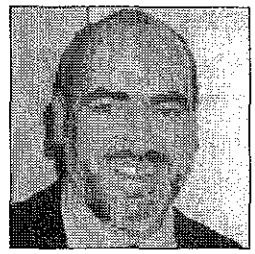
An introduction to treaties: what they are and where to find them



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Introduction

In the past few years there has been a growing interest in the relationship between international law and Australian domestic law and, in particular, the role and significance of treaties. It is probably as recently as only fifteen years ago that treaties were thought to be exclusively within the domain of public international lawyers. Since then, of course, a number of High Court decisions starting with the *Tasmanian Dams Case*[1] in 1983 have resulted in a much greater awareness by a broader cross-section of the community in the significance of treaties in Australian domestic law.

Now it seems to have become *trendy* for the Australian media to publish stories on the extent to which existing Australian legislation or proposed legislation is inconsistent with Australian international treaty obligations. Also special interest groups and NGOs are far more aware of the potential relevance of treaty provisions. A couple of examples of this popular interest in treaties from my own experience will illustrate the point I am making.

Earlier in the year I was contacted by a journalist who wanted to do a story on the extent to which the Penington Committee's recommendations for drug law reform in Victoria were consistent or otherwise with various international treaty obligations that Australia had as a State Party to a number of drug-trafficking conventions. Last year I was contacted separately by both the Victorian Police and the Victorian Council for Civil Liberties with a question about whether the proposed introduction of capsicum spray by the Victorian Police Force was consistent or otherwise with Australia's international treaty obligations under either the *Biological Weapons Convention of 1972*[2] or the *Chemical Weapons Convention of 1993*[3]. No doubt each of you have your own anecdotal evidence of the growing interest in treaties and their impact on Australian domestic law. If that was not the case, I imagine I would not have been invited to speak to you on this particular topic.

1 *Commonwealth v Tasmania (1984-5)158 CLR 1.*

2 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, signed 10 April 1972, ATS 1977 No. 23, 1015 UNTS 163 (entry into force 5 October 1977).*

3 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction Doc. CD/1170 (1993) (not yet entered into force but full text of the Convention is available as a schedule to the Chemical Weapons (Prohibition) Act 1994).*

The decision of the United Nations Human Rights Committee in the *Toonen Case*,[4] that particular provisions of the *Tasmanian Criminal Code* outlawing male homosexual activity constituted violations of Australia's treaty obligations (specifically the right to privacy) pursuant to the *International Covenant on Civil and Political Rights*,[5] and the subsequent Commonwealth Government response in the adoption of the *Human Rights (Sexual Conduct) Act 1994*, were watershed events in raising public awareness of the significance of treaties in Australian domestic law. These events sparked a lively, often heated, debate about both Australia's treaty making processes and about the relationship of treaties to Australian domestic law. These events also precipitated the establishment of the Parliamentary inquiry into Australian treaty making processes. That inquiry resulted in the publication of the Committee's report *Trick or Treaty?: Commonwealth Power to Make and Implement Treaties*.[6]

My own view is that international law will only continue to grow in significance for Australia and for other States in the international community. International Law is the second most popular optional subject in the undergraduate program at the University of Melbourne, behind Taxation Law. Given that so many students take Tax because they believe without that subject their employment prospects may be slim, International Law is a very popular subject indeed. This trend at Melbourne University is replicated in the law schools around the country and I do not see that trend abating in the near future. As Australia becomes more aware of the international community, more interested in engaging with other States in our region and in the rest of the world, international law will only grow in its significance.

Requests to you as law librarians about where to find treaty texts, or information about treaties, or summaries of implications of treaties for the Australian legal system will only grow in number. What I hope to be able to do today is provide you with a brief introduction to treaties, an explanation of what they are and a brief coverage of the terminology associated with the international law of treaties. I also intend to discuss Australia's approach to treaty making and particularly explain the proposed reforms of the new Government in this area. Then I will conclude with some suggestions about sources of treaty texts and other helpful information on where to find answers to the questions that you encounter.

What is a Treaty?

