

INTERNATIONAL TREATIES: THEIR IMPACT ON AUSTRALIA

Keynote Address by Senator the Hon Gareth Evans QC, Minister for Foreign Affairs, International Treaties Conference, Canberra, 4 September 1995

This conference on international treaties is certainly timely. Australia's involvement in treaty making is currently being examined in a number of forums; there is now a Senate Committee looking at the operation of the external affairs power in the Constitution; and there is legislation currently before the Parliament dealing with the effect of treaties on administrative decision making. I think there can be no doubt that treaties do have an important and developing influence on many aspects of Australian society and I want to examine their impact in a little detail. But first I think it would be useful to spend a few moments in considering what treaties actually are, and perhaps more importantly, what they are not. I feel constrained to do so because of the misinformation, some of it quite deliberately spread, which has clouded the whole issue of treaty-making over the last couple of years.

What treaties are not. Let me start by making clear what treaties are not. Despite assertions from the radical right, a treaty is not an edict issuing forth from some unelected and unrepresentative world body and imposed on unwilling nation states. Nor is a treaty a secret agreement between Australia and the rest of the world designed to undermine federalism and the Australian Constitution. And a treaty does not have any legislative-type effects unless and until an Australian parliament incorporates it into Australian law.

To tackle the global conspiracy theory first. Nation states, i.e. individual countries, enter into treaties of their own free will and on the basis that the terms of those treaties serve their national interest. This is certainly the basis on which Australia enters into treaties. The United Nations has absolutely no power to impose treaty obligations on nation states. Governments negotiate treaties among themselves and, once they have agreed upon a text, each government decides whether or not it will become a party to the treaty. Treaties thus represent an agreed position between nations. By becoming a party, nations freely accept the obligations imposed by the terms of the treaty. It is always open to them not to become a party, or to become a party with reservations where this is not

excluded. The process is entirely voluntary. Indeed, becoming party to a treaty is an exercise and an affirmation of a country's sovereignty - a point that is lost sight of in the often confused debate about the impact of treaties on sovereignty.

And what of the national conspiracy theory which has it that the Federal government is secretly whittling away the power of the States and the foundations of the Constitution? The fact is that it is the Constitution itself which grants power to the executive government to enter into treaties and grants the legislative power to the Federal government to implement them. It is important to keep in mind that treaty making is not a process carried on in secret or behind closed doors. The Commonwealth government recognises that treaties may, in some cases, impact on State and Territory administration. The State and Territory governments are extensively consulted in all cases and at an early stage on all treaty negotiations in which Australia is considering participation. It is not only essential but, perhaps more importantly, it is very sensible, for the Commonwealth to seek the views of the States and Territories, particularly where they will be involved in implementing treaty obligations.

Finally, international treaties do not somehow subvert the constitutional arrangements in Australia. There can be no doubt that constitutional power to enter into treaties lies with the executive government. The Australian Constitution distinguishes between the treaty making power and the power to implement treaty obligations in Australian law. The former is an executive power of the Commonwealth, and under section 61 of the Constitution it is exercised by the Federal Executive Council. The latter - the external affairs power - is a legislative power, and is exercised by the Parliament of the Commonwealth. The rights and obligations contained in a treaty do not become binding rights and obligations under Australian law unless and until specific legislation is passed implementing its provisions. This basic position was reaffirmed in April this year by the High Court in *Teoh's* case which I will return to in a moment. The position is in sharp contrast to that in the United States, for example, where treaties - which require the consent of two thirds of the members of the Senate before they are ratified - are then generally self-executing and directly enforceable by domestic courts.

What treaties are. So, what then are treaties? The Vienna Convention on the Law of Treaties (itself of course a treaty) holds that a treaty is an international agreement concluded between states in written form and governed by international law. It has also been observed that '(t)reaties are landmarks which

guide nations in their relations with each other. They express intentions, promises and normally appear to contain reciprocal advantages. Treaties represent attempts to reduce the measure of uncertainty inherent in the conduct of international affairs'.

It is sometimes claimed that Australia is party to over 2,000 treaties. This claim is based on a misreading of the *Australian Treaty List*. Simply counting the number of items in the *List* does not provide an accurate indication of the number of treaties which are currently in force in Australia. The *List* sets out separately all treaty actions which Australia has undertaken, or which were undertaken on its behalf by the United Kingdom: amendments to treaties are included as separate items in the *List*, which also includes references to treaties which have been terminated, superseded or replaced, and to treaties which have been signed but have not yet entered into force for Australia.

