THE INCORPORATION OF INTERNATIONAL AGREEMENTS: THE AUSTRALIAN EXPERIENCE

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Australian law follows the established Westminster model as regards the status of ratified treaties and conventions. A treaty does not form part of domestic law unless implemented by legislation and, in the absence of such legislation, it cannot *directly* create rights in or impose obligations on Australian citizens and residents. However, a greater degree of influence in Australian law, absent legislative incorporation, became apparent eleven years ago in the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh*[1], in which the High Court, by a majority of 4-1, held that treaties may have some *indirect* influence on Australian domestic law prior to their implementation through legislation.

It is accepted in Australian legal theory, based in Westminster norms, that conventions may influence law in three ways: first, by pointing to avenues of development in the common law; secondly in the matter of statutory interpretation; and thirdly, but most contentiously, by attracting a right to procedural fairness if an administrator in government intends to depart from the standard raised by a ratified convention. In that case, the convention may be treated as an announcement of intended government policy, departure from which is of course possible at law, but only after the person to be affected by the changed posture of government has been heard as to why the previous policy, announced by ratification of the convention, should not be adhered to.

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* In the limited time available from my invitation to prepare this paper, I have drawn on an article by Glen Cranwell "Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law" [2001] QUTLJJ 5. Needless to say, the law has moved on since then.

[1] (1995) 183 CLR 283.

It is that third aspect of the use of international agreements that is the basis of what I bring to you from Australian jurisprudence. The recitation in the above paragraph is the position adopted by four out of five judges in *Teoh*, but that stance has been the subject of virulent attack ever since it was handed down, and it is by no means clear that the same result would be achieved today in our High Court.

The Anglo-Australian world seemed so simple prior to *Teoh*. In the event of ratification, an action untramelled by little supervision, at the time of *Teoh*, from the Parliamentary arm of government[2], no consequences fell on government in any direct sense whatsoever. But the winds of change were blowing in the 90s of the last century, and the New Zealand Court of Appeal had already, by 1994, wondered if ratification was not being argued by the Government of that country as "window dressing"[3]. The joint judgment in *Teoh*, written by Mason CJ and Deane J, said that "… ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act…"[4].

The thrust of the High Court's reasoning in *Teoh* was that the ratification of a convention raised a legitimate expectation that the standard set by that agreement would be followed. This seemed not a bridge too far, as the Court in *Haoucher*[5] had held that a Ministerial announcement of deportation policy to Parliament had the effect of raising a legitimate expectation that that procedural policy would be kept to. But in extending the reach of procedural fairness to embrace departures from ratified conventions, the Court had

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[2] "In 1961, … Prime Minister RG Menzies announced that, in general, the Australian Government would henceforth not proceed to ratify or accede to a treaty until it had lain on the table of both Houses of Federal Parliament for twelve sitting days. … The practice so instituted was followed until the 1970s when it fell into disuse. … The present practice is for treaties to be tabled in bulk every six months. …
On 21 October 1994, in a joint statement, the Minister for Foreign Affairs and Trade and the Attorney-General said: "The Government will supplement [the present] information flow by now tabling, wherever possible, all treaties, … before (cont) (cont) action is taken to adhere to them." MD Kirby "Treaties in Australian Law: The Role of International Standards in Australian Courts" Address 10 May 1995 at the University of NSW Law School.
Teoh was argued in the High Court on 24 and 25 October 1994. The author was junior counsel for Mr Teoh.

[3] *Tavita v Minister for Immigration* [1994] 2 NZLR 257 at 266 per Cooke P for the CA.

[4] *Teoh* fn 1, at 291.

[5] (1990) 169 CLR 648.

embarked on the perilous waters of Executive assumption of right to operate outside curial supervision.

It might be noted, particularly in the context of this session which is aimed at the utility of trade agreements, that the convention at stake in *Teoh* was the Convention on the Rights of the Child (CROC), which asserted that the interests of children should have *a* primacy (sic) in decision making by Government officials. It might be noted that amongst the international community, the United States and Somalia, the latter having no recognisable government, are alone in refusing to ratify CROC[6].

While the content of CROC may seem a million miles from the stuff of trade agreements, the rules in Anglo-Australian law as to how such agreements are to be incorporated remain the same: legislative action is the only way to provide for legal rights to flow from a treaty. But conservative commentators and Ministers of the Executive alike were outraged by the assertion in *Teoh* that even though no legal rights were created by ratification, nonetheless, a standard of administrative behaviour was summoned up, which could only be departed from after a hearing.