In domestic law we have a range of different legal instruments including contracts; conveyances; mortgages; corporate charters; legislation and regulations. All of these constitute a variety of instruments for the regulation of life and interaction in our society. By contrast, international law does not have the same range of different legal instruments. In international law, treaties are a generic body of instruments covering a range of different legal relationships. For example, the

4 *Communication No 488/1992 CCPR/C/50/D/488/1992, 8 April 1994*

5 *Signed 18 December 1972, ATS 1980 No 23; 999 UNTS 171 (entry into force 13 November 1980).*

6 *Senate Legal and Constitutional References Committee (1995)*

constitutional instrument establishing the World Trade Organisation;[7] the bilateral agreement between Australia and Japan governing the protection of habitats for migratory bird species between our two countries;[8] the regional arrangement known as the *South Pacific Nuclear Free Zone Treaty*[9] declaring the region of the South Pacific free of nuclear weapons; and the global multilateral *United Nations Convention on the Rights of the Child*,[10] now with over 190 States Parties, are all treaties and therefore subject to the same international rules about implementation and interpretation.

That is not to say that international law does not have other legal instruments or that the only source of international legal obligations are treaties. For example, resolutions of international organisations (particularly the UN Security Council) are another type of legal instrument. However, there is no question that treaties are the most common source of legally binding obligations at international law.

(a) Definition

As librarians who deal with lawyers on a daily basis, it would hardly be surprising for you to know that the principal source of rules about treaties is itself a treaty - the *Vienna Convention on the Law of Treaties of 1969*.[11] That convention was an attempt by the international community to codify the international law on treaties into a single instrument. According to Article 2 of the *Vienna Convention*, a treaty is defined as "an international agreement concluded between States in written form and governed by international law...whatever its particular designation". This definition includes a number of different components and we will consider each of those in turn.

First, a treaty is an international agreement and this implies a concept of consent to be bound. In Australian contract law, for example, a binding contract is dependant upon an intention between the parties to create legally binding obligations. At international law there is a similar concept in the law of treaties. That is, an instrument will only constitute a treaty if there is consent between the parties to the instrument to create binding legal obligations. Courts look at the intention of the parties expressed through the language of the document as well as through other action (the office of the person undertaking the act of concluding the instrument, for example).

Article 2 of the *Vienna Convention* also refers to an international agreement concluded between States. On the basis of this criterion, the rules of the *Vienna Convention* only apply to agreements or treaties concluded between independent sovereign nation States. That raises problems in contemporary international law

7 *The Marakesh Agreement Establishing the World Trade Organisation, signed 15 April 1994, ATS 1995 No. 8; 33 ILM 1125 (entry into force 1 January 1995).*

8 *Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, Australia - Japan, ATS 1981 No. 6, (entry into force 30 April 1981)*

9 *South Pacific Nuclear Free Zone Treaty, signed 6 August 1985, ATS 1986 No. 32, (entry into force 11 December 1986).*

10 *Signed 22 August 1990, ATS 1991 No. 4; 28 ILM 1448 (entry into force 16 January 1991).*

11 *Signed 13 June 1974, ATS 1974 No. 2; 1155 UNTS 331, (entry into force 27 January 1980)*

because international organisations and other non-State entities have increasingly become involved in international life. Many of these non-State entities have treaty making capacity and are actively engaged in treaty making, sometimes between themselves and more often between themselves and States. In recognition of this shortcoming in the scope of the application of the 1969 Convention, the international community concluded a second convention on the law of treaties in 1986. This second convention is entitled *The Vienna Convention on the Law of Treaties Concluded Between States and International Organisations or Between International Organisations* [12] Despite the rather lengthy title of the treaty, the intention of the second convention is to extend the rules of treaties to a broader scope of treaty-making activity in the international community.

A third criterion of the definition of the *Vienna Convention* is that agreement is in written form. That is a self explanatory criterion but an important one nevertheless. It ought not to be assumed that treaties are the only source of binding obligation at international law. In some cases an oral statement by a Head of State or a Foreign Minister may be sufficient to bind a State at international law. However, any such oral statement resulting in a binding obligation is not a treaty. It is important, for today's purposes, to make that distinction.