In fact, at the end of 1994, Australia was a party to approximately 920 treaties. The majority, over 500, of these treaties are bilateral i.e. between Australia and just one other country. Some growth has occurred in recent years in the number of bilateral treaties, particularly in areas such as investment, extradition, mutual assistance in criminal matters and taxation. However, our rate of participation in treaties is by no means unusual: the United States, for example, is a party to more than 7,000 treaties. Australia's adherence to multilateral treaties negotiated under the auspices of the United Nations is about average for an OECD country. There is simply no basis for the wild allegations that are sometimes made that the treaty regime is somehow out of control or running amok with Australian constitutional arrangements.

The growing level of international interaction is, I believe, a positive force in the world, especially for a nation like Australia which reaps tremendous benefits from international developments in trade, transport, and communications. As an increasing number of activities are conducted on a transnational basis, national actions increasingly have international ramifications. Treaties have always been a feature of international relations but with the trend to globalisation they play an increasingly important role: some help us to achieve common goals, for example, cooperation in space, telecommunications and trade; some set reference points which guide international behaviour in times of crisis such as war and in relation to issues such as disarmament; some set common standards in relation to human rights and refugees, for example; and some address issues which, it is increasingly recognised, can only be addressed on a global scale such as damage

to the environment, transboundary movements of hazardous wastes and drug trafficking.

For small and medium sized powers like Australia, international law and international treaties and institutions are particularly important. They provide a framework which ensures that our voice is heard and that we can play a fair and reasonable role in global deliberations. For a country of less than major power status, a world governed by principles of justice, equality and the rule of law is much more attractive than a world governed by status and power.

Let me not turn in a little more detail to the impact which treaties have and can be expected to have on Australia and Australians, in particular on Australian law, Australian policy making, Australian industry and business, and Australian society more generally.

Impact of treaties on Australian law. The impact of treaties on Australian domestic law has received a good deal of attention lately. The basic point to be noted here, again, is that the terms of treaties do not create rights or obligations in Australian law in the absence of legislation. Creating such rights and obligations is a role reserved for Parliament under the Australian Constitution.

That is not to say that treaties to which Australia is a party do not affect Australian law at all. The courts have traditionally used treaties to which Australia is a party in a limited way - to resolve ambiguities in legislation, and as a guide in developing the common law (i.e. judge-made law - where there is no legislation), particularly where a treaty declares universal fundamental rights. In addition, treaty provisions could quite properly be taken into account in the exercise of a discretion by an administrative decision maker: decision makers did not have to take a possibly relevant treaty into account, but if they did, they would not be taken to be in error.

In the *Teoh* case of April this year, however, the High Court went one step further. The Court held that merely entering into a treaty could give rise to a "legitimate expectation" that government decision makers would make decisions in accordance with the treaty provisions, even if they had not been legislated into Australian law: in this particular case, an immigration official deciding a deportation matter was held to be in error for not taking the Convention on the Rights of the Child sufficiently into account - even though there was no specific legislation implementing this particular Convention, and even though the

Convention had not been referred to in argument. The Court went on in its decision to state that such a "legitimate expectation" could be displaced by statutory or executive indications to the contrary.

The Court's decision raised a fundamental question about our system of parliamentary law making in Australia - should the Parliament be by-passed to allow treaties to have a direct effect in Australian law? The Government is firmly of the view that this is not an appropriate development and that the role of changing Australian law to conform with treaty obligations should remain with the democratically elected parliaments of this country.

The Joint Statement which the Attorney-General and I published on 10 May 1995 and the Administrative Decisions (Effect of International Instruments) Bill 1995 were designed to make that "contrary intention" clear, in the way that High Court itself allowed for. Our concern in making the statement and in introducing the Bill was simply to preserve the role of parliament in changing Australian law.

We still take our treaty obligations very seriously - and will continue to make every effort to ensure that Australian law is in accordance with the treaties we decide to adhere to. However, I firmly believe that it is appropriate to retain the long-standing, widely accepted and well understood distinction between treaty action undertaken by the Executive, which creates international rights and obligations, and the implementation of treaty obligations in Australian law. The implementation of treaties by legislation is the way that the rights, benefits and obligations set out in treaties to which Australia is a party are conferred or imposed on individuals in Australian law.

