1. What is the nature of public international law?

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed”: Permanent Court of International Justice, *Case concerning the SS Lotus*, (1927) Ser A No 10, 18.

Nature of international law:

- International law comprises a system of rules and principles that govern the international relations between States and other institutional subjects of international law.
- States, being members of a community, recognise that there is a body of rules binding upon them as law.
- Effectiveness: The absence of a ‘police force’ or compulsory court of general competence does not mean that international law is ineffective. International law is effective because it is based on common self-interest and necessity (ie rules are needed for the international community to function).
- The content of the rules of international law can be uncertain.

2. What role do treaties play in international law?

(i) Treaties are a formal source of international law ie a source of binding obligations on States as a matter of international law. Consider:

- Is Australia bound by the treaty? Identify the date of entry into force generally as well as for Australia (ie when did Australia become a State party). Check the UN Treaty Series and the Australian Treaty Series.
- Identify any modifications to the treaty’s terms through reservations or subsequent amendments.

(ii) treaties are a basis for establishing the jurisdiction of the International Court of Justice: Art 38, *Statute of the International Court of Justice* [1975] ATS No 50:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States...

See also Art 36(2), ICJ Statute:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

   a. the interpretation of a treaty;
   
   b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.


4. To what treaties does the Vienna Convention apply?

(i) The document must be a ‘treaty’ and not another instrument:

- an international agreement concluded between States in written form and governed by international law, whether embodied in one or more instruments and whatever its particular designation: Art 2(1)(a), VCLT.
- See also Koowarta v Bjelke-Petersen (1982) 153 CLR 168, per Brennan J at 254: “all agreements made by Australia with other international persons so as to be binding upon Australia and one or more other international persons”.

Attributes of a ‘State’:

- a defined territory
- a permanent population
- a government, and
- independence from any other State.

A ‘treaty’ is to be distinguished from an ‘instrument of less than treaty status’:

- the parties do not intend to create legal rights or obligations or a legal relationship between themselves (eg memoranda of understanding, arrangements or declarations).
- Assess the document’s language and form, the nature of the subject matter, whether the document is intended to be public, the mechanisms for modification, amendment and dispute settlement, and the authority necessary to conclude the agreement: N Campbell, “Australian Treaty Practice and Procedure”, in K Ryan (ed), International Law in Australia (Law Book Co, 2nd ed, 1984) 53 at 61.

(ii) The treaty must be between ‘States’, and not between other international actors.

- Compare Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force; Australia is a party).

(iii) The VCLT only applies to treaties which entered into force after 27 January 1980. However, many of its provisions (including the rules on treaty interpretation) reflect customary international law.
(iv) The rules of international law applicable to multilateral treaties (e.g., treaty interpretation) also apply to bilateral treaties.

5. What general law applies apart from the Vienna Convention?

- Articles 31 and 32 codify customary international law on the correct approach to treaty interpretation and are applied as such by Australian courts: *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74, the Court at [113]. Although the VCLT has not been legislatively enacted under Australian law, it has been applied on the basis that it is declaratory of customary international law.
- A treaty is to be interpreted in the wider context of international law. The general rule of interpretation in Art 31 also states in Art 31(3): ‘There shall be taken into account, together with the context…(c) any relevant rules of international law applicable in the relations between the parties.’ Eg International Court of Justice, *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ 4 at [41]-[45]: International law on the use of force was used as context to interpret the US-Iran Treaty of Amity, Economic, and Consular Rights.

6. What does the principle of “pacta sunt servanda” play under the Vienna Convention and the general law of interpretation of treaties?

- *pacta sunt servanda*: what has been agreed to is to be respected. If an agreement could freely be departed from, there would be no point in concluding it.
- Every treaty in force is binding upon the parties to it and must be performed by them in good faith: Art 26, VCLT.
- Reciprocity of obligations – obligations apply reciprocally to mutual benefit.

7. What is the law regarding the creation of treaties, particularly the events that must occur internally in the State parties to the treaties?