(b) Terminology

I also want to make some comments about terminology because there is substantial misunderstanding about what particular terms actually mean. The term "treaty" is a generic term in international law which covers a range of instruments by other names, provided of course that the criteria for a treaty are all satisfied. Other terms that are often used include, for example, "convention", "pact", or "charter" It is important to recognise that these terms are not necessarily terms of art. They are often used synonymously and, from the perspective of international law, a treaty is a treaty whether its called a convention or a pact or a charter or a treaty or any other term. The same rules apply to instruments with any of those different names, and the legal status of each of them is the same. As already mentioned, there are a range of different types of treaties and it is true that sometimes the term "charter" is used for constitutional treaties setting up new organisations. It may also be true that "pact" is often used as the term to describe a particular instrument between a number of States establishing a military alliance but, again, that term is not used consistently for all such instruments. I do not believe it is a worthwhile exercise to attempt to explain a distinction between the use of these particular terms. The fundamental issue is what the parties intended when they entered into the agreement, not the term they used to describe the particular instrument.

Another term that is often used is "protocol". In most circumstances the term "protocol" is used with a specific meaning - to describe an instrument additional to a treaty. A protocol may be drafted at the same time as the treaty and be offered as a separate instrument to States which choose to become parties to the treaty but may or may not choose to become party to the additional protocol. Or, in other

12 Not yet entered into force but complete text of the Convention is available at 25 ILM 543

circumstances, a protocol may be drafted at a later date than the treaty and be used to add something to the treaty text. In those circumstances it is still optional for States Parties to a treaty to decide whether or not to also become parties to the protocol. If the international community wants to alter a treaty text in a way that will ensure that all States Parties to the treaty are bound by the alteration, then the usual process is by amendment to the treaty itself. Both these approaches, amendment to the treaty or the drafting of a separate protocol, are quite common in international law. Having said all of that though, it is also possible that an instrument be termed a "protocol" when it is not additional to an existing treaty. So even here we see that the term "protocol" is not always used in a consistent way.

Another term often referred to is "memorandum of understanding". Usually such an instrument constitutes an agreement between States Parties to a treaty as to the clarification of a particular provision of a treaty and a "memorandum of understanding" is not usually considered to create binding obligations between States Parties to a treaty. However, despite that general rule, it may be that in some particular circumstances, if it can be shown that the States Parties to the "memorandum of understanding" intended to create binding obligations between them, the memorandum itself can constitute a treaty

If you sense confusion about all this, my suggestion is do not be concerned. The important thing, as I have already said, is the intention of the States in the creation of the instrument. Choice of terminology is not determinative of the status of the instrument - only the intention of the parties as a result of agreeing to the instrument decides the issue of the status of the instrument. If there is an intention to create binding legal obligations between the parties, any court or arbitral body would be able to say that the written instrument constitutes a treaty.

There are also a number of other terms that are commonly used in the treaty making process which I would like to discuss. However the most appropriate place to talk about them is in the next section on the process of becoming a State Party to a treaty.

The Treaty-Making Process

There are basically two ways that a State can become a party to a multilateral treaty. My intention is to focus the discussion on multilateral treaties rather than on bilateral treaties because the terminology is most commonly used in relation to multilateral treaties.

There are two crucial dates in the life of a multilateral treaty. The first is the date of opening for signature and the second is the date of entry into force for the treaty itself. Those two dates are important for reasons which I will go on to explain. But first, an explanation of the two ways a State can become a party to a multilateral treaty. The first is a two step process involving signature and ratification. The second is a single step process involving accession

(a) Signature and Ratification

Multilateral treaties invariably involve a process of negotiation to arrive at the final and agreed draft of the treaty text. Sometimes this negotiation process is extremely protracted and on other occasions relatively short and uncomplicated. Ultimately, the amount of time that it actually takes to reach agreement on the draft text has to do with the realities of international politics and the extent to which the international community believes that it is in the national interests of a sufficient majority of States to reach agreement in the negotiation process. However, once the treaty text is agreed, the treaty then becomes open for signature. Sometimes opening for signature happens at a big signing celebration in a beautiful city somewhere in the world. At other times opening for signature happens in the context of an annual session of the United Nations General Assembly (not that New York is an undesirable destination!). Either way, once the treaty is open for signature, individual States can sign on to the treaty.

