Warning: This Digest was prepared for debate and reflects the legislation as introduced but does not canvass subsequent amendments.

Administrative Decisions (Effect of International Instruments) Bill 1995

Date Introduced: 28 June 1995
House: House of Representatives
Portfolio: Attorney-General
Commencement: The Act is taken to have commenced on 10 May 1995

Purpose

The Bill overrules the recent High Court decision in Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (the Teoh case) handed down on 7 April 1995.

The Explanatory Memorandum (page 1) states that the Bill 'will restore the situation which existed before Teoh, in which if there were to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they would be made by parliamentary and not executive action.'

Background

Australia is a party to over 900 treaties.

In Teoh, the High Court decided that when the executive ratifies an international treaty, provided there are no statutory or executory indications to the contrary, a legitimate expectation is created that administrative decision-makers will act in accordance with the treaty. Should decision makers not act in such a manner, procedural fairness requires that the person affected be given the opportunity to persuade them otherwise. [For an overview, see: M Spry, The reception of treaties in Australian domestic law, Parliamentary Research Service, Research Note No 33, 9 May 1995]
The Commonwealth Executive may negotiate and enter into treaties on Australia's behalf. It is Parliament, however, that makes or alters domestic law in order to implement treaties ratified by the Executive.

Although the provisions of an international treaty do not become part of Australian law unless incorporated by statute, they may, nevertheless, have implications for domestic law. The Courts may look to relevant treaties to help explain ambiguous statutes. This is because, 'the Parliament should be taken as intending to legislate in conformity and not in conflict with international law.'

In addition, where the common law is uncertain, judges may look for guidance to international treaties ratified by Australia. Moreover, in Mabo, Justice Brennan stated that in developing the common law, 'international law is a legitimate and important influence.' And, although noting the need for care when Parliament has not expressly incorporated a treaty into Australian law, Mason CJ and Deane J said in Teoh:

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.

The Explanatory Memorandum (page 1) states that the Bill will not affect the use of international treaties by the Courts in interpreting legislation or in developing the common law. Nor will it mean that international treaties are not a relevant consideration in administrative decision-making.

The impact of conventions on domestic law has also been discussed recently in the United Kingdom and in New Zealand.

In 1991, for example, the House of Lords in Ex parte Brind [(1991) 1 AC 696] decided that international treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, although not incorporated into English law, could be used by the Courts to resolve ambiguity or uncertainty in legislation. However, as the relevant statute in Ex parte Brind was clear there was no need to resort to the Convention for assistance. Lord Ackner also said that given the Convention is not part of English law, it cannot be a source of rights and obligations. Indeed, if the Secretary of State was obliged to have regard to the Convention it would result in 'incorporating the Convention into English domestic law by the backdoor.'

In Tavita v Minister for Immigration [(1994) 2 NZLR 257], decided in 1994, the New Zealand Court of Appeal observed that the argument that the New Zealand Minister for Immigration and his Department were entitled to ignore international instruments is 'unattractive', implying that New Zealand's adherence to the international instruments has been at least partly window dressing.
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Given New Zealand's accession to the Optional Protocol, the Court in Tavita also observed that the United Nations Human Rights Committee 'is in a sense part of this country's judicial structure' and that New Zealand courts could be legitimately criticised if they accepted that 'because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.' [For a discussion of Australia and the First Optional Protocol see: A Twomey, The First Optional Protocol, Parliamentary Research Service, Research Note No 6, January 1995]

In Teoh, the High Court of Australia was not considering a treaty expressly incorporated into Australian law. Nor was it concerned with an ambiguous statute or with the development of an existing common law principle. Nevertheless, the majority held that ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that Commonwealth officers will act in accordance with its provisions.

On 10 May 1995, the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Mr Michael Lavarch, issued a Press Release 'to clarify the Government's position following the recent decision in the Teoh Case.' Senator Evans and Mr Lavarch stated on behalf of the Government that:

entering into an international treaty is not reason for raising any legitimate expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground of review of a decision. This is so, both for existing treaties and for future treaties that Australia may join.

It was noted in the Press Release that this kind of action was foreshadowed by the High Court. The Press Release also stated that the 'Government intends to legislate to reinforce this statement and put beyond any doubt the status of these unlegislated international obligations.' The Bill puts in place that legislation.

Main Provisions

Definitions

Clause 4 defines an administrative decision to mean a decision by or on behalf of the Commonwealth, a State, or a Territory, or an authority or office holder of the Commonwealth, a State or a Territory.
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The *Explanatory Memorandum* (page 4) states that State or Territory decisions are included as it is possible that the Executive act by which the Commonwealth entered into a treaty may have given rise to a legitimate expectation that State and Territory decision-makers would also act in accordance with its terms.

**International instruments do not give rise to legitimate expectations**

Clause 5 makes it clear that the fact that Australia is party to a treaty or that a treaty is referred, or attached, to an enactment does not give rise to a legitimate expectation.

**Relevance of international instruments in decision making**

Clause 8(1) provides that Clause 5 does not affect the operation of an enactment if that enactment states that an international instrument is a relevant consideration in making an administrative decision.

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2 See: *Minister for Foreign Affairs and Trade v Magno*, 112 ALR 529 (Federal Court), at 534, per Gummow J.


4 *Mabo v Queensland* (1992) 175 CLR 1 at 42.

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This Digest does not have any legal status. Other sources should be consulted to determine whether this Bill has been enacted and, if so, whether the subsequent Act reflects further amendments.

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