- Treaties are signed by States and not governments or individual ministries – the internal division of responsibilities is left to national law.
  - In Australia, the power to conclude treaties is conferred on the executive under s 61, *Constitution*. The treaty will be given effect under Australian law by Parliament under s 51(xxix), *Constitution*.
- Authorising a person to represent the State: Art 7, VCLT: A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if he or she produces appropriate full powers;
  - “full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty: Art 2(1)(c), VCLT.
  - Certain individuals (e.g., heads of State) are deemed to represent their State: Art 7(2), VCLT.
- Means of expressing consent to be bound to a treaty: established through signature, exchanging instruments, ratification, accession or other means stipulated by the treaty: Arts 2(1)(b), 11 – 16, VCLT.
  - Ratification:
is an executive act which has no direct legal effect upon Australian law: *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ and McHugh J at 305.

the act is a ‘positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]’: *Minister for Immigration & Ethnic Affairs v Teoh (Teoh’s Case)* (1995) 183 CLR 273, per Mason CJ and Deane J at 291.

“However loosely such obligations may be defined, it is apparent that Australia, by depositing its instrument of ratification, bound itself to observe the terms of the Convention and assumed real and substantive obligations” to other state parties: *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, per Deane J at 262.

- Entry into force: as agreed by the parties: Arts 24, 25, VCLT. A matter of national law eg need for implementing legislation or having a ‘direct effect’ within the national legal system.
- National law cannot be invoked to justify a failure to perform a treaty: Art 27, VCLT.
- States parties cannot defeat the object and purpose of a treaty prior to its entry into force: Art 18, VCLT.

8. What are the rules of treaty interpretation?

- A treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose: Art 31(1), VCLT.
  - A special meaning is given to a term of a treaty if the parties intended: Art 31(4), VCLT.
  - Context includes the preamble, annexes and any agreement or instrument between the parties which relates to the conclusion of a treaty: Art 31(2), VCLT.
- Consider the express terms of the treaty. Where legislation gives effect to a treaty by adopting the words used in that treaty, then in the interests of certainty and uniformity the provisions of the legislation should be interpreted using the interpretative principles which apply to that treaty: eg *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, per Allsop J at 326-8 (with whom Black CJ agreed at 300).
- Subject to any contrary legislative direction, treaties are to be interpreted by Australian courts in accordance with Art 31, VCLT: *SZOQQ v Minister for Immigration and Citizenship* [2011] FCA 1237 at [22].
- Primacy is given to the treaty text but the context, object and purpose must also be considered: eg *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202, Allsop J at [142].
  - *Tech Mahindra Limited v Commissioner of Taxation* [2016] FCAFC 130:
    - Royalties paid by Australian customers to an Indian taxpayer are subject to withholding tax in Australia.
    - Article 12(4) of the Australia-India double tax agreement removed the relevant tax provisions for property, rights or services “effectively connected” with a permanent establishment. However, Article 12(4) gave priority to Article 7 (business profits) – consider the relationship between treaty provisions.
• The language of a taxation treaty is given a meaning consistent with its purpose, namely the allocation of taxing rights between States.

• Treaty interpretation is a “holistic exercise”: Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225, Brennan CJ agreeing with McHugh J at 230-1, Dawson J at 240, McHugh J at 251–256, and Gummow J agreeing with McHugh J at 277.

• Note how a treaty is drafted: as the product of diplomatic negotiations and political compromise, treaties are “not expressed with the precision of formal domestic documents”: The Commonwealth v Tasmania [1983] 158 CLR 1, per Deane J at 261. Treaties should generally be interpreted in a more liberal manner than that ordinarily adopted when construing legislation: Morrison v Peacock (2002) 210 CLR 274, the Court at [16]. Treaties are to be given a broad, contextual interpretation, unconstrained by technical rules of national law or precedent, and on broad principles of general acceptation: Shipping Corp of India Ltd v Gamlen Chemical Co (A’asia) Pty Ltd (1980) 147 CLR 142, Mason and Wilson JJ at 159, Gibbs J agreeing at 149, Aickin J agreeing at 168.

