

Commonwealth Legal Assistance News



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ARTICLES

Unincorporated Treaties in Australian Law: the official response to the Teoh decision, by Ryszard Piotrowicz, (1997) 71 Australian Law Journal, 503

This article considers an issue which has been quite controversial in Australia recently: what is the exact legal effect of a treaty which the executive has ratified but which has not actually been incorporated into Australian law?

The author follows the progress of comment on and reaction to the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, (reported in Crimewatch, Issue No. 9, December 1995) which stated that where the executive has entered into a treaty and ratified it, that treaty may have certain effects under Australian domestic law, regardless of the fact that there was no implementing

legislation. In particular, it was said that a "legitimate expectation" could be created by the act of ratification that Federal, State or Territory decision makers would act in accordance with the treaty, despite the fact that it is not part of national law. It was pointed out that such an expectation did not create an obligation to act according to the treaty but it did require that, should a decision maker wish to depart from the treaty notice must be given to the person affected. (For background information purposes, it is useful to note that the Teoh case concerned the possible effect of the United Nations Convention on the Rights of the Child.) The impact of this decision meant that all public decision makers were potentially affected wherever there were treaties ratified by Australia in their areas of activity.

The article then refers to the Federal Government's response issued as a joint statement by the then Minister for Foreign Affairs and the Attorney-General. That response acknowledged that ratified treaties might offer guidance on the development of the common law in some situations but stated that conventions could not give rise to rights and obligations unless enacted into law. Ministers indicated their view that an unincorporated treaty could not give rise to a legitimate expectation.

Following the 1996 election the new Government, again through the Attorney-General and the Minister for Foreign Affairs, effectively adopted the position of the previous Government in a statement which stressed that treaties do not form part of Australian law unless incorporated by statute.

The author notes the view of the Government that the "legitimate expectation" concept propounded by the High Court is inconsistent with the proper role of Parliament and that the potential effect of requiring all decision makers to advert to all relevant international obligations was, according to the Ministerial statement, "not conducive to good administration". These comments, the author suggests, reflect "something like mass panic...amongst sections of the executive."

The article goes on to suggest that the Ministerial statement that "the act of entering into a treaty does not give rise to legitimate expectations in administrative law..." is far too wide. The ground for this argument is that the decision of the High Court was supposed to mean that an executive indication (or statutory statement) purporting to deny legitimate expectations could only be effective if made with regard to a particular treaty and not generally. Following this line of argument the article suggests that the executive statement may not have achieved its purpose because it is not in accordance with the decision of the Court. On one view, according to the author, the High Court reference to legitimate expectations arising unless there were statutory or executive indications to the contrary, could be taken to refer to statements made at the time the treaty was entered into rather than to statements made years after as was the view of Hill J. in the Federal Court case of *Department of Immigration and Ethnic Affairs v. Ram* (unreported, June 1996).

Article on the Case of *Lui v United States*, by James D Wilets, published in [1997] *American Journal of International Law* 537

This article discusses the March 1997 U.S. Court of Appeals (1st Circuit) decision in *Lui v United States* 110 F. 3d 103 and considers the implications of the decision, the effect of Hong Kong's reversion to China and possible application of Chinese law after July 1, 1997 and the role of the US judiciary in the extradition process.

The Case

(a) Facts:

Lui Kin - Hong applied successfully to the United States District Court for the District of Massachusetts for the issue of a writ of habeas corpus to prevent his extradition to Hong Kong under the terms of the Extradition Treaty and Supplementary Treaty between the United States and the United Kingdom.

The Court of Appeals reversed the decision of the District Court and ordered Lui to be held without bail, subject to extradition to Hong Kong, irrespective of the likelihood that he would be tried and punished by the People's Republic of China as a consequence of the colony's reversion to China. In its reasoning, the court noted that the Senate was aware of the impending reversion of Hong Kong to China when it approved the 1985 Supplementary Treaty with the U.K. and that the U.S. had signed a new treaty with the incoming government of Hong Kong, the Hong Kong Special Administrative Region (HKSAR). The court also noted the provisions of the Joint Declaration between China and the United Kingdom providing for the HKSAR to enjoy a "high degree of autonomy except in foreign and defence affairs;" and that "laws currently in force in Hong Kong will remain basically unchanged."

