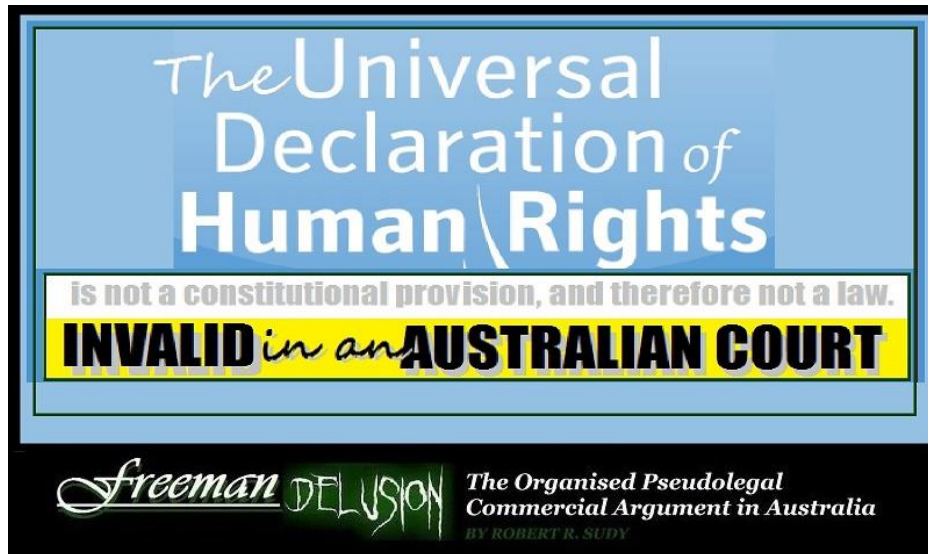


## International Treaties



Australia has no Charter of Freedoms or other Bill of Rights, all of our civil rights are based on common law and constitutional provisions. OPCA adherents often cite various treaties in international law as protection of certain rights, such as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. During the COVID-19 pandemic, the Nuremberg Code was frequently cited regarding mandatory vaccination. It seems to be the case that they see international law as a “higher law” that governments must obey, and if any domestic law is inconsistent with “United Nations law” then it is invalid. As seen [Filla v Independent Community Living Australia \[2022\] NSWCATAD 108](#) (at 8-10):

*“In both written and oral submissions, Mr Filla referred to Article 7 of the International Covenant on Civil and Political Rights 1980 and sought my explanation as to how any NSW law, or, the PHO’s, could override international law. He frequently referred to there being no ‘higher laws’ above United Nations Law and that the Hon Bradley Hazzard MLA, Minister for Health and Medical Research, had no jurisdiction to make valid PHO’s because a PHO order is not a law, only a directive. Therefore, the PHO’s are of no legal effect. Mr Filla cited the Charter of Human Rights and Responsibilities Act 2006, which protects him from cruel, inhuman or degrading treatment and that this and other international laws and covenants are apposite in this leave application.”*

With all treaties in general, they are not part of domestic law or binding on individuals within a nation unless they are ratified by legislative enactment. This includes the provisions of the enactment into the body of law of the particular State, without which a court has no provision by which to adopt it. As pointed out in [Isabella Stevens v Epworth Foundation \[2022\] FWC 593](#) (at 26):

*“...the contention of Ms Stevens that the Directions are invalid on the ground that they are contrary to international human rights conventions is misconceived, because international conventions have domestic effect in Australia only to the extent that they have been incorporated into legislation.”*

**Treaties do not form part of domestic law**

Firstly, there is the principle of national sovereignty, which implies that no other body can enforce its system of laws on another sovereign nation. The highest form of law in Australia is the Constitution, and that is where all other laws must originate from. As stated in [\*Durham Holdings Pty Ltd v New South Wales \(1999\) 47 NSWLR 340\*](#):