• The VCLT provisions concerning treaty interpretation ‘are regularly applied by Australian courts to guide them in a principled and consistent construction of treaties of local significance’: De L v Director-General, New South Wales Department of Community Services (1996) 187 CLR 640, per Kirby J at 675-676.

• A treaty provision must be capable of providing assistance in construing the meaning and effect of national law: Al-Kateb v Godwin (2004) 219 CLR 562, per Hayne J at [238]. It may be neither necessary nor useful to consider how conventions would apply to the circumstances of a case which are governed by Australian law.

9. What do we mean *jus cogens*? What role does this play in the interpretation of treaties?

• A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character: Art 53, VCLT.

*Zhang v Zemin* [2010] NSWCA 255:

• Argument: A statute should where possible be interpreted consistently with international law; international law recognises certain peremptory norms described as *jus cogens* which no State is free to depart from; those norms include torture and have included torture at all times material to this case; there is a species of universal criminal jurisdiction in torture cases as a reflection of *jus cogens*; international law does not recognise acts which are *jus cogens* to be done in a public or official capacity; it is no part of the public capacity of an executive government or a head of state to torture citizens; the words “foreign State” in s 9, *Foreign States Immunities Act 1985* (Cth), did not extend to such conduct.

• Held: the terms “except as provided by or under this Act” in s 9 did not permit an exception based upon international law, being torture as contrary to a rule of *jus cogens*.

  o Spigelman CJ:
‘Where, as here, an Australian statute applies to circumstances to which international law also applies, an Australian court must apply the local statute in accordance with its terms, even if doing so may conflict with a principle of international law. The court applies all principles of statutory interpretation, including the principle that, where permissible, the court will seek to give effect to Australia’s international obligations, including rules of customary international law’: at [125].

‘By enacting Part II of the Immunities Act, Parliament intended to remove the uncertainty in the state of both international law and the common law by creating, in s 9, an absolute immunity and providing, in subsequent sections, for a precise and complete list of exceptions. It would, in my opinion, undermine this objective to introduce a limitation of the kind for which the appellant contends upon the natural and ordinary meaning of the words’: at [136].

At [137]: citing Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514 at 519 per Mason CJ, Wilson and Dawson JJ: “[W]e are concerned with an Act which purports to cover the field ... and we do not think there is any room for international law to make up any deficiency, whether the result of inadvertence or not, which may appear in the law.”

‘Section 9 is not, in my opinion, ambiguous or obscure, within the meaning of s 15AB(1)(b)(i) of the Acts Interpretation Act 1901 (Cth). It is not necessary to have regard to extrinsic material pursuant to that section’: at [138].

Per Allsop P at [164]: “the introductory words of s 9 do not permit any general exception based on torture being contrary to a rule of jus cogens under international law”.

10. How does an entity come to have jurisdiction to make a binding declaration as the interpretation of any particular treaty?

The entity is expressly given that function/role under the treaty eg the Security Council under the Charter of the United Nations [1945] ATS 1:

- Art 25, UN Charter: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.
- Art 39, UN Charter: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
- Art 103, UN Charter: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
- Resolutions adopted by the Security Council may undoubtedly contain obligations binding on Member States, such as Australia. By virtue of Art 103 of the Charter, they assume a higher status than most other obligations owed under international law. Through its enactment under Ch VII of the Charter, and its use of mandatory language in pars 1, 2, 5, 6 and 9, Resolution 1373 was one such resolution. Clearly,
it is binding on Australia as a party to the Charter but subject always, within Australia, to any relevant limitations or restrictions of the Australian Constitution: *Thomas v Mowbray* [2007] HCA 33, per Kirby J at [282].

Australia has occasionally espoused an interpretation of the *International Covenant on Civil and Political Rights* [1980] ATS No 23 (*ICCPR*) which differs from that of the Human Rights Committee.

In the event of a dispute concerning the interpretation or application of a treaty, the parties may refer the matter to an international court or tribunal having jurisdiction to resolve it in a final and binding sense.

