

1997

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ADMINISTRATIVE DECISIONS (EFFECT OF INTERNATIONAL
INSTRUMENTS) BILL 1997**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

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INSTRUMENTS) BILL 1997

GENERAL OUTLINE

On 7 April 1995 the High Court brought down its decision in *Minister for Immigration and Ethnic Affairs v Teoh* (the *Teoh* case).

In the *Teoh* case the majority of the High Court held that entry into a treaty by Australia creates a 'legitimate expectation' in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. The High Court held that, where a decision-maker proposes to make a decision which is inconsistent with such a legitimate expectation, procedural fairness requires that the person affected by the decision be given notice and an adequate opportunity to put arguments on the point. The High Court made clear that such an expectation will not arise where there is either a statutory or executive indication to the contrary.

On 10 May 1995, the then Minister for Foreign Affairs and the then Attorney-General issued a joint statement concerning legitimate expectations based on treaties. On 25 February 1997, the present Minister for Foreign Affairs and present Attorney-General issued a further joint statement. Both statements said, on behalf of the Commonwealth Government, that the act of entering into a treaty should not give rise to such expectations. The joint statements were Executive indications of contrary intention as referred to by the High Court. The joint statement of 25 February 1997 replaced the earlier statement in relation to decisions made from 25 February 1997. The statement of 10 May 1995 continues to apply to administrative decisions made in the period from 10 May 1995 to 25 February 1997.

Prior to the *Teoh* decision, the terms of treaties to which Australia was a party had not been considered to create rights or obligations in Australian law in the absence of legislation. The High Court confirmed this principle in the *Teoh* case. The Court distinguished between a substantive rule of law and the doctrine of legitimate expectation on the basis that the doctrine only gave rise to a procedural right to have the treaty considered, not a legal right to enforce the terms of the treaty. Despite this distinction, however, the Court's decision gave treaties an impact in Australian law which they did not previously have.

The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations.

The Bill is a statutory indication to the contrary as discussed by the High Court in the *Teoh* case. The purpose of the Bill is to ensure that the Executive act of entering into a treaty does not give rise to legitimate expectations in administrative law.

Clause 7 of the Bill makes clear that the Bill will not affect any other operation or effect, or use that may be made, of a treaty in Australian law. For example, the Bill will not affect the operation of an enactment which incorporates the terms of a treaty into Australian law or relies for its operation on the terms of a treaty, for example, the *Human Rights and Equal Opportunity Commission Act 1986*. The Bill will not affect the established use of treaties to assist in statutory interpretation or their use as a source for the development of the common law.

Subject to the following paragraph, the Bill will apply to Commonwealth, State and Territory administrative decisions made on or after the day on which the Bill receives Royal Assent. The Bill will also apply to decisions reviewing, or determining an appeal in respect of, decisions made before that day. The Act will apply to international instruments entered into either before or after the Act commences. The Bill is intended to replace, in respect of decisions made on or after the date the Bill commences, the Joint Statement made by the Minister for Foreign Affairs and the Attorney-General on 25 February 1997.

Where a State or Territory legislature passes, or has passed, legislation having the same or similar effect as the Bill in relation to State or Territory administrative decisions the Bill will have no operation in relation to those decisions.

FINANCIAL IMPACT

It is not anticipated that the Bill will have a direct financial impact. However, the Bill will contribute to increased certainty in administrative decision-making and forestall the possibility of expensive litigation challenging administrative decisions on the basis of the *Teoh* case.

NOTES ON CLAUSES

Preamble

1. The Preamble sets out the considerations taken into account by the Parliament of Australia in enacting the proposed legislation. These include the need for certainty in administrative decision making and the importance of the role of Parliament in implementing treaties in Australian domestic law.

Clause 1 - Short Title

2. The short title of the Act is to be the *Administrative Decisions (Effect of International Instruments) Act 1997*.

Clause 2 - Commencement

3. The proposed Act is to commence on the day on which it receives the Royal Assent.

Clause 3 - Application to External Territories

4. This clause provides that the Act will have application in all the external Territories of Australia.

Clause 4 - Definitions

5. This clause contains definitions of the following three key terms - 'administrative decision', 'enactment' and 'international instrument'.

6. 'Administrative decision' is defined to mean a decision by or on behalf of the Commonwealth, a State or a Territory, or by or on behalf of an authority of, or office holder of, the Commonwealth, a State or a Territory. The decision must be of an administrative character whether or not the decision is made under an enactment. The definition includes an administrative decision reviewing, or determining an appeal in respect of, a decision made before the commencement of the Act. It does not include decisions of courts as they are not of an administrative character.

7. 'Enactment' is defined to mean an Act passed by the Commonwealth, a State or Territory. The term includes an instrument of legislative character made under an Act.

8. 'International Instrument' is defined to mean any treaty, convention, protocol, agreement or other instrument that is binding in international law and includes a part of any such instrument.

Clause 5 - International Instruments Do Not Give Rise to Legitimate Expectations at Law

9. Clause 5 is the main operative provision and provides that the fact that Australia is bound by, or a party to, a treaty does not give rise to legitimate expectations in

administrative law. The clause also makes clear that such legitimate expectations do not arise simply because a treaty is reproduced or referred to in an enactment.

Clause 6 - Exclusion Where State or Territory Coverage

10. This clause states that where a State or Territory legislature passes, or has passed, legislation having the same or similar effect as the Act in relation to State or Territory administrative decisions the Act will have no operation in relation to those decisions.

Clause 7 - Other Operation etc of International Instruments Not Affected

11. This clause is only included for the avoidance of doubt. It makes clear that the proposed Act will not affect any other operation or effect, or use that may be made, of a treaty in Australian law. For example, the proposed Act will not affect the operation of an enactment which incorporates the terms of a treaty into Australian law or relies for its operation on the terms of a treaty. The proposed Act will not affect the established use of treaties to assist in statutory interpretation or their use as a source for the development of the common law.