The important thing about the two stage process of signature and ratification before a State becomes a party to a particular treaty, is that signature is invariably an act of the executive arm of Government. Many States in the international community require parliamentary approval before they can be bound at international law by the particular obligations of a treaty. So the second step of ratification which follows signature facilitates the satisfaction of constitutional obligations by many States to have parliamentary approval for ratification before the State becomes bound. International law does not prescribe the way in which a State meets its constitutional obligations. A State can sign and ratify a treaty however it wants to do so, provided that, once it has become a State Party and is bound by its obligations under the treaty, it ensures that the obligations are implemented within its own domestic law. International law is much less concerned with form and process within domestic legal systems, and much more concerned with substantive implementation. That explains why the two step process of signature and ratification before a treaty becomes binding on a particular State is accepted as common practice.

I mentioned earlier the important date of entry into force. All multilateral treaties include a provision detailing the circumstances in which the treaty will enter into force. Often multilateral treaties require a specific number of ratifications and in some cases an additional period of time before the treaty becomes operative. For example, the *Chemical Weapons Convention of 1993*[13] states that the treaty will enter into force 180 days after the deposit of the 65th instrument of ratification. In the case of the *Law of the Sea Convention of 1982*,[14] that convention was to enter into force 12 months after the deposit of the 50th instrument of ratification. This formula of a specified number of ratifications plus a specified time period is very common indeed. When the specified number of ratifications is attained and the treaty enters into force, all those States, which both signed and ratified the treaty between opening for signature and entry into force, become States Parties and are bound by the obligations of the convention at that date.

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13 Above, note 3

14 Signed 10 December 1982, ATS 1994 No 31, (entry into force 16 November 1994).

Some States which signed the treaty between opening for signature and entry into force will not deposit their instruments of ratification until after entry into force. On some occasions a State which signed after opening for signature but before entry into force will never deposit an instrument of ratification. The delay in depositing the instrument of ratification or the inability to do so may all be tied up in domestic politics. Those States which require parliamentary approval for ratification are not always able to guarantee that they will receive that approval. The United States is a good illustration of this. There are a number of multilateral treaties which various US Administrations signed in the hope and expectation that Congress would give approval for ratification. For whatever domestic political reason Congress has not always granted that approval and the US has remained a State Signatory but not a State Party because of the failure to ratify

A State which ratifies after entry into force, having signed the convention between opening for signature and entry into force, becomes a State Party at the date that it deposits its instrument of ratification (unless it specifies a subsequent date). Once that State has become a Party to the treaty then it has the same status as all the other States Parties to the treaty The only distinction between States which became Parties before the treaty entered into force and those States which became Parties subsequent to entry into force of the treaty, is the term "Original State Party".

"Original States Parties" are those which were States Parties at the time the treaty entered into force and there is some kudos in the international community for this status However, there can be more substantive benefits than just being able to claim good international citizenship for becoming an Original State Party. If the multilateral treaty is establishing a new international organisation, for example, at the time the organisation is established, only nationals of Original States Parties will be entitled to employment in the new organisation. Furthermore, and perhaps more importantly for some States, only Original States Parties will be entitled to participate in the establishment and work of the organisation. This fact is often a very significant inducement for States to ensure that they sign and ratify before entry into force However, as already mentioned, from the perspective of international law the status of an Original State Party and a subsequent State Party is exactly the same once that subsequent State has deposited its instrument of ratification. Both States have the same obligations under the treaty and are equal in the sense of their legal status vis-a-vis both the treaty itself and other States Parties.

