EDITORIAL

International Environmental Treaties

The Role of the Commonwealth and the Making of Appropriate Linkages

This last issue of the Australian Environmental Law News for 1995 has a definite international flavour. In July of this year the ACT Division and the Department of Foreign Affairs and Trade organised a successful conference in Darwin on the implementation of International Environmental Treaties in the Asia Pacific region. The conference was addressed by twenty international speakers from thirteen countries. Thanks go to those government agencies that supported this important initiative (the Northern Territory Department of Asian Relations, Trade and Industry; the Commonwealth Environment Protection Agency and AusAid).

The keynote speech presented at the conference by Professor Sun Lin, the Chief of the Environmental Law and Institutions Program Activity Centre for the United Nations Environment Program, is reproduced in this issue. Professor Sun Lin's paper provides a useful overview of global environmental instruments and regional implementation initiatives. Two other papers from the Darwin conference are also included in this issue. Jacqueline Anderson considers the role of environmental management system standards, particularly topical given that ISO 14001 is expected to be released in mid-1996. Peter Durkin's paper considers the extra-territorial environmental responsibilities of the Australian Government in relation to the activities of Australian companies operating overseas. Again a most timely contribution given the Ok Tedi litigation and the EPA's recent proposal for a code of conduct for Australian companies operating overseas

International environmental treaties are having an ever increasing influence on the development of environmental law and policy in Australia. The sheer number and scope of international environmental instruments currently being negotiated is significant and growing. Australia currently participates in a host of international negotiations pursuant to the Climate Change Convention, the Bio-diversity Convention, the Basel Convention, the Desertification Convention, the Ramsar Convention, the World Heritage Convention and the Montreal Protocol. In addition there are environment related meetings of the International Standards Organisation (ISO), the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD), the World Bank, the Commission for Sustainable Development (CSD), the United Nations Environment Program (UNEP), the Food and Agriculture Organisation (FAO) and the World Heritage Committee. Each of these negotiations involves social, economic, political and scientific issues of enormous complexity.

The domestic implementation of international environment obligations is the challenge facing all Australian governments into the next century and raises a number of difficult issues. I would like to consider briefly two of those issues: the implications of the Commonwealth Government's growing environmental responsibilities and the process by which Australia enters into treaties.

Following the High Court's decisions in *Tasmania -v- The Commonwealth* (1983) 158 CLR 1, *Richardson -v- Forestry Commission* (1988) 164 CLR 261 and *Queensland -v- The Commonwealth* (1989) 167 CLR 232, it is clear that pursuant to section 51(xxix) of the Constitution, the entry into a bona fide treaty by Australia is a sufficient basis for the Commonwealth to rely on the terms of the treaty to enact appropriate and adapted implementing legislation[1]. Consequently, as the number of international environmental treaties grows the Commonwealth's potential legislative power on environmental matters expands.

Donald Rothwell and Ben Boer have recently acknowledged that over the last twenty years the development of international environmental law has focused on ensuring Nations are prepared to enter international commitments.[2] In the future, however, it is probable countries will increasingly be called on to account for their record in actually implementing international environmental obligations.[3]

The Commonwealth has in the past relied upon legislation to implement international environmental treaties in only a limited number of circumstances - eg. *Hazardous Waste (Regulation of Exports and Imports) Act* 1989; *Ozone* Protection Act 1988 and *World Heritage Properties Conservation Act* 1983. Historically it was the States and Territories that were responsible for the development of the environmental law and hence they developed the infrastructure to implement those laws. Consequently, rather than legislate to implement international environmental obligations the Commonwealth has often relied on co-operative arrangements with States like the Inter-Governmental Agreement on the Environment (IGAE). As noted in the July issue's editorial, however, implementation of the IGAE has been somewhat problematic. Progress on a range of initiatives has been slow. Moreover althouth the States and Territories have now committed themselves to the National Environment Protection Council I believe the first meeting in November 1995 had to be cancelled because of the lack of a quorum.

In these circumstances it seems inevitable that the Commonwealth will be forced to take a more direct role in the implementation of international environmental law, to avoid being found to be in breach of its international obligations. If co-operative initiatives with the States are not achieving satisfactory outcomes the Commonwealth may well have no option but to introduce new legislation or expand the application of existing legislation to thereby implement Australia's international environmental obligations.