Because we do take international obligations seriously, to ensure that there are no obvious gaps between the terms of domestic law and the treaties we have committed ourselves to - particularly in the human rights area, where this problem is more likely to arise - the Attorney announced on 5 July that his department will be carrying out a review of Commonwealth government decision-making in consultation with the Human Rights and Equal Opportunity Commission and other Government departments. If it emerges from the review that there are areas where those obligations are not being adequately met, we will do something to remedy the situation.

Impact of treaties on Australian policy making. Australia and Australians can no longer afford the inward-looking mentality of past decades. Nor can we any

longer rely on others to look after our interests in the wider world. Our future prosperity and security rely, to a large extent, on our playing an active and positive role on the international stage. Our contribution to international peace building and the international rule of law, our activism in international forums, and our commitment to establishing and maintaining global standards are what will keep us afloat in a sea of changing power relationships. Policy makers cannot try to disregard international developments such as these - rather they must try to influence those developments to promote and protect national interests.

To be successful in our efforts, we must approach treaty making in a cooperative and inventive way. We must seek outcomes which not only benefit Australia but which also benefit as many other parties as possible. As a middle power of some significance, we are in a strong position to influence the outcomes of important international deliberations. Our skill in coalition building, our flexibility in finding common ground, our experience over forty years of international diplomacy, and our pivotal position between Europe, America, and the Asia Pacific region give us added standing and credibility in international treaty negotiations.

Nationally, we must ensure that we plug into relevant international developments and make them our own. Let me take as an example the area of the environment. There is no doubt that concerns about the environment have become a major issue in the last ten years, both domestically and internationally, and they are likely to remain so for the foreseeable future. The issue has been driven internationally by the increasing recognition that many of the major threats to the world's environment extend beyond national borders and require solutions to be worked out on a global scale if they are to be effective. Issues such as global warming, depletion of the ozone layer, and threats to biodiversity are problems for the global community, not simply for individual states. For Australia the imperative to help resolve global and regional environmental problems goes well beyond our own national environment. Environmental problems, if unchecked, are likely to hamper our development, weaken our economic infrastructure and trade prospects, and diminish the quality of our lives and those of future generations. We therefore pursue solutions to such problems in negotiations for international treaties.

We are able to bring to these negotiations a wealth of practical background knowledge. In the case of climate change, for example, we have a strong record

of technological innovation which will assist international efforts to reduce the threat of global warming. Australian researchers have developed a range of efficient and renewable energy technologies, including advanced generating technologies using fossil fuels and photovoltaics, and we have particular expertise in sustainably managing agricultural, pastoral and forestry resources which could assist in reducing emissions of greenhouse gases, enhancing sinks for greenhouse gases or in adapting to impacts of climate change.

Impact of treaties on Australian industry and business. The Australian economy is heavily dependent on international trade. As the rest of the world moves forward setting up international trading arrangements we cannot expect to maintain our rate of growth by acting alone. We must have an effective handle on developments in the international system to enable Australian business and industry to participate fully in the globalisation of the world economy.

The 1994 Agreement establishing the World Trade Organisation, to which we are party, is crucial in this respect. Major agreements negotiated under the World Trade Organisation Agreement are the revised General Agreement on Tariffs and Trade; the General Agreement on Trade in Services; and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Together, these agreements will result in estimated increases in Australian exports of \$A5 billion and Australian GDP of \$A4.4 billion by the year 2002.

These are major multilateral trade agreements but regional and bilateral trade agreements also form part of our integrated approach to international trade. The South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA) provides a mutually beneficial framework for trade among South Pacific countries. It also contributes to the prosperity and stability of the region. Our Closer Economic Relationship (CER) arrangements with New Zealand, is a core element of our relationship with a country which is one of our largest trading partners. The Nara Agreement with Japan provides the cornerstone of our huge trading relationship there, the destination for 25 per cent of all our exports.

Australia has concluded some thirty five double taxation agreements which increase our international competitiveness by reducing to fair levels the tax burdens of companies with international operations. These agreements also encourage international investment in Australia. We also have bilateral Investment Protection Agreements with ten countries which act as confidence building mechanisms for investors, and protect the interests of Australian

investors overseas.