(b) Accession

If a State does not sign a treaty before opening for signature and entry into force, it will have the opportunity to become a party to the treaty by the single step process of accession after entry into force This process only needs to be a single step one, unlike the dual step process of signature and ratification, because if a State is only becoming a party after entry into force the same time constraints do not apply. The State can satisfy its own domestic legal requirements whenever it decides it wants to do that and then deposit its instrument of accession. Once a State accedes to a treaty, it also becomes a State Party to the treaty From the perspective of international law its status as a State Party is exactly the same as all the other

States Parties. Again there may be some implications for a State becoming a party by accession after entry into force just as there are for a State which ratifies its signature after the treaty has already entered into force. Consequently, accession to treaties tends not to be as common as signature and ratification. However, there may well be a whole range of reasons for a State to choose to become a party to a treaty after entry into force of the treaty. Again, the status of a State Party by accession is the same as by any other process. That State still has all the obligations of a State Party, just as any other States Parties do

One final comment that needs to be made in relation to this process of becoming a State Party is the effect of a State signing a treaty and the obligations that it has before it ratifies and the treaty enters into force for that particular State. According to Article 18 of the *Vienna Convention on the Law of Treaties of 1969*,[15] in the interim between signature and ratification, a State Signatory is under an obligation not to act in a way which would frustrate the principal objects and purposes of the treaty. This obligation applies to State Signatories regardless of the amount of time between the signature and the deposit of the instrument of ratification. In some cases, of course, the time lapse will only be a matter of a few months or perhaps a year or a couple of years. In other cases it may be a very protracted period of time. If a particular State which has been unable to become a State Party because of a failure to ratify for whatever reason, wants to be free of its obligation under Article 18 of the Vienna Convention, the appropriate course of action is for it to withdraw its signature from the treaty. If it fails to do that, even if the time lapse between signature and ratification is several decades, the State is nevertheless obliged not to act in a way which would frustrate the principal objects and purposes of the treaty

The Australian Approach to International Law

The position of the High Court in Australia has consistently been that international law, particularly obligations in international treaties, only become part of Australian law when Parliament has enacted legislation to implement those obligations. In the absence of such implementing legislation, the High Court has tended to the position that international treaty obligations are not legally enforceable by the courts of this country. There are, of course, some limited exceptions to this including the situation that arose in the case of Teoh16 where the High Court decided that the ratification of a treaty in the absence of implementing legislation could create legitimate expectations on the part of the Australian public that the Commonwealth would act consistently with its treaty obligations. In *Mabo's Case*,[17] where the High Court decided that international treaties, to which Australia had become a party, could inform and influence the content of the Australian common law. Both these examples demonstrate that there may be a role for international law to play in the development of Australian law, but neither of those decisions challenge the basic position of the High Court that treaty obligations only become part of Australian law where there is legislation of the Commonwealth Parliament to give effect to those obligations.

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15 Above, note 11

16 Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1994-5) 183 CLR 273.

17 Mabo v Queensland (1992) 175 CLR 1.

This approach to the relationship of international law to Australian law gives rise to two separate issues. The first of these is the relationship between the Commonwealth Executive and the Commonwealth Parliament. Since the Executive is empowered both to sign and to ratify treaties on Australia's behalf, it is quite possible for the Executive to act independently of Parliament and to have Australia become a State Party to treaties where there is no intention to adopt legislation to give affect to treaty obligations. This has in fact happened in many situations. Australia is a Party to a number of treaties and has obligations under those treaties and yet there is no legislation to give effect to those obligations in Australian domestic law. It is for this reason that a number of people have called for reform to the Australian treaty making processes; arguing strongly in favour of Parliamentary approval for ratification to avoid the situation in which Australia can be a State Party to a treaty and have international legal obligations but not be ensuring the fulfilment of, or implementation of, those obligations at domestic law.

The second issue is the relationship between the Commonwealth Parliament and the States and Territorial governments. Section 51 of the *Australian Constitution* allocates legislative power to the Commonwealth and the States. The approach of Section 51 is to enumerate the specific heads of power to the Commonwealth and to leave whatever is omitted from the list to the residual power of the States. Australia is a State Party to a number of treaties in which the subject matter of the treaty falls outside the enumerated list of legislative powers in Section 51 of the Constitution. Traditionally, the areas covered by the subject matter of these treaties has been considered to be exclusively within the legislative competence of the States. The list in Section 51 includes placetum xxix, the External Affairs power. The High Court has decided, first in *Koowarta v Bjelke-Petersen*[18] then in the *Tasmanian Dams* case in 1983,19 and subsequently in a number of other cases, that the External Affairs power can be interpreted to give to the Commonwealth Government the legislative competence to enact legislation to give effect to treaty obligations of any treaty to which Australia is a party, regardless of the subject matter. This clearly includes those treaties whose subject matter does not fall within one of the other enumerated heads of power.