**11. Where treaties are drafted in more than one language, what principles of interpretation apply?**

Interpretation of treaties authenticated in two or more languages: Art 33, VCLT:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

**12. What canons of construction apply in the interpretation of treaties?**

(i) The first step is to ascertain the operation of Australian law. However, where legislation uses terminology derived from or importing concepts which are derived from an international instrument then it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of an Act: *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46, French CJ at [11]-[12]. See also Hayne J at [200], [222] and [263].

(ii) Requirement for incorporation: the provisions of a treaty to which Australia is a party do not generally form part of Australian law unless and to the extent the treaty has been legislatively implemented through enactment: eg *Plaintiff M70 of 2011/Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32, Kiefel J at [218].

- Treaties which have not been domestically implemented (“unincorporated treaties”) do not create directly enforceable rights or deprive individuals of existing ones under Australian law: *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 480–482.
- Where a treaty is referred to or adopted wholly or in part by Australian legislation:
  
  (i) identify precisely what and how much of an international instrument Australian law requires to be implemented, and
(ii) con construed only so much of the instrument, and any qualifications or modifications of it, as Australian law requires: *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, Callinan, Heydon and Crennan JJ at 71.

- For example, *International Arbitration Act 1974* (Cth) s 16(1) gives “the force of law” to the UNCITRAL Model Law on International Commercial Arbitration (1985) reproduced in Schedule 2 to that Act. Reference was made to analytical commentary prepared by the UNCITRAL Secretariat as well as explanatory notes and working papers of the UNCITRAL Working Group in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* [2013] HCA 5, French CJ and Gageler J at [11], [13], [14], [19]-[20].

- If legislative language follows quite closely the language of a treaty, then it can be inferred that it was intended by the rule maker that the words used in the legislation should attract the same meaning as would be given by international law to the words of the convention: *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640 at 675. It is accordingly difficult to see a material difference between the principles governing treaty interpretation and those ordinarily adopted in respect of domestic legislation: *NBGM v MIMIA* [2006] FCAFC 60, Stone J at [122].

- Legislation may use definitions contained in a treaty. For example, the expressions “territorial sea”, “exclusive economic zone”, “contiguous zone” and “continental shelf” under the *Seas and Submerged Lands Act 1973* (Cth), s 3 have the same meaning as under Articles 3, 4, 55, 57, 33 and 76 of the *United Nations Convention on the Law of the Sea* (1982) 1833 UNTS 3; [1994] ATS No 31.

- Annexing or scheduling the text of a treaty to legislation does not make that treaty part of Australian law: eg *Minogue v Williams* (2000) 60 ALD 366, per Ryan, Merkel and Goldberg JJ at [21]–[25]. Note that a schedule is part of an Act: s 13(2), *Acts Interpretation Act 1901* (Cth).

- Legislation may expressly stipulate in its object and purpose that its provisions are intended to be construed consistently with a treaty. Such preambular words do not by themselves make that treaty part of Australian law: *Kioa v West* [1985] HCA 81, per Gibbs CJ at [21].

(iii) If the meaning of a legislative provision is ambiguous, Australian courts and tribunals can have regard to similar provisions in international instruments in certain circumstances. It is a common law principle that, where legislation purports to give effect to a treaty, Australian courts may look to the treaty as an aid to interpretation in order to resolve any legislative ambiguity: *Yager v The Queen* (1977) 139 CLR 28, per Mason J at 43–44.

- Legislation might not be ambiguous. Practitioners need to explain how a legislative provision is ambiguous and then how reference to a convention provides assistance in identifying the proper construction of that provision: *Muslimin v The Queen* (2008) 220 FLR 159 at [24]; see also *Muslimin v The Queen* [2010] HCA 7, per curiam at [14], [17].

(iv) Principle of conformity or conformability: Australian courts are able to ensure conformity with international law. Commonwealth and State legislation is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law.

- Legislation may use terminology or concepts derived from a treaty. Where legislation transposes the text or a provision of a treaty into legislation so as to enact it as part of Australian law, the prima facie legislative intention is that the transposed text should bear the same meaning in the statute as it bears in the treaty: eg Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225, per Brennan CJ at 230–231.

- International law must be clearly established before Australian courts will consider giving effect to it.