*“It does not rest upon judicial pronouncements to accord, or withhold, recognition of the law in question by reference to the judge’s own notions of fundamental rights, apart from those constitutionally established. . . .subject to any constitutional invalidity, the judge has no authority to ignore or frustrate the commands of the lawmaker. To do so would be to abuse judicial power, not to exercise it.”*

Secondly, the making of international treaties is within the responsibilities of the Executive branch of government, while the making of domestic law is within the Legislative branch of government. As explained by Mason CJ and Deane J (at 286-287) in [\*Minister for Immigration and Ethnic Affairs v Teoh \(1995\) HCA 20\*](#):

*“It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.”*

<https://freemandelusion.com/wp-content/uploads/2018/07/minister-of-state-for-immigration-and-ethnic-affairs-v-teoh-1995-hca-20.pdf>

The [\*Charter of the United Nations Act 1945\*](#) (Cth) appears to bring the international law into domestic law, with section 5 providing clearly: *“The Charter of the United Nations (a copy of which is set out in the Schedule) is approved.”* the more accurate view is that section 5 serves only for the purposes of international law, to ratify Australia’s participation in the United Nations. In [\*Bradley v Commonwealth \[1973\] HCA 34\*](#), the High Court stated the rationale for the decision (ratio decidendi) which is binding on lower courts. Barwick CJ with Gibbs and Stephen JJ (at 26) held that:

*“The Parliament has passed the Charter of the United Nations Act 1945 (Cth), s. 3 of which provides that “The Charter of the United Nations (a copy of which is set out in the Schedule to this Act) is approved”. That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth. ... Section 3 of the Charter of the United Nations Act 1945 was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council.”*

<https://freemandelusion.com/wp-content/uploads/2018/07/bradley-v-commonwealth-1973-hca-34.pdf>

This conundrum is further expressed in the Federal Court case [\*\*\*Minister for Foreign Affairs and Trade v Magno, G. \[1992\] FCA 864\*\*\*](#). In this case Justice Gummow compares the binding nature on Australian domestic law of the *Vienna Convention on the Law of Treaties* as opposed to the *UN Charter*.

*“First, there is the basic proposition that if the international obligation involves enforcement in the courts which is not already authorized by municipal law, legislation is needed to make the necessary changes in the law or equip the Executive with the necessary means to execute the obligation; it is for the Parliament and not the Executive to make or alter municipal law. ... Secondly, not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the Commonwealth, or creates justiciable rights for individuals. An example is s. 3 (sic) of Charter of the United Nations Act 1945. This simply states that the Charter is “approved”, something insufficient to render the Charter binding on individuals in Australia: Bradley v The Commonwealth [1973] HCA 34; (1973) 128 CLR 557 at 582, Koowarta supra at 224. See also Dietrich v The Queen supra pp 66-67. The legislation with which this appeal is concerned is not within this class, because s. 7 states that certain provisions of the Convention “have the force of law” in Australia.”*

<https://freemandelusion.com/wp-content/uploads/2018/07/minister-for-foreign-affairs-and-trade-and-ors-v-magno-g.-and-anor-1992-fca-864-28-ald-119.pdf>

As also noted by Hayne J. in [\*\*\*Josse v Australian Securities and Investment Commission \[1998\] HCA 77\*\*\*](#) (at 21):

*“The third element in the submissions made by the applicants, and the one to which greatest significance was given in oral argument, asserts that significance is to be attached to certain of Australia’s international dealings. These contentions fail to take account of certain basic principles. First, provisions of an international treaty to which Australia is a party do not form part of domestic law unless incorporated by statute. It follows that what one of the applicants referred to as various human rights instruments do not of themselves give rights to or impose obligations on persons in Australia. Similarly, the Charter of the United Nations does not have the force of law in Australia.”*

<https://freemandelusion.com/wp-content/uploads/2020/07/josse-v-australian-securities-and-investment-commission-1998-hca-77.pdf>

Similarly, regarding the *International Covenant on Civil and Political Rights*, in [\*\*\*Dietrich v The Queen \[1992\] HCA 57\*\*\*](#) Toohey J (at 22) held that:

*“The ratification by Australia of the ICCPR on 13 August 1980 did not render it part of Australian municipal law((199) Simsek v. MacPhee (1982) 148 CLR 636, at pp 641-642. See also Kioa v. West (1985) 159 CLR 550, per Gibbs C.J. at p 570.). The ICCPR is now contained in Sched.2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). While the Act confers power on the Human Rights and Equal Opportunity Commission to investigate and conciliate alleged breaches of rights contained in the ICCPR, it does not create justiciable rights for individuals. Likewise, although Australia’s accession to the First Optional Protocol to the ICCPR effective as of 25 December 1991 enables Australians to petition the United Nations Human Rights Committee*

*for alleged violations of the rights set out in the ICCPR, it does not make the ICCPR part of Australian municipal law.”*

<https://freemandelusion.com/wp-content/uploads/2018/07/dietrich-v-the-queen-1992-hca-57.pdf>

## **Parliamentary Supremacy**

Since this time, several States and territories have enacted human rights legislation, effectively incorporating human rights treaties into the domestic law of the State or territory. These are the [Human Rights Act 2004](#) (ACT), the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), and more recently the [Human Rights Act 2019](#) (Qld).

It is important to note that this does not make the actual treaty part of domestic law, but the enactment itself. These are ordinary legislation, which by their very nature are open to modification and limitation by subsequent legislation. For example, [section 28](#) of the ACT Act, [section 7](#) of the Victorian Act, and [section 13](#) of the Queensland Act, all provide that human rights may be limited in certain circumstances, as seen during the pandemic.

Even when an international treaty is brought into domestic law through legislation, the High Court has held in [Momcilovic v The Queen & Ors \[2011\] HCA 34](#) that the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic) does not empower the courts to radically re-interpret legislation or subvert the parliaments intent. It was held that the Charter protects fundamental human rights while maintaining parliamentary sovereignty.

<https://freemandelusion.com/wp-content/uploads/2020/11/momcilovic-v-the-queen-2011-hca-34.pdf>

## **Legal obligations of non-signatory nations**

While Australia may be a signatory nation of the treaty, non-signatory nations may also be found in breach of the *Universal Declaration of Human Rights*, so there is no real difference between the legal obligations of a signatory nation or a non-signatory nation.

While the *Universal Declaration of Human Rights* was adopted unanimously by the General Assembly of the UN in 1948, it is not a binding treaty that states ratify or accede to. Rather, it is a declaration of:

*“...a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”*

Treaties form a common basis for negotiations between nations. It is more difficult working with those that are outside the treaty system. However, if the UNDHR has become part of customary international law binding all nations, it becomes the basis of mutual obligations between states, and nations can be held accountable for their compliance or non-compliance with it regardless of whether individual states have ratified or acceded to the relevant treaties.

## Means of applying international law

Michael Kirby AC CMG.; “[Domestic Implementation of International Human Rights Norms](#)”

The Bangalore Principles state, in effect:

- 1. *International law (whether human rights norms or otherwise) is not, in most common law countries, part of domestic law.*
- 2. *Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law.*
- 3. *The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty – even one ratified by their own country.*
- 4. *But if an issue of uncertainty arises (by a gap in the common law or obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations.*
- 5. *From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.*

<https://freemandelusion.com/wp-content/uploads/2018/07/domestic-implementation-of-international-human-rights-norms.pdf>

Robert French CJ.; “[International Law and Australian Domestic Law](#)”

<https://freemandelusion.com/wp-content/uploads/2020/09/international-law-and-australian-domestic-law.pdf>



**Robert R. Sudy** (author) Website: [Freeman Delusion: The Organised Pseudolegal Commercial Argument in Australia](#) Email: [robertsudy@freemandelusion.com](mailto:robertsudy@freemandelusion.com) \* Like the page on [Facebook](#) Public group [Australian Pseudolaw](#) \* Follow me on [Twitter](#) \* Subscribe on [YouTube](#).