and institutions (such as the welfare and *parens patriae* jurisdictions) to extend beyond their traditional ambit.[498] Telling of the vulnerability of traditional techniques in giving effect to the CRC is that in no case was the CRC used to develop the common law,[499] or by the High Court to give a child-focused interpretation to a domestic statute. It is one case only that the VSC has relied on one of these techniques.[500] Some advancements have been made in giving the CRC effect in the exercise of judicial discretion, with the case law of the Family Court and the VSC providing strong support for the technique.[501] However, the position of the HCA on this technique is unknown.

The peripheral role of the CRC in many judgments of the High Court contrasts with the openness of the Family Court and the VSC toward it. While the High Court preferred to avoid dealing with difficult CRC-related issues such as incorporation arguments, external affairs power or the relevance on the CRC being a declared instrument under the HRCA, the Family Court was willing to address them from the perspective of the relationship between the Convention and the Family Law Act, or family law more generally.[502] Similarly, the VSC judges welcomed the opportunity to engage with the CRC under the 2006 Charter and to seek guidance from the general comments of the Committee.[503] While the absence of substantial engagement with the CRC by the HCA has created an arid children's rights jurisprudence at the highest judicial level, it left space for courts more amenable and better equipped by statutes to accommodate the CRC standards, to develop their own jurisprudence.

4.5.2 Non-normative approaches

Formally-recognised techniques discussed above do not capture the full array of techniques used by judges to relate to the CRC. Courts have used additional methods that have no intrinsic constraining effect and are not formally recognised as distinct methods to engage with international law. These methods are informal, subtle and diffuse, and difficult to capture in conventional legal language. In this work, they are referred to as 'non-normative approaches'.

Non-normative approaches involve using the CRC as a reference framework which enable judges to look at the domestic law in some new light, provided there is no obvious conflict between the CRC and the domestic law. When used in this way, the Convention may assist the courts better to understand and apply domestic law; or to 'discover' correspondent domestic legal concepts able to give effect to the Convention. Thus, unincorporated treaties may be 'an often useful context for the exposition of what Australian law requires',[504] and international

[498] *Re Z; B and B v MIMIA; Re Woolley*.
[499] In *Teoh*, Gaudron J noted the similarity between article 3(1) and an alleged pre-existing common law right, but the CRC was used to 'discover' that right rather than develop it. In *Re Woolley*, potentially extending the ambit of the *parens patriae* doctrine was relevant but was not argued before the Court.
[500] *ZZ*.
[501] Part 4.4.6.
[502] *Murray; B and B Family Law Reform Act 1995; B and B v MIMIA.*
[503] Compare, for example, *Re Woolley* (generic reference to the CRC) with *Certain Children* cases (detailed consideration of the CRC standards).
[504] *Koroitamana v Commonwealth of Australia* [2006] HCA 28 per Kirby J para 66 (referring to articles 7 and 8 of the CRC).

law 'may also sometimes assist a judge to exercise the applicable statutory powers'.[505] International instruments may 'reveal but do not resolve the conflicting interests',[506] and they may 'help to put … controversies into a conceptual context and express the basic values which must be taken into account'.[507] Although they do not 'throw much light on how they [conflicts of interests] should be resolved',[508] international instruments highlight interests which may be otherwise overlooked. In *Teoh*, Gaudron J 'discovered' a right which might have remained dormant had the CRC not been considered – the common law right to have the best interests of the citizen child considered,[509] a close equivalent of article 3(1) of the Convention. In *Re Z* and *B and B v MIMIA*, the wider scope of the best interests of the child under the CRC inspired the Family Court to seek convergent features in domestic law, so as to extend the scope of autochthonous provisions supportive of the best interests of the child. *In Re TLB*, article 9 of the CRC directed Bell J's attention to the relevance of the best interests of the child for his decision. In *DPP v TY*, the consideration given to the CRC enabled the judge to identify common law rules 'giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children'.[510]

These approaches have been criticised in the past for avoiding the 'hard questions' concerning the relationship between the international and domestic law.[511] They can be further criticised for maintaining the *status quo* rather than advancing the protection of rights. Without dismissing these concerns, ultimately, these approaches use the resourcefulness of the domestic law and judicial creativity to give effect to the CRC in the face of legislative ambivalence or hostility. While they rest on a measure of convergence between domestic law and the CRC they are not deprived of value when conflict exists. Although courts cannot provide a remedy, they may take note of the incompatibility between domestic and international standards,[512] placing it therefore into the public domain, where it can be considered publicly and politically.