(v) The presumption of compliance: Consistency with Australia’s international obligations is presumed in the absence of clear words to the contrary: Brown v Classification Review Board (1998) 83 FCR 225, per French J at 236.

- Interpretative constructions which could occasion a breach of Australia’s obligations under international law, including treaty obligations, should be avoided: eg Behrooz v Secretary of Department of Immigration & Multicultural & Indigenous Affairs (2004) 219 CLR 486, per Kirby J at [131]–[132].

- The presumption of compliance is displaced where legislation expressly makes clear a Parliamentary intention to legislate contrary to Australia’s international obligations: eg Plaintiff M70/2011/Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32, per Heydon J at [153].


(vi) Uniformity: treaties should be interpreted uniformly by State parties: Povey v Qantas Airways Limited [2005] HCA 33, per Gleeson CJ, Gummow, Hayne and Heydon JJ at [25]. Consider:

- what does the relevant treaty provide?
- how is that international obligation carried into effect in Australian municipal law?

13. What role does the plain meaning of words used versus the subjective intention of parties play in the interpretation of treaties?

The subjective intention of a party or parties – what a negotiating party intended a word to mean, or their “true” intention - is strictly not relevant to treaty interpretation because:

- the words used in a treaty reflect the text as agreed between the parties ie reflects the shared expectations of the parties;
- in the absence of a special meaning, the words used are to be interpreted according to their plain or ordinary meaning ie the “objective” meaning; and
- the party or party has adopted and expressed their consent to be bound to the treaty as reflected in the text

Nonetheless, subjective intentions can be taken into account in various ways:

- If the State issues an “interpretative declaration” indicating its understanding of a provision. An interpretative declaration is not a “reservation”: a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting,
approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State: Art 2(1)(d), VCLT.

- A State’s preferred interpretation may be evident in its subsequent application of the treaty, and hence relevant to interpretation as subsequent practice under Art 31(3)(b), VCLT.

- The preparatory work or the circumstances of a treaty’s conclusion may evidence a State’s intentions, and become relevant to interpretation under Art 32, VCLT.

14. What extrinsic material can be taken into account in interpreting treaties?

- It may be apparent from extrinsic materials that legislation was intended to give effect to a treaty. If any material not forming part of an Act is capable of assisting in ascertaining its meaning, then consideration may be given to that material to confirm that the ordinary meaning is that which is conveyed by the text (taking into account legislative context and purpose or object), or to determine its meaning when the provision is ambiguous or obscure, or where the ordinary textual meaning leads to a manifestly absurd or unreasonable result: s 15AB(1), Acts Interpretation Act 1901 (Cth). Extrinsic materials include explanatory memoranda, second reading speeches, and treaties or other international agreements referred to within legislation: s 15AB(2).

- Extrinsic sources include the form in which a treaty is drafted, subject-matter, the mischief addressed, negotiating history and comparisons with earlier or amending instruments relating to the same subject matter: Applicant A v MIEA (1997) 190 CLR 225, per Brennan J at 231.


- Consider any subsequent agreement or practice between the parties regarding the interpretation or application of its provisions or any relevant rules of international law: Art 31(3), VCLT.
  - Considering evidence of subsequent practice in the application of the treaty in order to interpret a treaty provision:
    - Judgments and decisions of international and national courts and tribunals: eg ‘Hence, by reason of s 15AB(2)(d) of the Acts Interpretation Act, the Convention may be considered for the purposes described in s 15AB(1). Further, Australian courts will endeavour to adopt a construction of the Act and the Regulations, if that construction is available, which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into its domestic law. The Convention will also be construed by reference to the principles stated in the Vienna Convention on the Law of Treaties (“the Vienna Convention”), even though the Vienna Convention has not been enacted as part of the law of Australia’ (emphasis added): MIMIA v
**Macoun v Commissioner for Taxation** [2015] HCA 44:

- Whether the immunities provided under the Convention on the Privileges and Immunities of the Specialized Agencies [1988] ATS No 41 and under implementing Australian law exempted from taxation in Australia a pension received by a former employee of an international organisation.