The Tasmanian Dams case, of course, was all about whether or not the Commonwealth had the legislative power to enact legislation to override the Tasmanian Government's decision to build another hydro-electricity dam on the Lower Franklin River. Neither the generation of electricity nor the question of the environmental regulation are explicitly listed in the enumerated list of powers in Section 51 of the Constitution. Traditionally, these areas of legislative competence have been seen to be within the power of the States and in this case Tasmania would normally have been entitled to build a dam wherever it wanted to build a dam within Tasmania.

The Commonwealth Government relied on Australia's obligations as a State Party to the *World Heritage Convention*[20] and the fact that it had listed the Gordon-Lower Franklin region as a world heritage area. On the basis of this treaty

18 (1983-4) 153 CLR 168

19 Above, note 1.

20 Convention for the Protection of the World Cultural and Natural Heritage, signed 22 August 1974, ATS 1975 No 47, 1037 UNTS 151 (entry into force 17 December 1975)

provision the Commonwealth Government enacted legislation to implement the treaty obligations to ensure the protection of the wilderness area and to ensure that the proposed dam did not go ahead. This whole issue of the protection of the Gordon-Lower Franklin area was a key issue in the 1983 election when the Labor Party came to power at the end of the Fraser Government era. In Tasmania many people were angry that the Commonwealth Government could determine which rivers in Tasmania could be dammed and which could not. That exercise of the External Affairs power in Section 51 of the Constitution was seen by some as a violation of Tasmanian State rights.

If anybody thought the *Tasmanian Dams* case was controversial, imagine the reaction to the decision of the United Nations Human Rights Committee in Geneva in relation to the Toonen Communication otherwise known as the *Tasmanian Gay Rights* case.[21] Nick Toonen, a Tasmanian gay rights activist, was able to take a complaint to the Human Rights Committee in Geneva because the Australian Commonwealth Government had acceded to the First Optional Protocol to the *International Covenant on Civil and Political Rights*.[22] The First Optional Protocol grants to individuals in a State Party the right to make a complaint to the Human Rights Committee that one or more of the individual rights contained within the Covenant is being denied to the individual concerned. Nick Toonen successfully argued that the relevant provisions of the *Tasmanian Criminal Code*[23] outlawing male homosexual activity were inconsistent with the right to privacy in the Covenant. The Commonwealth Government then relied on the Human Rights Committee decision to adopt the *Human Rights (Sexual Conduct) Act*,[24] guaranteeing the right to participate in male homosexual activity in private. Many people have queried the process by which Australia incurred the treaty obligations to ensure the protection of all the rights contained within the Covenant and the process by which Australia committed itself to allowing individuals to bring private rights of action to the Human Rights Committee in Geneva. It is interesting to note that the Commonwealth Government only enacted legislation in response to the specific adverse finding of the Human Rights Committee and has never adopted comprehensive implementing legislation to give effect to all the obligations under the *International Covenant on Civil and Political Rights*. If any such implementing legislation had existed, Nick Toonen would have been required by the Human Rights Committee to exhaust all possible local remedies before his complaint to the Human Rights Committee would have been considered.

Commonwealth Implementation of Treaty Obligations

There are any number of examples of implementing legislation where the Commonwealth has sought to give effect to its obligations under specific treaties. Although the Commonwealth Government does not implement legislation in a systematic way, the fact is that in many cases it has done this. It is only in a minority of situations that this exercise of legislative power is controversial.

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21 Above, note 4.