4.5.3 The impact of judicial engagement with the CRC

The High Court jurisprudence is marked by the intractability of the immigration legislation and the web of constitutional issues with which CRC-related issues blended (primarily the division between federal and States legislative powers and the type of jurisdiction of the courts). The absence of wholesale incorporation by federal statute, or of constitutional status has limited the impact of the CRC more generally.

This is apparent in the difficulties in mainstreaming its rights. The FCFC has attempted to circumvent the unincorporated status of the CRC by mainstreaming its standards through some

[505] *AMS v AIF* per Kirby J para 169 (fn omitted).
[506] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50.
[507] *AMS v AIF* per Kirby J para 169.
[508] *AMS v AIF* per Kirby J para 169
[509] In *DJL v The Central Authority* [2000] HCA 17, Kirby J embraced Gaudron J's view (para 135).
[510] *DPP v TY* para 50.
[511] Dyzenhaus, Hunt and Taggart (2001 note 47 at 18) point out to the use of a similar technique by British courts to 'discover' fundamental rights in the common law. This was problematic because it 'pre-empts any serious or conscientious consideration of international rights requirements by the lazy assertion of an identity between them and the common law list' (ibid).
[512] *MIMIA v B* per Kirby J para 171.

best interests-related provisions in the FLA.[513] Had this view been endorsed, some best interests provisions in the FLA would have found application beyond that Act, and they would have been able to inform the application of State or Territory legislation under section 109 of the Constitution. This approach was rejected by the HCA in *GPAO* and *MIMIA v B.* The absence of constitutional clout deprives the CRC of another avenue of mainstreaming its standards across all states and territories, and matters legislated on by the Commonwealth Parliament, and of having a substantial say in controlling federal legislation.

With incorporation and legitimate expectation arguments having lost currency, statutory interpretation remains the most likely technique to advance the CRC in judicial reasoning. However, the impact of this method is inevitably constrained by the scope of the interpreted statute, as proved with the Family Law Act. In *B & B: Family Law Reform Act 1995*, the FCFC held that it was only those CRC provisions relevant for the object and purpose of the FLA (the relationship between parents and children) that can be used for its interpretation. This has not prevented the FCFC, however, from occasionally considering provisions not fitting strictly into this category.[514] As the majority in *Re Z* said, the best interests of children cannot be compartmentalised and courts may need to approach matters concerning children holistically,[515] despite the sometimes-artificial divisions in relation to jurisdiction.

The most notable jurisprudence has developed around article 3(1). It started with *Teoh,* where reliance on article 3(1) enabled the majority to decide that the best interests of the child can be 'extracted' from its traditional confines (such as family law or child protection)[516] and be applied to all actions concerning children. *Teoh* has been said to promote only a procedural protection of rights,[517] and its utility 'beyond the identification of an interest sufficient to trigger the application of procedural fairness'[518] has been questioned. These concerns do not diminish the importance of the case for the rights of children – *Teoh* provided a counterweight to the absence of a comprehensive domestic children's rights framework, by legitimising recourse to the CRC to make such children's rights visible in litigation. Without creating an obligation for decision-makers to take the CRC into account, it required it to be taken into account 'in a practical sense'[519] by '[s]ome sort of mental activity'[520] being directed at the rights of children.