(b) Interpretation of Extradition Treaties

The author describes the three principles articulated by the Court on the issue of interpreting extradition treaties:

- (i) the executive branch's construction of a treaty should have great weight, since the executive branch wrote and negotiated the operative document;
- (ii) extradition treaties are to be construed liberally in favour of enforcement in the interests of justice and international relationships; and

- (iii) the rule of non-inquiry, which requires that courts refrain from inquiring into the fairness of the judicial system of a country requesting extradition and recognises that the executive branch is the more appropriate body to address concerns regarding the fairness of the forum.

(c) Hong Kong's Reversion to China

The Court of Appeals considered the District Court's argument that surrender could not be granted on the ground that Hong Kong would not be able to try and to punish Lui because the substantive law of China and not Hong Kong would apply to trial and punishment and that there was no US treaty with China. The Court of Appeal determined that the "possibility of his being tried and punished by a non-party" was a contingent political event and the indicia of nonjusticiable political questions included such contingent political events. The Court also concluded that the principles of reciprocity mitigated against construing treaties as having a cut-off date before 1 July 1997 since the US may wish to seek surrender from Hong Kong before that date.

Case Commentary

In addition to discussing the contingency issues raised by the Court, the author asks to what extent the United States can, or should, consistently with principles of international law and its own domestic extradition policies, continue to recognise the separate existence of Hong Kong for the purposes of extradition, while at the same time recognising the sovereignty of China over the HKSAR. In this context it is suggested that the underlying validity of the treaty between HKSAR and the United States seems to be contingent on the good faith of the People's Republic of China in respecting the independent judicial system and laws of Hong Kong; but he expresses some concern about China's uncomfortable political relations with the U.S. as well as its poor human rights record, raising doubts as to whether China will actually honour its pledge in the Joint Declaration. He adds that although it is true that the United States often has enforceable extradition treaties with countries whose regimes change and that for reasons of reciprocity this is necessary in most cases, it is not unreasonable to expect the executive to consider afresh whether the public policies of the United States with regard to extradition treaties are being upheld by the continuing enforceability of such treaties.

Prosecutor's Threats result in Denial of Extradition

The International Enforcement Law Reporter reports, in its December 1997 issue, (Vol. 13, Issue 12, p.499) on the denial by Canada of a US extradition request relating to three persons wanted for telemarketing offences following the televising of a documentary in which an assistant US attorney stated that Canadians who refused to waive extradition, plead guilty and co-operate would be extradited anyway and "wind up serving a great deal longer sentence under more stringent conditions". The attorney is also reported as having said "you are going to be the boyfriend of a very bad man if you wait out your extradition".

The case was heard in the Ontario Court where Justice Hawkins held that extradition would violate the Canadian Charter of Rights and Freedoms. He upheld the claim of the fugitives that their right to life liberty and security of person would be violated and that they would face cruel and unusual punishment. Justice Hawkins, in his judgment, wrote "In my view, to commit these fugitives for surrender to be tried before a judge who has publicly threatened them with the imposition of a maximum sentence before having commenced their trial and to be prosecuted by a prosecutor who has publicly threatened them with homosexual rape (boasting at the same time how successful the technique has been)' shocks the Canadian conscience' and is 'simply not acceptable.'"

In the view of the Editor of the International Law Enforcement Reporter, this case highlighted the delicate but critical interplay of international human rights issues, the media and diplomacy in extradition cases.