Questions were asked jocularly as to what efficacy such a hearing could have, when an administrator could give perfunctory attention to submissions, and then proceed as intended. But the political reality would be that in giving notice to affected parties of, say, an intention to depart from the standard of CROC, a potent weapon would be placed in the hands of the affected parties: what Government would care for the media coverage of the letterhead from government announcing that it intended to trash something as fundamental as children's rights.

Of course, trade agreements are unlikely to bear the emotional weight of a CROC, and the media possibilities of appealing to the public's sympathies are less likely in the event of departure. But the reality in Australia is that such agreements are driven by Executive

[6] That having been said, the United States Supreme Court has recently taken clear account of international standards and values as expressed in conventions, even those to which the United States is not a signatory. So much is apparent from *Roper v Simmons* 161 L Ed 2d 1, 22 (2005), concerning CROC.

determination to give hard edged effect to the document. It is very often bi-lateral, and the product of intense and detailed negotiation over many years, and as such is very different from the hazy and amorphous, values driven[7], "warm and fuzzy" tone of many human rights conventions, drafted with a view to inclusion in the whole range of human societies. The US-Australia Free Trade Agreement of the last year is just such an example of bi-lateral agreement with a political determination to have full legal effect, of which, more below.

The saga of *Teoh* through the common law courts and the political process has been a chequered one. Within weeks of the decision being handed down in 1995, the Australian Attorney General and the Minister for Foreign Affairs, himself a former Attorney General, delivered a joint Ministerial statement[8] denouncing the High Court's reasoning, and purporting to assert that by issuing the statement, they had disempowered any future claim to rely on ratified conventions as the foundation for a legitimate expectation to a hearing in the event of proposed departure.

This statement was followed by no less than three attempts over the ensuing years to pass Bills through the Australian Parliament, overturning the decision. These Bills were proposed by both major parties, as the Federal Government changed from Labor to Liberal coalition in 1996. All failed through a lack of control of the Senate[9], but the present High Court seems minded to reverse *Teoh*, as evidenced in the decision *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[10].

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[7] See the judgment of O'Connor J in *Roper v Simmons* (above) at 19 as regards values. Her Honor was dissenting, but her theme on this aspect is consistent with the majority.

[8] See Joint Statement by the Minister for Foreign Affairs and the Attorney–General, *International Treaties and the High Court Decision in Teoh* (10 May 1995) and Joint Statement by the Minister for Foreign Affairs and the Attorney–General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making* (25 February 1997).

[9] The Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth) and Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth) all lapsed before being passed by the Federal Parliament. South Australia is the only state parliament to pass legislation to counter the effect of the *Teoh* decision: *Administrative Decisions (Effect of International Instruments) Act* 1996 (SA).

[10] (2003) 214 CLR 1.

10 Eg *R v Uxbridge Magistrates Court & another ex parte Adimi* [2001] QB 667 at 690ff (Divisional Court) per Newman J.

Contrariwise, the English courts embraced *Teoh* with open arms[11]. The Canadian Supreme Court came to the same basic conclusion regarding the use of CROC, without actually citing *Teoh*, in *Baker v Minister for Citizenship and Immigration*[12]. The failure to cite *Teoh* was of note, as the Federal Court of Appeal, below, had examined *Teoh* at length, and had disagreed with it[13]. *Teoh* appears to have as yet taken no hold in South Africa.

The reactions of both prominent politicians and the conservative end of what in Australia is called the Commentariat, have ensured that the debate on the utility of international conventions has remained focussed around the necessity of legislative incorporation. Anything less is regarded as a dangerous and unconstitutional intrusion by the judiciary into Australia's sovereignty, and an undermining of the democratic will. Even when senior judges discuss the impact of international law at its most anodyne, that is, in supporting incremental development in the common law, and in assisting in statutory interpretation, they receive the sort of coverage indicated by Professor Hilary Charlesworth et al, and which also seems reflective of the debate in the United States:

> "There is a fear that international law undermines Australian sovereignty or the capacity to govern ourselves as we choose. Anxiety is also fuelled by a perception (akin to a form of legal xenophobia) that international law is an intrusion from 'outside' into our self-contained and carefully bounded legal system. Both concerns are reflected in contemporary debates about international law such as that over whether Australia should participate in the International Criminal Court.
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> Australian judges who have recognised the relevance of international law to our legal system have even faced stern criticism. For example, Chief Justice Murray Gleeson of the High Court was upbraided for discussing international law at an International Bar Association conference. [Murray Gleeson, 'Global Influences on

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[12] [1999] 2 SCR 817.
[13] [1997] 2 FC 127.