It is understood that the Federal Government is planning a major environment statement prior to the next election. The Coalition too may well release an environmental policy document in the coming months.. In my view, these documents should attempt to address the question of what is the appropriate role for each level of government in the domestic implementation of international environmental obligations. This may well involve a re-examination and re-negotiation of existing arrangements. Of course, this is not the only difficult issue raised by the ever-growing body of international environmental law.

Pursuant to section 61 of the Constitution, the Commonwealth Executive has responsibility for negotiating and entering into international treaties. All that is required before Australia enters an international treaty is the approval of the responsible Minister or the Cabinet followed by the approval of the Governor General in Council.

Pursuant to the IGAE, the Commonwealth has agreed to consult the States prior to ratifying or acceding to, approving or accepting, any international agreement with environmental significance. However, this does not mean that the Commonwealth will only enter into an international environmental treaty if all State governments agree. Furthermore, there is no requirement for the Federal Parliament to be consulted or even notified of the entering into an international treaty. The Federal Government has recently committed itself to tabling bi-annually those treaties on which negotiations have concluded or to which Australia has acceded. The Minister for Foreign Affairs and Trade and the Attorney General have also indicated that "wherever possible" the Government will table treaties before action is taken to adhere to them.[4] Anne Twomey, in a recent paper for the Parliamentary Research Service, suggests the Executive in fact continues simply to table treaties in twice yearly batches regardless of whether this means a treaty is in fact tabled before ratification.[5] Further, the Commonwealth Government has made clear that "tabling treaties is not intended to be an exercise in ascertaining Parliament's views about whether or not Australia should become a party" to an international instrument.[6]

Critics on both the left and the right of Australian politics have expressed alarm about a perceived loss of national sovereignty as the result of entering into international treaties. I believe such views are somewhat naive. The growing interdependence of nation states, the globalisation of the economy and of popular culture, and the development of a worldwide communication network is, for better or for worse, inevitable. Therefore the real issue is not whether Australia participates in international treaties but rather how to develop appropriate linkages between the international law making system and our domestic legal system.

A starting point for the development of such linkages would be to improve the publicly available information about treaties and treaty negotiations and to formalise improved mechanisms to examine and debate the impact of entry into international instruments. To this end the Senate Standing Committee on Legal and Constitutional Affairs has recently completed a report on the Commonwealth treaty-making power. The Committee's major recommendations include:

* The establishment of a treaties data base, containing key information about treaties to which Australia is a signatory.

* A Treaties Council established by legislation comprising members appointed by Government and Oppositions of all Australian Parliaments. The Council would provide public reports on the impact of a treaty on States and Territories and the method of implementation.

* Legislation requiring the tabling of treaties in both Houses of Commonwealth Parliament 15 days prior to signing or ratification;

* A Commonwealth Joint Parliamentary Committee on Treaties to be established by legislation to consider and make recommendations on the entry into treaties;

* The preparation of treaty impact statements.

The adoption of these recommendations would be a useful start to the development of appropriate linkages between the international and domestic law making systems. They would also go some way to democratising the domestic processes through which Australia participates in the international law making system. It will be interesting to see if each of the major parties will be prepared, during the coming Federal election campaign, to commit themselves to adopting the Senate Standing Committee's recommendations.

In my view the High Court's decision in *Teoh v The Minister for Immigration* (1995) 128 ALR 393 is another example of an attempt to link the international and domestic law making systems. In *Teoh* a majority of the High Court held that where an international treaty created individual rights, this was sufficient to create a legitimate expectation that such matters would be taken into account domestically by administrative decision makers. Following the *Teoh* decision, the Federal Government issued a Ministerial Statement stating that the mere entry into a treaty should not be regarded as sufficient to found a legitimate expectation. Legislation to this effect was also introduced into parliament but did not get through Senate before the end of the parliamentary year.

Given that, as a rule, environmental treaties do not create individual rights the *Teoh* decision is not directly relevant to the other matters canvassed in this editorial. It does however, suggest that the linkages between domestic and international law making systems will be a recurring theme into the next century.

John Reynolds

ENDNOTES

1 Crawford J The Constitution and the Environment (1991) 13 Syd LR 23

2 Rothwell D and Boer B: From Franklin to Berlin (1195) 17 Syd LR p276

3 Ibid

4 Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney General, Michael Lavarch, 21 October 1994

5 Twomey A Procedures and Practice of Entry and Implementing International Treatis, Parliamentary Research Services, 1995

6 Senate Estimates Committee Hansard, Department of Foreign Affairs and Trade, 29 November 1994; 158