CASE NOTES

Extradition - applicant suffering from depression and unfit to plead

Canada sought the extradition of D to face trial on charges of having caused the death of three people and the serious injury of another by dangerous driving in 1989. In 1995 D had unsuccessfully sought the issue of a writ of habeas corpus following his committal and had appealed to the House of Lords against the refusal of the court to grant that application. The petition to the House of Lords was unsuccessful and D was arrested to await a surrender determination. He made a second application for a writ of habeas corpus and relied on recent medical reports to show that he was suffering from severe depression such that he was not fit to plead.

Held, allowing the application:

Although it had been established that the delay had been caused by D himself, it would have been oppressive to send D back to Canada to stand trial, knowing that he would remain there on bail or in custody for an indefinite period in case he recovered adequately to plead.

✓ *Davies, Re* (Unreported) (U.K.), July 30, 1997, QBD

Extradition - habeas corpus - locus of crime - whether German courts have jurisdiction - Extradition Act 1989 (UK) - meaning of "proceeding for an offence"

The fugitive who was detained pending German extradition proceedings had applied for habeas corpus, challenging his committal by a stipendiary magistrate. He was the subject of a German warrant of arrest which had been issued in connection with alleged fraud offences committed in Germany against German citizens, the proceeds of which were received in Germany before being transferred to companies controlled by him in Switzerland.

The applicant claimed that the committal charges were flawed on the ground that his case gave rise to matters of extraterritoriality contrary to the Extradition Act 1989, s. 2(1) and that he was neither a person accused in a foreign state within the meaning of s. 1(1) nor a person against whom competent authorities of the party seeking extradition are proceeding for an offence within the meaning of the European Convention on Extradition Order 1990 Art.1.

Held, dismissing the application:

1. It was clear that Germany had jurisdiction, as the offences were committed in Germany and the proceeds of the fraud were received in Germany and it was irrelevant that other offences may have been committed outside Germany.

2. German competent authorities were proceeding with an offence in Germany. They had issued a warrant of arrest on the basis that there was evidence of the commission of an offence. Accordingly the argument that the German proceedings were merely investigative failed. Tests in *Evans, Re* [1994] 1 W.L.R. 1006, [1994] C.L.Y. 2132 and *Kainhofer v. DPP* 132 A.L.R. 483, applied.

3. There was no distinction to be made between "proceeding for an offence" under the Convention and "prosecution for an offence" under s. 1(1). The applicant was therefore an "accused" person under the terms of the Act.

✓ *Ismail, Re* (UK) (Unreported) July 2, 1997, Queen's Bench Division

Confidential Relationships (Preservation) Law (1995 Revision) (Cayman Islands) ("the Law") - grand jury subpoena - public policy - Cayman assets

The applicant, a US citizen, was subpoenaed by a grand jury in Pennsylvania to give evidence regarding assets in the Cayman Islands which his father was alleged to have failed to reveal as his property in bankruptcy proceedings in Pennsylvania. The assets were part of a trust fund of which the applicant's father was the purported settlor and of which the applicant had been appointed trustee. The subpoena was in respect of the grand jury's investigations into the activities of the applicant and his father, H.Snr., relating to alleged violations of the US Bankruptcy Code.

Directions were sought by the applicant, pursuant to s. 4 of the Law as to whether he should comply with a subpoena which had been served upon him in Pennsylvania requiring him to testify before a grand jury there. He believed that to do so without first bringing this application, would put him in breach of Cayman law, since the information which he held in respect of the Cayman assets was confidential information. The Pennsylvania District Court granted a stay on compliance with the subpoena pending the outcome of the application.

Held, giving directions under s. 4 of the Law:

1. As the applicant, upon his appointment as trustee, had received the confidential information in the course of business of a professional nature within the meaning of s. 2 of the Law, he had properly applied under s. 4 for the court's directions. There had been no consent to disclosure from the trust companies holding the assets, nor any valid consent from his father who was under threat of sanction from the US courts. Even if this application had not been made, he would still have been required by the Trusts Law (1996 Revision), s. 45 to obtain guidance from the court pursuant to his fiduciary duty to the beneficiaries of the trust.