- Subsequent practice: decisions of the United Nations Administrative Tribunal, decisions of national courts from France and the Netherlands, an international arbitration and a UN Secretary-General statement.

- Approach: examine the ordinary meaning of the relevant words, the *travaux préparatoires* to the Convention and the practice of State parties.

- Held: ‘there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation’.

- French CJ, Bell, Gageler, Nettle and Gordon JJ: ‘Australia’s international obligations…do not require Australia to exempt Mr Macoun’s monthly pension payments from taxation’.

- Compare Tamberlin DP in *Macoun v Federal Commissioner of Taxation* (2014) 97 ATR 100: decisions from Spanish national courts were useful ‘not as binding authority but as providing some indication that the reasoning contended for by [Mr Macoun] is not without significant reasoned support’. The ‘relevant principle’ was that ‘it is generally desirable that where the same expressions are used in international agreements they should so far as possible be construed in a uniform and consistent manner by both local courts and international courts to avoid a multitude of different approaches’. Although the legislative provisions being considered by the Spanish courts were different to the provisions under consideration, they ‘provide some reasoned guidance on the issue before me in considering the interpretation to be given to the language which has been applied consistently and over a lengthy period in the International Conventions’.

- Subsequent agreement: an agreement which is concluded between the parties can modify the interpretation of an earlier treaty (as permitted under Art 31(3)(a), VCLT): *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28, per French CJ at [36] and Gummow, Crennan, Kiefel and Bell JJ at [65].

- Supplementary means of interpretation (including the preparatory work of the treaty and the circumstances of its conclusion) can be used to confirm the meaning determined through the textual approach (above) or to determine the meaning where the textual approach leads to ambiguity or obscurity or a result which is manifestly absurd or unreasonable: Art 32, VCLT. Article 32 reflects customary international law: *Qantas Airways Ltd v SS Pharmaceutical Co Ltd* [1991] 1 Lloyd’s Rep 288, per Kirby P at 298-9.

  - The *travaux préparatoires* consists of all the records of the treaty drafting process, including the details of negotiations, reports, drafts or accompanying explanatory statements: *Great China Metal Industries Co Ltd v Malaysian*
Consideration of the preparatory material is legitimate for determining the meaning to be ascribed to treaty provisions: *Commonwealth v Tasmania* (1983) 158 CLR 1, per Gibbs CJ at 93–96 and Wilson J at 191–192.

- The preparatory material may be partial, incomplete or misleading, and may not always provide assistance: *R v Tang* (2008) 237 CLR 1, per Gleeson CJ at [25] and Hayne J at [137].

- Consideration of output (eg recommendations, views) from institutions established under a treaty and mandated with responsibility for monitoring implementation by State parties.

  Eg *Maloney v The Queen* [2013] HCA 28: the alcohol management laws on Palm Island complied with the *Racial Discrimination Act 1975* (Cth), which gave domestic effect to Australia’s obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* [1975] ATS 40.

- Different interpretative approaches:
  - at [61] (Hayne J), [134] (Crennan J), [174]–[175] (Kiefel J): legislation incorporating a treaty was to be interpreted in accordance with the ordinary canons of statutory construction, including that a statute should be interpreted as far as possible in accordance with international law.
  - French CJ and Bell J: cited *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ): ‘If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way’.

- Treatment of output from the Committee on the Elimination of Racial Discrimination:
  - French CJ, Crennan, Kiefel, Bell and Hayne JJ: warned of “interpretations” which rewrite the [treaty] text’, elevating ‘non-binding extraneous materials over the language of the text’, the risk that State parties may ‘be taken to have agreed that which they have not’, and the threat of the treaty text being ‘supplemented’ by non-binding committee recommendations.
  - French CJ: such material ‘may illuminate the interpretation of [a] provision where it has been incorporated into the domestic law of Australia…That does not mean that Australian courts can adopt “interpretations” which rewrite the incorporated text or burden it with glosses which its language will not bear”.
  - French CJ and Crennan J: the Racial Discrimination Committee and the Expert Mechanism had sought to create obligations that did not exist in the text of the Convention.
  - French CJ: additional requirements cannot be ‘imported into a text which will not bear it by the subsequent opinions of expert bodies, however distinguished’.
  - Kiefel J: the Committee’s views were relevant, provided ‘they are well founded and can be accommodated in the process of construing the domestic statute’.
  - Bell J: such materials were not materials of the kind referred to in s 15AB(2), *Acts Interpretation Act 1901* (Cth).
Hayne J: the only extrinsic materials that may be used for interpretation are those that existed when the statute was enacted. Subsequent material (such as reports of treaty bodies) ‘may usefully direct attention to possible arguments about how the [Act] should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind’.