22 ATS 1991 No 39; UNTS 302 (entry into force 25 December 1991)

23 Criminal Code 1924 (Tas)

24 1994 (Cth) (No 179 of 1994)

Commonwealth legislation to implement treaties often happens in a relatively systematic and comprehensive way when the subject matter of the treaty falls squarely within at least one of the legislative heads of power in Section 51 (other than the External Affairs power that is). Implementing legislation in these circumstances is not only uncontroversial, but even expected of the Commonwealth Government. I will never forget the look on the face of a DFAT official involved in the preparation of drafting instructions for the *Chemical Weapons (Prohibition) Bill*[25] prior to Australia's ratification of the *Chemical Weapons Convention* when I suggested that it would not be inconsistent for the Commonwealth Government to ratify the Convention before any implementing legislation was in place. He was horrified. Under no circumstances would he countenance such an approach. "How could Australia encourage other regional countries to take their obligations seriously if we did not do that ourselves?" The reply in my own mind was that we do exactly that on a regular basis - particularly in the area of human rights.

In the areas of defence and security, international aviation, international trade etc., it is commonly accepted that Australia needs to be involved in the multilateral system and that the Commonwealth is responsible to ensure that we participate and benefit as much as we are able to.

However, the issue of implementing legislation becomes much more controversial when the subject matter of the treaty is outside the enumerated list of Commonwealth legislative power and therefore traditionally considered to be within the residual legislative competence of the States. The controversy is diminished where the States have voluntarily devolved authority to the Commonwealth (similar, perhaps, to the adoption of the *Family Law Act 1975*) but otherwise the controversy is not simply based on perceptions of traditional areas of legislative power. The subject areas of State legislative competence are administered by the States. Existing legislative and administrative regimes will be directly affected by any comprehensive Commonwealth legislation in these areas. In such circumstances, the Commonwealth has to rely exclusively on the High Court's interpretation of the scope of the External Affairs Power to adopt implementing legislation for the particular treaty in question.

Human Rights, Industrial Relations and Environmental Protection are all examples of these sorts of subject matter areas. It is in these sorts of areas that most treaties have not been implemented into Australian law through Commonwealth legislation. The only logical basis for explaining the discrepancies in approach, is, in my view, political expediency. Decisions are certainly not made primarily on the basis of legal principle. The Commonwealth Government implements legislation when it considers it expedient and not when it does not.

Given the often hysterical public debate over the Commonwealth's decision to ratify Australia's signature of the *UN Convention on the Rights of the Child,*[26] it was hardly surprising that the Commonwealth Attorney-General's Department

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25 Now Chemical Weapons (Prohibition) Act 1994 (Cth).

26 Above, note 10.

announced, after an 18 month review, that implementing legislation for the Convention was not required. The purported justification for this decision was the finding from the review that Australian legislation (including in the States and Territories) was consistent with Australia's obligations under the Convention. The facts of the *Teoh* Case, however, exposed the dominant influence of federal political realities over commitment to international legal obligations inherent in the position of the Attorney-General's Department.

The High Court's interpretation of the scope of the External Affairs Power has obvious implications for the Australian federal system of government. I do not accept that those implications are necessarily negative although there seem to be many others who do. I am an internationalist and I believe strongly in the role Australia can play in the development of, and implementation of, international law - particularly in the Asia-Pacific region. I also have the view that Australia's national interests can only be achieved by active and strategic engagement in multilateral processes. However, I also believe that those views are not incompatible with a more significant role for the States in Australia's treaty-making processes than has hitherto been the case. There have been extremist calls for Australia to withdraw from multilateral engagement altogether as the best way of ensuring the preservation of our sovereignty and the guarantee of our way of life - fortunately an argument few, if any, decision-makers take seriously. But there have been other calls for the Executive not to bind Australia to treaties the subject matters of which are outside the Commonwealth's enumerated powers. Others have called for Commonwealth Parliamentary approval before Australia can be bound by any treaty. There are disadvantages in both these approaches and it is welcome news, to me at least, that neither approach has been adopted.

Where to Find Treaties

In the past, the process of locating treaty texts has not always been straightforward. However, as a consequence of the growing interest in, and awareness of, international treaties in Australian domestic law (prompted in large part by the controversies I have outlined above), it is becoming much easier to be able to access treaty texts and discover information about treaties. In particular, the new Commonwealth Government's reforms to the treaty-making processes in Australia and their commitment to dissemination of information to the general public will result in much easier access than we have had before.