Reliance on domestic institutions (welfare of the child, welfare jurisdiction or *parens patriae*) convergent with article 3(1) of the CRC continued as an apparently deliberate strategy in response to the vulnerability of the CRC as an unincorporated treaty.[521] VSC cases, and notably the *Certain Children* cases, rest on the best interests provision in the Victorian Charter (section 17(2)). In giving content to this section, the VSC did not rely exclusively on article 3(1) of the

[513] *Re Z* (the current section 60CA) and *B and B v MIMIA* (section 67ZC; the welfare jurisdiction).
[514] See references to article 37 in *B and B v MIMIA*, or articles 19 and 34 in *Langmeil.*
[515] *Re Z* Nicholson CJ and Frederico J para 325.
[516] For discussion of children's interests as sentencing factors in Australia, see T Walsh and H Douglas 'Sentencing parents: The Consideration of dependent children' 2016 (37) *Adelaide Law Review* 135.
[517] J Todres 'Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the Child and its early case law' 1998-1999 (30) *Columbia Human Rights Law Review* 159.
[518] Lacey 2004b note 362 at 155.
[519] Allars 1995 note 62 at 229.
[520] Ibid.
[521] *Re Z*; *MIMIA v B* and *Re Woolley*.

CRC, but utilised other relevant CRC provisions (articles 6, 12, 37 and 40) and general comments of the CRC Committee. This is a welcome judicial articulation of a rights-based approach to a best interests provision with a wide scope (i.e., not confined to a specific area of law), and a confirmation of the independent legal clout of such provision. This approach is similar with techniques used in other jurisdictions, where the best interests of the child has been used as a gateway for giving effect to CRC rights.[522] It suggests that reliance on article 3(1) (and associated institutions) is sometimes used as a reserve strategy, in the absence of other avenues to allow the CRC to produce domestic effects.

It is sometimes difficult to establish the independent legal effect of the CRC. In some cases, the CRC reasoning is subsidiary to domestic law[523] or it is simply inconclusive.[524] As mentioned previously, apart from *Teoh*, the CRC has made little difference to the majority judgments in the HCA. In many cases of the VSC, such as *DPP v TY*, *In Re TLB*, *DPP v SL*, *DPP v SE* and *ZZ*, the CRC reasoning was additional to or it reinforced the reasoning under domestic law. However, a forensic analysis which seeks to identify outcomes relating exclusively and independently to the CRC may be unrealistic and may overlook subtler ways in which the CRC has influenced domestic jurisprudence. For example, in *Re Jamie*, the FCFC used articles 5 and 12 to guide the court in the exercise of welfare jurisdiction when the statute did not prescribe the relevant factors. In *Certain Children* 2017,[525] the VSC interpreted the best interests provision in the 2006 Victoria Charter so as to require giving consideration to the views of the child, as per article 12 of the CRC.[526] Also in the *Certain Children* cases, the VSC relied heavily on the CRC to give contour to what amounts to a lawful detention regime for children under the 2006 Victoria Charter. In *DPP v TY*, the CRC prompted Bell J to use his discretionary powers to ensure that the relevant body decides, on the day of sentencing, whether the accused could serve his sentence in a juvenile centre to avoid him being unnecessarily sent to an adult prison.[527] Here, the CRC had a diffuse effect on the attitude of the court, and the reliance on it was motivated by the Court's belief that its exercise of discretion under the influence of the CRC 'will be the better for it'.[528]

In other cases, the CRC has increased children's visibility in legal processes and has prompted courts to consider children as legal subjects independently of the legal position of their parents. The judgments of the majority in *Teoh* are illustrative. The CRC has drawn the courts' attention to the vulnerability of children as citizens to whom the state owes protection independent of that provided by their parents.[529] The CRC has also prompted some judges to conceptualise legal issues in a child-sensitive way. In *De L*, for example, Kirby J discusses extensively the

[522] See France (Chapter 3 above), where the courts have sometimes applied article 3(1) of the CRC so as to protect the substance of other rights.
[523] *GPAO* (per Kirby J); *B and B v MIMIA*; Gaudron J in *Teoh*.
[524] *Re Z* per Nicholson CJ and Frederico J para 317; *Murray* para 149.
[525] *Certain Children* 2017 para 262.
[526] This was a position accepted *obiter* in the earlier case of *A & B v Children's Court of Victoria* [2012] VSC 589 paras 94-95, 109-110 (the Court did not rely on the CRC because it found that the statutory provision which required interpretation was not ambiguous).
[527] *DPP v TY* para 69-70.
[528] *DPP v TY* para 51.
[529] *Teoh* per Gaudron paras 3-5.