2. It was contrary to public policy to permit the disclosure of the information whilst the legal challenge to the validity of the trust was pending. To do so would be in breach of the applicant's duty to the beneficiaries if the trust were declared valid, and if it were not, the Pennsylvania authorities would have access to the information without the need to subpoena the applicant once his father's trustee-in-bankruptcy took control of the assets.

3. Further, not only did the subpoena come from the grand jury, which, as a matter of comity the Cayman court was not obliged to assist, and lacked the clear endorsement of the Pennsylvania court, but it was also aimed to have extra-territorial effect in breach of Cayman law. Although the applicant was a US citizen and subject to the jurisdiction of the courts there, neither the Pennsylvania court nor the grand jury could, other than in exceptional circumstances, order his assistance in the administration of justice in the United States - and in this context a distinction could be drawn between the issue of a subpoena and other measures intended to enforce the private rights of a citizen - in infringement of Cayman sovereignty. The applicant was directed not to give evidence in compliance with the grand jury subpoena.

9 *In Re H*, [1996] C.I.L.R. 237 (The Cayman Islands Law Reports) ✓

Mutual Assistance in Criminal Matters Act 1997 (Australia) - Foreign Evidence Act 1994 (Australia) - judicial review of decision taken by Attorney-General to request taking of evidence abroad - reasonableness of decision - Relationship between the Mutual Assistance and Foreign Evidence Acts.

The applicant had been charged with a large number of criminal offences. While committal proceedings were pending, the Attorney-General made a request to authorities in the United States under s. 12 of the MACM Act that persons be examined on oath in the presence of the DPP and the applicant.

Section 12 of the MACM Act provides:

"The Attorney-General may, in his or her discretion, request an appropriate authority of a foreign country to arrange for:

- (a) evidence to be taken in the foreign country; or
 - (b) documents or other articles in the foreign country to be produced;
- for the purposes of a proceeding in relation to a criminal matter in Australia."

Part 3 of the FE Act provides for the use of the material obtained pursuant to a request to a foreign country by the Attorney-General and s. 27 states:

"This part does not limit the ways in which a matter may be proved, or evidence may be adduced, under this Act....or any other Australian law....."

Action which commenced in Australia included the provision of financial assistance to the applicant to enable him and his legal representatives to be present during the taking of evidence in the US. Disputes then arose as to the amount of the financial assistance to be given following which the applicant sought judicial review of the Attorney-General's decision to rely on the MACM Act to make a request for evidence to be taken. He also sought an interlocutory injunction to restrain the DPP from proceeding with arrangements for the taking of the evidence in the US. The applicant submitted in the alternative that:

- (a) the Attorney-General's request was invalid; or
- (b) the decision to make the request was invalid because it removed the protection given to the accused under Part 2 of the FE Act and fragmented the criminal justice system.

(Part 2 of the FE Act deals with requests by Superior courts to make orders relating to the examination of persons outside Australia and provides safeguards with respect to the making of the order and the taking of evidence. The Part also provides that it is not intended to exclude or limit the operation of any other law providing for examination of witnesses outside Australia.)

Held, dismissing the application:

1. The Attorney-General had the power to make a request under the MACM Act for the specific purpose of seeking to rely on Part 3 of the 1994 Act. Parts 2 and 3 of the 1994 Act do not operate as a code in the sense that provisions of Part 3 have application only with respect to material obtained pursuant to Part 2. This is the effect of s. 27.

2. There was no indication that the Attorney-General had omitted to take into consideration factors said by the applicant to be material, in particular the fragmentation of the criminal proceedings and the failure to consider the question of financial assistance to the applicant.

3. It was not shown that the exercise by the Attorney-General of the power to make the request was so unreasonable that no reasonable person could have so exercised the power. The safeguards to a charged person found in Part 2 of the FE Act did not disappear if a request was made under the MACM Act, by virtue of s. 18 of the FE Act. The DPP was permitted to seek further evidence during the committal proceedings and even after committal for trial. With respect to the question of financial assistance, it was not up to the court to decide whether the offer was sufficient, nor to make orders that would fix the amount.

