THE *TEOH* DECISION - A PERSPECTIVE FROM THE GOVERNMENT SERVICE

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This paper gives a perspective from the Government's side on the High Court's *Teoh* decision and its ramifications and explains the actions that have already been taken in response to it.

First, I should briefly outline what the case was all about. Counsel for Mr Teoh commenced his address to the High Court, saying "This case is about seven little Australians" - and that, in a sense, was the problem for the Minister for Immigration. Mr Teoh himself, however, had been convicted of serious drug offences. Applying the Migration Act policy guidelines in relation to permanent residence, the decision-maker, exercising her discretion, decided that his serious convictions outweighed the considerations dealing with the welfare of the seven children - some of whom were his own, others to whom he was stepfather. The mother, Mrs Teoh, was in no position to care for any of the children. Having weighed up the interests of the children, and the fact that they would have a bleak future, the decision-maker nevertheless felt that the criminal record was the most important factor and decided that Mr Teoh should be deported.

At the stage of the full Federal Court, a creative lawyer suddenly seized on the Rights of the Child Convention and threw this into the ring. He pointed to Article 3 of that Convention which said that in all decisions concerning children, the best interests of the child should be a primary consideration. This is a very broad treaty provision, drafted as so many treaty provisions are, in fairly general language, but nevertheless a provision which put a specific obligation on decision-makers. The full Federal Court seized on the argument and by majority said, in effect, that there was an almost substantive entitlement to have decision-makers act consistently with the treaty provision. The Court ordered that the decision be re-made, as there had not been adequate information sought about the welfare of the children to enable that provision of the Rights of the Child Convention to be honoured.

The case then went on appeal to the High Court, the Minister for Immigration thinking that the case had major significance and contained undesirable principles which he hoped to overturn. The Minister's argument did not meet with much sympathy from the majority of the High Court, which, by four to one, held that the Rights of the Child Convention gave rise to a legitimate expectation which had not been adequately respected. Justice McHugh dissented.

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From the point of view of international law, the High Court re-affirmed the traditional rule that treaties are not part of Australian law in the absence of legislative incorporation. That point was made quite strongly, and is a well established rule. The Court also confirmed that treaties can be relevant in the interpretation of ambiguous statutes and the development of the common law, as we have seen in *Mabo v Queensland* (1992) 107 ALR 1, and *Dietrich v R* (1992) 109 ALR 385. But the majority introduced a new element, and said that the ratification of a treaty was a positive statement by the Executive that it would act in accordance with the treaty, so that the formal act of ratification gave rise to an expectation that all Commonwealth decision-makers would act in accordance with the treaty. The High Court was at pains to say that this is merely a procedural right. If a decision-maker wishes to displace it, it is necessary to give notice to a person affected and give them an opportunity to make a submission. In the absence of giving that notice, or of some other statutory or executive indication about what is proposed, the ratification of a treaty will give rise to this legitimate expectation.

The High Court attempted to explain that this legitimate expectation did not interfere with the fundamental constitutional principle that a treaty is not part of domestic law, and does not give rise to rights or obligations or benefits in the absence of legislation.

That was not how the decision was received by the government, which expressed two aspects of concern. The first was the concern that the decision undermined the fundamental principle on which governments had relied, that it did not need to consult Parliament before a treaty was ratified.

The Executive had always said that if the law was going to be changed, a treaty would be taken to Parliament, and the necessary legislation enacted. The *Teoh* decision seemed to destroy that principle, and there was a concern at the political level to reassert the principle.

The second concern was of a practical nature, and related to Commonwealth decision making. What decisions will be affected? Any decision that could be subject to judicial review, whether made under statutory provisions or the prerogative? Is it only Commonwealth decisions? That was not even clear. Certainly Justice McHugh referred to examples of State decision makers being bound by the principle, given that the treaty in question had been accepted on behalf of the whole of Australia and not just at the Commonwealth level.

To what treaties could this legitimate expectation attach? While there may not be many treaties with provisions like the Rights of the Child Convention, many treaties have an individual rights focus, including some major human rights treaties. There are concerns that some of the broad environment treaty provisions might enable challenges to be made in relation to environment decisions.

There are concerns about how the expectation can be excluded. What will amount to an adequate statutory indication to the contrary, or an executive indication to the contrary? Do you need to exclude the application of the expectation by express and clear language, or can it be said that a closely confined statutory discretion leaves no scope for an expectation?

There is this considerable uncertainty, and not a lot of indication in the judgments as to how the uncertainty

might be overcome. Certainly the reaction at the highest levels of many departments was of some consternation at the decision.

On the first weekend in May the Constitutional Centenary Foundation held a meeting in Canberra to talk about treaties and to talk about the proposal for a republic. At that meeting the Shadow Foreign Affairs Minister, Alexander Downer, in his speech about treaties recommended that Parliament should legislate to displace the *Teoh* decision. He also recommended that Parliament should legislate to displace the use of international law in the way in which it has been used in *Mabo* and *Dietrich* to develop the common law. He actually proposed a draft section for a Treaties Act, to displace the *Teoh* decision. Senator Evans, the Foreign Affairs Minister, was in the audience when this speech was made and I think that got him thinking. A few days later, on 10 May, a joint statement was issued by Senator Evans, and the Attorney-General, Mr Lavarch. It is a lengthy, two and a half page statement which seeks to explain what the Government thinks the *Teoh* decision meant, and to clarify its position.

In essence the statement sought to do two things. First, it sought to displace by a clear and express statement the legitimate expectation that had been found in *Teoh* to arise from the ratification of a treaty. The High Court was probably astonished that their decision could be overturned or displaced by a statement like this. When the Court referred to statutory or executive indications to the contrary they were probably thinking of a provision in a particular statute or in a set of guidelines. Nevertheless, if an expectation arises from the act of ministers ratifying a treaty, logically those ministers can displace that legitimate expectation.

In the statement the Ministers say the government now makes such a clear and express statement - that entering into an international treaty is not a reason for raising any expectation that government decision makers will act in accordance with that treaty. The statement emphasises that the government is fully committed to observing treaty obligations, but wishes to reassert the primacy of Parliament when it comes to the incorporation of treaties into Australian law.

In order to put the position beyond doubt, the statement foreshadows that Parliament will legislate to reinforce the statement.

Attention in government is now focussed on drafting an appropriate statute that would displace the effect of the *Teoh* decision.[1]

In recent weeks, human rights practitioners have expressed some criticisms and concerns about the joint statement. There is a concern in particular that in some way the statement signals that Australia is not taking its human rights obligations seriously. However, there is certainly no suggestion that the complaints mechanisms under the *Human Rights and Equal Opportunity Commission Act* will be displaced in any way. In a sense, that is the remedy the Government considers has been chosen by Parliament, if a person considers there has been a breach of Australia's international human rights obligations. The Government's position is that a person should not be able to come along and challenge a decision made in good faith and according to procedural fairness, alleging simply that there has been a breach of a treaty provision.

Endnotes

1 A Bill to this effect has since been introduced: see *Administrative Decisions (Effect of International Instruments) Bill 1995.*