difficulties faced by children in expressing views in contentious family law litigation. In *Re JJT; Ex Parte Victoria Legal Aid*,[530] the same judge mentioned the Convention briefly in footnotes (11 and 29), but acknowledged children's vulnerability in family law disputes, and the need to take such vulnerability into account when interpreting and applying statutes providing for the legal representation of children. This conceptualisation is not, unfortunately, immune to legislative intransigence. As illustrated by *Re Woolley*, arguments premised on the vulnerability of children and international obligations to treat illegal immigrant children according to such vulnerability failed in front of the legislative diktat.

Absence of deep engagement with the CRC or uncertainty about its impact does not deprive the references to the CRC of significance. The willingness of judges to acknowledge the CRC when they have no obligation to do so shows some 'judicial curiosity' in relation to the Convention. The willingness to consider the Convention enables the courts to find domestic concepts which can accommodate CRC values, and which may have otherwise lain dormant and unutilised.[531] Even cases where the engagement with the CRC is not extensive or it is limited to reinforcing of domestic standards, or where the Convention has no tangible impact or voice of its own,[532] contribute to an accumulation of pronouncements which support the relevance and the legitimacy of the CRC in judicial reasoning.

4.6 Conclusions

The interaction between the CRC and domestic judicial reasoning in Australia is complex, and made difficult by its unincorporated status and the federal legislative reluctance to give it full effect. Formal means of application are indirect, and their effect may be superseded by legislation. In the field of immigration especially, the jurisprudence of the courts reflects this legislative intransigence. Constitutional obstacles related to the distribution of powers between the Commonwealth and the States have also affected the capacity of the courts to give effect to the CRC. Overall, detailed engagement with the Convention is not common, and the attention given to its standards is often limited. On the positive side, the jurisprudence of the Family Court and the VSC shows that statutory endorsements of the value of the CRC have resulted in these courts being more open to the Convention and to engaging more meaningfully with it.

Despite challenges, the CRC remains relevant for the courts. Australian law has strengths (some yet to be fully explored) which have contributed and may still contribute to the CRC being given domestic effect.[533] The Convention has had the most notable impact when judges

[530] [1998] HCA 44.
[531] See part 4.5.2 above.
[532] For illustrations, see *CDJ v VAJ* [1998] HCA 67 (in relation to the paramountcy principle, per Kirby J fn 182); *Cattanach v Melchior* [2003] HCA 38 (article 18; Gleeson CJ para 35).
[533] For example, the common law tradition and the more significant role played by judges in law-making than that played by their civil law systems counterparts; the existence of domestic institutions whose convergence with the CRC has not been fully explored (see the *parens patriae* comments made by various judges in *Re Woolley*); or the significant potential for advancing the rights of children through the jurisprudence developed under States' human rights acts.

were able to identify convergence/complementarity and lack of conflict between the CRC and domestic law. The use of the CRC to guide judicial discretion and the non-normative techniques developed by courts accommodate such non-antagonistic relationship with the domestic law, and facilitate the engagement with the Convention.

As other authors have argued, the judicial potential of the CRC is still to be fully explored.[534] Very few issues have been definitively addressed by the HCA, which leaves scope for further developments. The exercise of external affairs powers in the context of the CRC and its consequences await clarification. The views expressed by Gaudron J in *Teoh* that best interests of the child is a common law right and the state is a 'safety net' for the rights of children carry potential for further development. The numerous *obiter* statements made by Kirby, Gummow and McHugh JJ in their separate judgments in *Re Woolley* remain unexplored, as does Kirby J's statement in *GPAO* that the welfare of the child and his/her best interests, although similar concepts, may be distinct.[535] No major case involving the CRC has been dealt with by the HCA in recent years, but hopefully with a legal position strengthened by legislative endorsements, when such case reaches the Court, the Convention will find a warmer reception.

[534] Tobin 2016 note 94 at 34, for example.
[535] Same view in *Re Z* per Nicholson CJ and Frederico J para 309.