The most readily accessible source of treaty texts in Australia is the *Australian Treaty Series*. This series lists in chronological order all the treaties that Australia is a party to, by name and title, including the full texts of the treaties. Most sizeable Australian law libraries already subscribe to the Australian Treaty Series and have these texts available through it. The Treaty Series includes an index by subject matter and this index facilitates access to the particular texts of the treaties. The Australian Government also produces an updated Australian Treaty List on an annual basis. The list also includes in chronological order, in the two sections of bilateral and multilateral treaties, the titles of all the treaties Australia is a party to and includes in the list an index by subject matter as well.

In the past, the *Australian Treaty Series* has been under-utilised, partly because of a lack of interest in treaties in Australian law. It is much more common nowadays to see references and citations from the *Australian Treaty Series* to particular treaty texts. I believe that many more people are familiar with the Treaty Series now than used to be the case.

The Government reforms to the treaty-making process are potentially very significant. One of those reforms is to make information about treaties more readily accessible for no cost to the user. As a consequence of this policy the Commonwealth Government has funded an establishment grant to AUSTLii (the Australian Legal Information Index) to put all the treaty texts on database and be made available through the internet. AUSTLii will provide hypertext links from the treaty texts to Australian case law, Australian legislation and to electronic legal periodical databases around the world. Once this system is in place, and the plan is for it to be in existence sometime in 1997, it will be much easier to search for information relating to Australia's treaty obligations. It will be a great facility, for example, to be able to take a key phrase or treaty title and search Australian case law to determine all the cases in which a particular treaty has been considered. Or alternatively, to take key words or the title of a treaty and search through Australian legislation to see all the places where a particular treaty has been considered in legislation and regulations. This is a very welcome development for those of us interested in accessing information about Australian treaty obligations and I am sure once the system is up and running, there will be many people using your libraries who will be very keen to have access to the information.

The Government has proposed a number of other reforms and they will also impact on users of information. One of the reforms is the creation of a Treaties Standing Committee in Parliament, with the responsibility to review Australian treaty action. The Standing Committee is already in place and is engaged in the process of examining the treaties that Australia intends to become a party to. In addition, the Standing Committee on Treaties is receiving from the relevant Commonwealth Department in association with the Department of Foreign Affairs and Trade a treaty impact analysis of every treaty that Australia proposes to become a party to in the future. This treaty impact analysis will provide a brief survey of the implications for Australia of becoming a party to a particular treaty, the advantages and disadvantages and on balance the argument for Australia's intention to enter into the treaty. These impact analyses are currently available on the Hansard home page for the Commonwealth Parliament and my understanding is that they will also be available through the AUSTLii database once it is established. These particular statements will be an important source of information to explain why the Australian Government believe that it is necessary for Australia to undertake particular treaty action.

The end result of these particular reforms is that access will be much greater for people who want to find out about what Australia is doing and why in relation to particular treaties and also be able to access the actual treaty texts themselves.

I also believe that one of the consequences of the growth of interest in Australian treaty obligations will be a number of publications attempting to analyse particular treaty obligations and explain what the nature of Australian obligations are. At this stage, those secondary sources are quite limited and narrow in scope but as primary source information becomes more readily available, I am convinced that secondary source material will follow.

All of this information is really only relevant to those treaties, bilateral and multilateral, to which Australia is a Party. For bilateral treaties between other States and for multilateral treaties to which Australia is not a Party, the *United Nations Treaty Series* (UNTS) will continue to be the authoritative source of the original treaty text. If only the UNTS was available on the internet with hypertext linkages!

Conclusion

There is no question that the number of treaties that Australia participates in will continue to grow and that interest in Australia in those particular treaties will certainly not diminish. This means of course, that Australian law librarians will be increasingly required to provide services in facilitating access to information about these treaty obligations. I hope that today's presentation has enabled you to understand some basic background information about international treaty law and Australia's approach to treaty making. I also hope that the whole issue of access to treaties will no longer be as daunting as it once may have been. It is certainly true that in the past it has often been extremely difficult to access information about international law texts and instruments. One of the great consequences of the electronic information age, for international lawyers in particular, is greater access to the primary source material.

Good luck to all of you in providing your users with the information they want and need.