Equitable access to the world's natural resources is more than ever governed by international agreements. The United Nations Law of the Sea Convention, for example, in the negotiation of which Australia played a critical role, establishes globally accepted regimes for access to the resources of the sea and the seabed with 200 nautical mile exclusive economic zones.

And the list goes on: civil aviation agreements, telecommunications agreements, postal agreements, customs agreements and the like all operate to support and facilitate international trade and commerce. The benefits are enormous, to Australia certainly, but also to the region and to the world.

Impact of treaties on Australian Society. Just as the benefits of treaties for business are often overlooked, this is also true of the benefits to individual Australians. In many everyday activities - including international post, air travel and communications- treaty arrangements are the silent partner.

This is particularly important and significant in a society as multicultural as our own. As a nation we have a heightened awareness of and interest in the people of other nations and this translates into a global outlook on issues like the environment and human rights. The responses of Australians to the crisis in Rwanda and to the ongoing conflict in the former Yugoslavia are indicative of the concern many Australians share for problems which are geographically remote from us.

Major international human rights treaties include the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. These treaties establish world wide standards and the international machinery to monitor and help ensure that the rights are implemented.

Following Australia's ratification of the International Covenant on Civil and Political Rights in 1981, the Government established the Human Rights and Equal Opportunity Commission here in Australia to increase the understanding, acceptance and observance of human rights in Australia and promoting social justice and equal opportunity. The Commission administers Australian legislation in the field of human rights such as the *Racial Discrimination Act 1975* and the

Sex Discrimination Act 1984 which are squarely based on the relevant international treaties: the Australian Government brings these internationally accepted standards into Australian law and practice - by getting the Australian Parliament to enact appropriate Australian legislation.

Another major area of international treaty law which has clear benefits for Australian society generally is that of the International Labour Organisation Conventions, setting internationally accepted minimum standards in areas such as forced labour, discrimination in employment and workers with family responsibilities.

Treaties such as this allow us to examine ourselves against international standards and see how we measure up. Another way we do this is through our adherence to The Optional Protocol to the International Covenant on Civil and Political Rights. This allows individual Australians to approach the United Nations Human Rights Committee where they believe that their rights under the Covenant have been breached and where they have exhausted all available domestic remedies. The Committee is not a court and its decisions are not binding, but its views do provide valuable guidance on implementing human rights standards at the national level. As you will recall, last year the Committee provided its views to Australia in the *Toonen* case in relation to Tasmanian laws which made sexual relations between consenting adult men in private a criminal offence. The Committee expressed the view that criminal laws of this sort did not meet the standards set out in the Covenant. The Australian Parliament agreed, and the Human Rights (Sexual Conduct) Act was passed in 1994, effectively negating the Tasmanian legislation. This is another example of our international obligations not being self-enforcing, but being examined by Parliament and enacted into Australian law.

The *Toonen* case is sometimes cited as an example of the Commonwealth Parliament overreaching itself and legislating in an area traditionally thought to lie within State responsibility. This ignores, however, the very extensive efforts the Commonwealth made to persuade the State to act first and the reality that the Commonwealth only acted as a last resort.

There are those who will go on expressing the view that by participating in the treaty system we are somehow ceding national sovereignty to the international community. But there is no frightening 'new world order' telling us what to do. We are an active and successful player in the multilateral game and any

concessions we make are met by concessions from other parties for the common good. Each decision to become a party to a treaty is taken after extensive consultation with States and Territories, with industry groups and other non government organisations and with Australia's national interest clearly in mind. We enter treaties freely as a sovereign nation state and with our eyes wide open.

It should really be apparent that full and active participation in the international arena and the international treaty system is simply a requirement of life in the modern world. There is little point in ignoring such developments, and every point in working within the system to promote and protect our national interests. The system has a very great deal to offer a middle power like Australia: it empowers us by establishing rules and systems which operate in a transparent and equitable way.

Overwhelmingly, Australia benefits from its involvement in the international community of nations and the treaty system. We are empowered and enriched politically, socially and economically. Treaties allow us to assist and to be assisted in an ever increasing range of areas. They oil the wheels of international dealings and provide guidance and rules for the conduct of international relations. Without them Australia would be unworkably isolated and struggling to make its way. Treaties may at times seem to be difficult and complex beasts, but they are well worth the time and trouble to harness.