> the Australian Judiciary' (2002) 22 *Australian Bar Review* 1]. In his speech, Chief Justice Gleeson had catalogued the various means through which international human rights law affects Australian law. These remarks were characterised as being '[l]ike some rich kid discovering the Church of Scientology'. The Chief Justice was also described as being 'on some evangelical road to discovering the wonders of international law' [Janet Albrechtsen, 'Justices Leave the Door Wide Open to Killers' *The Australian* (4 December 2002): <http://www.theaustralian.news.com.au/printpage/0,5942,5608786,00.html>(7 July 2003). Dr Albrechtsen is a regular right wing populist writer for *The Australian* newspaper].[14]

The calling in aid of apocalyptic impact from reflecting international standards is quite antithetical to the actual process of government in Australia. The standards set by CROC, for instance, as to the position of children, were adopted by the Minister for Immigration in the Ministerial direction on deportation policy issued by the then new coalition government in 1996, the year after *Teoh* came down, and varied again in 1999[15]. And the process of notification to Parliament of a proposed convention or treaty has improved significantly since *Teoh*.

Charlesworth et al set out the improvements since 1996 in informing Parliament and empowering Members, so as to lessen the sense of absolute Executive control over the ratification process. Charlesworth wrote of the reforms having five aspects:

- The tabling in Parliament of all treaty actions proposed by the Government in Parliament for at least 15 sitting days before binding action is taken. Treaty actions which the Minister for Foreign Affairs certifies to be particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests, are exempted from this requirement;
- The preparation of a National Interest Analysis (*NIA*) for each treaty, outlining information including the obligations contained in the treaty and the benefits for Australia of entering into the treaty;

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[14] Charlesworth et al "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423 at 423-4.

[15] In *Lam* fn 10 above, the High Court noted the existence of the Ministerial direction [49], but failed to note that it was the Government policy expressed in that direction that drove any expectation on the part of the public, not CROC itself.

- The establishment of the parliamentary Joint Standing Committee on Treaties (*JSCOT*);
- The establishment of the Treaties Council comprising the Prime Minister, Premiers and Chief Ministers; and
- The establishment on the internet of the Australian Treaties Library.

In August 2002, the Minister for Foreign Affairs announced refinements to the tabling process. Treaties of major political, economic or social significance are now tabled for 20 sitting days, while other treaties continue to be tabled for 15 sitting days.[16]

But the reality that international agreements only take legal effect in Australia through legislative incorporation is illustrated by the path of the American-Australian Free Trade Agreements of recent years. These agreements have been incorporated in the *US Free Trade Agreement Implementation Act 2004*. This Act is in turn no more than an umbrella Act with schedules referring to a wide range of Federal legislation dealing with, for example, customs tariffs.

I have not been able to access the modern South African Constitution electronically, but a reading of your legislation indicates to me that the method of incorporating international conventions in the Republic is the same as in the Anglo-Australian legal world: statutory inclusion and giving effect. The *World Heritage Convention Act 49 of 1999* (SA) would seem to illustrate the point.

Section 3 provides that:

The objectives of this Act are to-

(a) provide for-

(i) the cultural and environmental protection and sustainable development of, and related activities within, World Heritage Sites; and

(ii) giving effect to the values of the Convention;

[16] Charlesworth fn 14 above at p439-440.

(b) **make the Convention part of South African domestic law and to create a framework to ensure that the Convention and the Operational Guidelines are effectively implemented in the Republic, subject to the Constitution and the provisions of this Act; …**

There is one remaining curiosity in this saga: the Australian Constitution provides in section 51 for the various heads of legislative power: the Commonwealth Parliament has a limited range of subject matters upon which it may legislate. Amongst the placita, as they are called, of heads of power, is a power to legislate in respect of external affairs. For over 70 years it has been accepted that the entry by the Australian Government into international agreements constitutes an external affair, so that the Commonwealth parliament is then empowered to legislate on the subject of the agreement.

It follows that by entering into the international covenant or treaty, the Government provides the platform for the Parliament legislating on the subject, and the legislation will be more safely valid the nearer it sticks to the wording of the agreement. The easy way out is to legislate to adopt the wording of the agreement as a schedule to the Act, thus bolstering the legislation, and incorporating the agreement into Australian law. This is precisely what has happened with the US-Australia Free Trade Agreement.