Crennan J: extrinsic materials guide State parties in respect of their reporting obligations; there is no interpretive role for these materials.
  o The restrictive approach of Hayne and Crennan JJ assumes that international law is static. Note the possibility of evolving interpretations by reference to subsequent practice, customary international law, supplementary means of interpretation, and the proposition that ‘an international legal instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’: International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) [1971] ICJ Rep 16.
  o Consider also the subject matter of the treaty under consideration eg the ‘dynamic’ or ‘evolutive’ approach to interpreting a human rights treaty: ‘the Convention is a living instrument which … must be interpreted in the light of present day conditions’: European Court of Human Rights, Tyrer v United Kingdom (1978) 26 Eur Court HR (ser A), [31].

Gageler J: the legislation was designed to ‘give effect to Australia’s obligations under…the Convention’ and was to be ‘construed to give effect to those obligations … to the maximum extent that its terms permit’. Gageler J accepted the non-binding nature of the Racial Discrimination Committee’s output, but contended that its recommendations ‘have elaborated a coherent understanding of the meaning and interrelationship’ of various articles of the Convention.’ The ‘international understanding’ of the Convention had evolved, including because of the Committee’s ‘clear and consistent’ jurisprudence’. The legislative purpose ‘would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding’.

  o Compare:
    • Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] HCA 20, per Kirby J at [148]: the output of the Human Rights Committee carried the weight of ‘persuasive influence. No more; but no less’.
    • Thiel v Commissioner of Taxation (1990) 171 CLR 338, 357 per McHugh J: A treaty ‘is to be interpreted in accordance with the rules of interpretation recognised by international lawyers’. The Organisation for Economic Co-operation and
Development’s commentary on one of its conventions was a ‘supplementary means of interpretation’ for the purposes of Art 32, VCLT.

- The views of the Human Rights Committee on the interpretation of the ICCPR were ‘supplementary means’ pursuant to Art 32, VCLT. The Committee’s output may qualify as ‘the teachings of the most highly qualified publicists’ and accordingly ‘subsidiary means for the determination of rules of [international] law’ under Art 38(1)(d), *Statute of the International Court of Justice: Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, [42]–[48] per Perram J.

- International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639 at [66], quoted in *Anochie* (2012) 209 FCR 497 at 510: ‘Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.’ (emphasis added)

Parliamentary Joint Committee on Human Rights:

- the High Court in Maloney ‘adopt[ed] a number of conclusions which are arguably not in conformity with the current state of international law and practice relating to special measures’
- ‘many international lawyers and others accept that in many respects the Declaration spells out the details of relevant obligations under [the Convention]’.

**Practitioner tips:**

- adopt a structured and logical approach
- explain relevant rules of treaty interpretation
- make submissions explaining why the material sought to be relied on is relevant as a matter of international law

**Additional References**

- Registered treaties are published through the United Nations Treaty Series: https://treaties.un.org/
- National Interest Analysis: describes the potential economic, social, cultural, environmental and legal impacts of a treaty for Australia, assesses direct costs, specifies the implications of national implementation, the possibility of denunciation or withdrawal and the degree of consultation.
- Reports of the Joint Standing Committee on Treaties: this Committee may inquire into and report on matters arising from treaties, proposed treaty actions and any questions relating to a treaty or international instrument referred to it by Parliament or a Minister – see http://www.aph.gov.au/house/committee/jsct/index.htm.

Stephen Tully
February 2017