Treaty obligations:
cost of consent

Address by the Attorney-General, Mr Michael Duffy, to the conference on the role of consent and the development of international law, organised by the Centre for International and Public Law, at the Australian National University, Canberra, on August 15.

What I have realised in my short time as Attorney-General is the significance of international law in a large range of government decisions in the domestic area. This reflects, in part, the increasing number of issues which have international implications and hence often raise legal issues at the government-to-government level. It also reflects the increasing interaction between domestic and international law.

It is some of the difficulties that arise in this area that I particularly want to talk about today. Before doing so, however, I would like to mention briefly some proposed action by the Australian Government in relation to treaties falling within my portfolio area.

I will be introducing legislation in Parliament shortly to enable Australia to ratify the International Convention for the Settlement of Investment Disputes.

This legislation has been long in gestation, Australia having signed the convention in 1975. It is an example of a treaty where the concern to be able fully to implement the treaty in domestic law, particularly the detailed privileges and immunities contained in it, led to considerable delay in ratification.

I also intend to proceed with legislation to implement the Geneva Protocols on Humanitarian Law in Armed Conflict. This was delayed in the last Parliament due to Opposition objections.

Let me now turn to consider some of the practical problems raised in domestic law by treaties.

Acceptance of a treaty by ratification or accession, as you all know, imposes an international legal obligation to implement the treaty in good faith. This is an obligation Australia takes seriously in the view of some, too seriously. I do not agree. I suggest that a discriminating attitude is now adopted by Australia to treaties. We still sign and join many. But we think carefully about the current and future implications - or at least I hope we do.

This reflects the need to consider carefully the legislative requirements to comply with a treaty and normally to have these in place before joining the treaty. I am not here to complain about the need to take treaty obligations seriously. I recognise and accept their value and the importance of complying with them. This Government, as I think will be demonstrated by examples if refered to, is committed as much as any other in the world to the maintenance and development of international law.

I want to remind you, the practitioners, of some of the practical restraints and difficulties encountered by government in seeking to give effect to the international obligations to which Australia as a state has consented, or to which it may wish to consent.

As I am sure all lawyers, particularly those from countries with a written constitution subject to judicial review, are aware, words take on a life of their own. This is particularly significant in the area of international law and treaty obligations. Treaties are drawn up in broad language, deal with events that may unfold in unpredictable ways in the future and are not easy to amend or rewrite.

Termination may not be possible or feasible given the important or significance of the treaty. Yet the fundamental principle of international law, as we all know, is that one is bound by one's treaty obligations.

International law does not apply different rules to the interpretation of different categories of treaties. Without exploring the issue here, perhaps it should.

I ask, without seeking an answer, whether interpretation of law-making treaties should not be approached differently from administrative and contract-type international agreements?

If greater subjectivity, or national discretion were accorded in the interpretation of broad multilateral treaties, this may assist in domestic implementation of such treaties. On the other hand, there is an argument for uniformity in the application of such treaties by nations.

What then are some of the practical issues that face government in giving effect to treaty obligations? Let me give you some specific examples. There are three areas where difficulties arise. These are:

- in interpretation of treaties by domestic courts;
- the problems of ensuring observance and compliance with treaties at the regional or provincial and state government level; and
- the changing interpretation of treaty obligations.

I turn first to illustrate the problem of interpretation by courts to the area of refugees. Here we have a convention and protocol dating from 1951 and 1967 respectively. These were drawn up in a largely European context.

Today we are faced by incredibly complex and difficult problems arising from the movement of people across national boundaries. One finds large-scale exoduses from certain countries, usually due to prevailing economic as well as political considerations.

This inevitably places strains on governments faced with asylum-seekers. Governments are no longer in a position where they can readily accede to every claim that someone is a refugee. They have to assess in a careful manner claims to that effect.

In Australia, with a system of judicial review for administrative decisions, we have in recent years seen the courts involved in review concerning decisions on refugee status. This was not something that government set out deliberately to ensure. In fact, governments have consistently rejected review on the merits of decisions concerning refugee status.

However, as with all administrative decisions, it is difficult to exclude judicial review on grounds such as denial of natural justice or unreasonableness.

This involvement in judicial review has led the courts to a situation where they have interpreted the meaning of various phrases of the refugee convention. Some of their decisions have appeared to give very broad and generous meanings to some of the expressions and to adopt interpretations which the government itself may not consider appropriate.

Faced with this position, the Government has recently announced as part of the review of processes for determination of refugee status, that it will legislate to provide guidance as to the meaning of certain of the convention terms - phrases such as "well-founded fear" and "persecution". The Government considers it important that it retain some control of the meaning that is to be given to its international obligations in this area.

Consistently with what the Government considers a proper interpretation of convention language, it will legislate to give guidance to domestic decision-makers and courts as to what it considers its obligations under the refugee convention entail.

Relevant powers

The Constitutional argument about the relevant powers of federal and state governments to implement treaties that used to bedevil debate on treaty implementation in Australia has largely ceased. However, there remains the very real problem of ensuring that treaty obligations assumed by Australia can be implemented where appropriate at all levels of government.

In the case of many treaties, Australia relies on state law and state government assurances in order to comply with particular convention obligations.

This need to focus on compliance at the second level of state or regional government is becoming an issue of increasing importance in the GATT Uruguay Round. It also arises in the human rights area.

This is evident in the need to report in detail on state law and practices in the various periodic reports that Australia is required to make under various human rights instruments to which it is a party. And the consequence is that often detailed consultations take place with the states about their compliance with new instruments before Australia moves to become party to them. Which raises as a related issue the extent to which legislative implementation of treaties should take place before Australia becomes a party to them.

