

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ADMINISTRATIVE DECISIONS (EFFECT OF INTERNATIONAL
INSTRUMENTS) BILL 1995**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

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GENERAL OUTLINE

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

In the *Teoh* case the High Court held that the ratification of a treaty by Australia creates a legitimate expectation that the Executive Government and its agencies will act in accordance with the treaty provisions, even if they have not been legislated into Australian law. If it is proposed to make a decision inconsistent with that legitimate expectation, it was held that procedural fairness requires that the person affected be given notice and an adequate opportunity to reply. The Court held that the legitimate expectation will not arise if there is either a statutory or executive act amounting to a contrary indication.

A Joint Statement was issued by the Attorney-General and the Minister for Foreign Affairs on behalf of the Government on 10 May 1995. The Joint Statement was a deliberate action by the Executive to oust any legitimate expectation based on the ratification of a treaty that might otherwise exist. It represented the contrary intention of the Government in the sense referred to in the *Teoh* case. The Joint Statement foreshadowed this Bill to reinforce its effect.

Prior to the *Teoh* decision, the terms of treaties had not been considered to create rights or obligations in Australian law in the absence of legislation. The High Court confirmed this principle in *Teoh*. However, the Court distinguished between a substantive rule of law and a legitimate expectation that a decision maker will comply with the terms of a treaty. A legitimate expectation amounts only to a procedural right to have the treaty considered, as opposed to a legal right to enforce the terms of the treaty. Despite this distinction, the *Teoh* decision is likely to give to ratified but unimplemented treaties a force in domestic law which was previously assumed to be dependent upon parliamentary action. 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.

Treaties previously have been considered by courts in statutory interpretation, development of the common law and as a relevant but not obligatory consideration in administrative decision-making. The use of treaties in this way does not give rise to enforceable rights, even of a procedural kind. The Bill will not affect the use of treaties in this way.

The purpose of the Bill is to eliminate any expectation which might exist that administrative decisions, whether at the Commonwealth, State or Territory level, will be made in conformity with provisions of ratified but unimplemented treaties, or, that if a decision is to be made contrary to such provisions, an opportunity will be given for the affected person to make submissions on the issue.

The Bill will apply to administrative decisions, made on or after 10 May 1995, including such decisions reviewing, or determining an appeal in respect of, decisions made before that day. This reinforces the effect of the Joint Statement, in that from 10 May 1995, no legitimate expectations will have arisen on the basis of an international instrument.

The Bill also includes clauses which put it beyond doubt that Parliament in legislating to oust legitimate expectations based on the ratification of treaties which are not incorporated into Australian law, is not affecting other aspects of the way in which such treaties may have some relevance in Australian law.

The Bill does not affect the operation of treaty provisions which have been incorporated into Australian law.

The Bill does not affect the operation of an enactment in so far as it provides for remedies against, or any procedures for redress of grievances in respect of breaches of international instruments binding on Australia, or to which Australia is a party. In particular, the Bill does not affect the operation of procedures available pursuant to the *Human Rights and Equal Opportunity Commission Act 1986*.

The Bill does not affect the operation of an enactment in so far as it provides that compliance with an international instrument is a relevant consideration in making an administrative decision.

The Bill does not make compliance with an international instrument an irrelevant consideration in making an administrative decision.

FINANCIAL IMPACT

It is not anticipated that any of the provisions of the Bill will have a financial impact on the Commonwealth. The Bill will foreclose the possibility of expensive litigation challenging Commonwealth (and possible State and Territory) decisions.

NOTES ON CLAUSES

PART 1 – PRELIMINARY

Preamble

The Preamble sets out the considerations taken into account by the Parliament of Australia in enacting the *Administrative Decisions (Effect of International Instruments) Bill 1995*.

It recites that Australia is fully committed to observing its obligations under international instruments, but it is for the Parliament to decide how this should be done when a change to Australian law is involved. The courts have consistently held that international instruments do not form a part of Australian law unless Australian legislation so provides.

It recites that the Parliament considers that considerable uncertainty is introduced into the administrative decision making process by allowing decisions to be challenged on the ground of legitimate expectations based on international instruments that do not form part of Australian law. The Bill is necessary in order to ensure the necessary certainty in administrative decision making in Australia.

The Preamble recites the fact on 10 May 1995, the Minister for Foreign Affairs and the Attorney-General issued a joint statement amounting to a contrary indication of any legitimate expectations which might otherwise arise on the basis of Australia's ratification of international instruments. The joint statement was made in response to the High Court's decision in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*. The joint statement set out the Commonwealth Government's intention to introduce this Bill.

Clause 1 – Short Title

This is a formal clause.

Clause 2 – Commencement

This clause provides that the Act is taken to have commenced on 10 May 1995.

Clause 3 – Application

This Clause provides that the Act will have application in all the external territories of Australia.

Clause 4 – Definitions

The term '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, that is a decision of an administrative character (whether or not the decision is made under an enactment). An 'administrative decision' is a decision made on or after 10 May 1995. It includes decisions which are reviews of or appeals from decisions made before 10 May 1995.

This definition does not include decisions of courts exercising judicial review, as decisions made in this capacity are not administrative decisions.

The Bill includes State and Territory decisions, given that it is possible that the act by the Commonwealth Executive by which Australia becomes party to or bound by an international instrument could be held to give rise to the same legitimate expectation in relation to State and Territory decision making as that which was found to exist in the *Teoh* case.

The term 'enactment' is defined to mean an Act passed by the Commonwealth or a State Parliament or Territory Legislative Assembly, or an instrument of a legislative character made under such an Act.

The term 'international instrument' is defined to mean any treaty, convention, protocol, agreement or other instrument that is binding in international law, or any part thereof.

Clause 5– International instruments do not give rise to legitimate expectations

This clause prevents the provisions of international instruments by which Australia is bound, or to which Australia is a party, from giving rise to a legitimate expectation that administrative decisions will be made in conformity with them, or, if such decisions are to be made otherwise, that notice and an adequate opportunity to present a case against the taking of such a course will be given.

Clause 6 – Enactments may incorporate or apply international instruments

Clause 6 is enacted to avoid doubt about the operation of clause 5.

Subclause 6(1) provides that clause 5 does not affect the operation of any enactment in so far as it incorporates or otherwise applies an international instrument as Australian law.

Subclause 6(2) provides that the reproduction of, or reference to an international instrument in an enactment does not, of itself, amount to the incorporation of such instrument into Australian law.

The scheduling of certain human rights instruments to the *Human Rights and Equal Opportunity Commission Act 1986*, or the scheduling of international instruments to any other Act does not have the effect of incorporating those instruments into Australian law (confirmed by subclause 6(2)), nor would it of itself give rise to legitimate expectations.

Clause 7 – Enactments may provide remedies relating to international instruments

Clause 7 is enacted to avoid doubt about the operation of clause 5.

Clause 7 provides that clause 5 does not affect the operation of an enactment so far as it provides procedures for or remedies against breaches of international instruments binding on Australia or to which Australia is a party. In particular, clause 5 will not affect the operation of procedures available under the *Human Rights and Equal Opportunity Commission Act 1986*.

Clause 8 – Relevance of international instruments in decision making

Clause 8 is enacted to avoid doubt about the operation of clause 5.

Subclause 8(1) provides that clause 5 does not affect the operation of an enactment so far as it provides that the requirements of an international instrument are a relevant consideration in making an administrative decision. Thus, where enactments specifically require a decision maker to have regard to or to act in accordance with international obligations, those provisions are not affected.

Subclause 8(2) provides that clause 5 does not have the effect of making the requirements of an international instrument an irrelevant consideration in making an administrative decision.



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