In our legal system, treaties are not part of the law unless incorporated in some way. Traditionally, Australia has been cautious in accepting treaty obligations before enacting the necessary legislation or satisfying itself that existing legislation, federal and state, is adequate. This I think is appropriate. It does, however, sometimes lead to criticism.

For instance, the president of the Australian Human Rights Commission, Sir Ronald Wilson, at a recent seminar criticised the delay by Australia in ratifying a number of human rights instruments. he suggested that in certain cases prospective measures are contemplated under the conventions, such as legislation or "appropriate measures". There was, therefore, no justification for delay in accepting various obligations.

However, except where progressive implementation is explicitly stated in the treaty, I do not think it appropriate in the Australian context to rely simply on the fact that prospective action may suffice.

The executive does not always control both houses of parliament. State law and action is often contemplated as the appropriate way in which to enforce an obligation. One cannot necessarily be confident that the necessary legislation will be passed by federal or state parliaments in the future.

The only safe and appropriate course is normally to require that all necessary legislative and administrative frameworks are put in place before joining a treaty. The fact that other countries do not take treaty obligations to require prior legislative measures, is not of itself reason for Australia not to insist on prior legislative measures.

Other countries do not have the same Constitutional framework. I am reinforced in this need for careful appraisal of implementation requirements before joining treaties by several instances where it is now being suggested that Australia has not fully implemented certain treaty obligations.

This takes me to the third area I mentioned, the changing interpretation of treaty obligations.

A multilateral treaty often takes on a life of its own, both within a country and as between countries. This often leads to calls some years after a treaty has been joined that particular action is required under a treaty that was clearly not originally contemplated.

For instance, in the same seminar paper to which I have referred, the president of the Human Rights Commission has foreshadowed that the Commission is carefully reviewing whether Australian law complies with article 4(a) of the racial discrimination convention. That provision deals with the punishment of incitement to racial discrimination.

At the time Australia joined the convention, it lodged a statement which indicated it would legislate in future to meet that commitment, and meanwhile would rely on existing laws. That was seen as sufficient at the time. As perceptions have changed, the pressure for specific legislation has grown. yet one cannot assume that such legislation will necessarily be passed by relevant legislative bodies.

Let me turn to another example, this time in the area of copyright.

Australia joined the Berne Convention many years ago. This Convention contains a very general article dealing with the protection of moral rights. Yet Australia has never legislated specifically to deal with this issue. No country has specifically complained to Australia about its absence of action in this area.

At the time, Australia and a number of other common law countries joined the Berne Convention, it was clearly considered that existing legislative and judicial remedies were adequate to comply with that part of the Convention on moral rights. Yet today, different perceptions, different expectations, are leading governments including this Government to re-examine the way in which it might give effect to convention provisions on moral rights.

In a study of this topic by the Copyright Law Review Committee, no unanimity could be reached and the Government was presented with a report from the committee split four-three. The majority said no legislative change was necessary to give effect to the international obligations, while the minority vigorously argued such additional measures were necessary.

Government is still considering this report and no decision has been taken as to the direction or attitude Australia should take in this matter.

This example highlights yet again the fact that a treaty obligation was accepted in good faith on the basis that no particular action was required. Yet many years later, the Government has to re-examine its obligations under the treaty.

This suggests to me that a careful appraisal of treaties before accepting them is desirable. This will not prevent the problem I have referred to from arising - but it may help to prevent it.

Of course, from another perspective, governments often applaud the flexibility which they are accorded under many international agreements. The use of the phrase "take appropriate measures", for example, appears in many conventions. These words leave the Government with a wide discretion and degree of flexibility. It is, I suspect, the sort of language that will continue to be used in many international agreements, including possibly some of the new environmental conventions that are under consideration.

However, from my perspective as Attorney-General, I must say that if there is an international problem that requires a convention or international agreement on common action, then it seems desirable that greater rather than lesser guidance ought to be provided.

In this way, governments have better appreciation of the sorts of costs and obligations they are assuming by becoming a party and they can expect other countries to be taking similar action at similar cost.

Particularly in areas with an economic impact, and this clearly includes development of new environmental control measures, it is important that governments assume burdens that are known.

In conclusion, the start of the Decade of International Law was proclaimed by the United Nations General Assembly last year. This provides an occasion when I think it important that those who practice in the field of international law reflect carefully on the ways in which international law can be promoted and the consent of states to particular treaty obligations can be made universally meaningful.

I believe that governments will more readily accept international obligations and commitments if they do not find that particular treaties or obligations which they undertook in the past now require them to do all sorts of new and unexpected things.

This is not to say that treaties should not be documents that can grow and evolve, like constitutions, to reflect the changing world. However, governments will feel increasing disenchantment with international law if they feel their consent to particular obligations is then being used by other countries, courts, international organisations or pressure groups to seek to impose different and unforeseen burdens.

I have given you a number of examples where the Australian Government is faced with the need to react and adapt its practices to international obligations. If I am to be successful in promoting and defending the role of international law in Australian law, then I think it behoves domestic courts, international law practitioners and the community at large to appreciate the constraints within which governments operate and to assist in the proper understanding of the nature of treaty obligations and of what they can legitimately be interpreted to entail.

I therefore welcome the fact that this conference is addressing one of the fundamental international law concepts, that of consent. Far too often these days the international law literature focuses on the details of particular international issues and events and does not adequately reflect on the more fundamental international law obligations.

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