4. Any evidence obtained abroad would not be automatically admissible in proceedings in Australia and objections to its admissibility could be made at the committal hearing.

Reid v Attorney-General (CTH) and Another, (Federal Court of Australia) (1995) 133 ALR 428

Evidence - assistance to foreign court - meaning of "proceedings which have been instituted" and "court or tribunal" - whether production of self-incriminating evidence can be compelled - entry, search and seizure - Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the "1978 Order")

The Special Investigating Judges' Office in Berne asked the Cayman authorities, *inter alia*, to search the respondents' house and seize evidence of their assets and business interests for use in criminal proceedings against them in Switzerland. The letter of request contained examples of documents and other items which the Swiss authorities wished to use in evidence in those proceedings. At the time of the request the Swiss authorities also sought the extradition of the respondents to Switzerland. The hearing of the application relating to the request for assistance was deferred pending the determination of the extradition case. In the event both people sought by Switzerland were granted writs of habeas corpus on the ground that the evidence supporting the extradition requests was not in admissible form. (See Kruger Case, 1996 CILR 157 reported in CLAN, Issue 21).

After the arrest of the respondents for the purposes of extradition, the Cayman police had searched the respondents' premises and removed documents and computer equipment. A list and description of all the property seized was attached to the witness statement of the officer who had conducted the search and accompanied the present application.

Upon conclusion of the extradition proceedings the request for assistance came again before the court in an *inter partes* hearing.

Held, dismissing the application on behalf of Switzerland

1. Upholding the first and third submissions by the respondents:
 - (a) that as there was no expert evidence on the Swiss prosecution and trial process, the court had to decide by construing the letter of request itself whether the letter had originated with a "court or tribunal" exercising jurisdiction in the requesting state, and whether criminal proceedings had been instituted there against the respondents and it could not consider any information on Swiss criminal procedure contained in Commonwealth case law; and
 - (b) it was apparent from the letter of request that the Special Investigating Judges of Berne were not the judges who would themselves try the respondents should they be extradited to stand trial in Switzerland, instead they exercised an inquisitorial or prosecutorial function and thus did not constitute a "court or tribunal."
2. Rejecting the second submission by the respondent, the letter of request, showed that charges had been laid in a criminal prosecution pending in Switzerland, thus satisfying the requirement that "proceedings [had] been instituted."
3. Upholding the Respondents submission that the request was phrased in terms so speculative and non-specific that it amounted to an application for financial discovery against the respondent, to which the court could not give effect.
4. Upholding the respondents' submissions that, since there were charges framed under the Cayman Penal Code as a result of the Swiss request for extradition, the court could not require the respondents to incriminate themselves by the production of documents, nor could the respondents be deprived of their common law protection against self-incrimination simply because of the nature of the offences.
5. Upholding the respondents' submissions that the seizure of the documents had taken place during an unauthorised search and accordingly the documents were deemed to have remained in the respondents' possession and this was true whether they were in the hands

of the respondents themselves or of their attorneys.

6. Since the respondents had been released under a writ of habeas corpus, they were no longer obliged to produce documents to the court. It was therefore inappropriate to grant the application, which had been made long after the request for judicial assistance from Switzerland in an attempt to legitimize the earlier actions of the Cayman authorities and amounted to an abuse of process of the court.

In Re Canton of Berne's Request, [1996] CILR 179, (Cayman Islands Law Reports)

OXFORD CONFERENCE

CHRIST CHURCH, OXFORD, 24-28 AUGUST 1998

The Commercial Crime Unit is pleased to announce the 1998 Oxford Conference which it is organising in conjunction with the Secretariat's Human Rights Unit. The theme of the Conference is:

**International Co-operation in Criminal Matters -
Balancing the protection of human rights with the needs of law enforcement.**

The Conference will consider the issues facing governments as they seek to ensure that they can co-operate with each other to combat crime while at the same time ensuring that they maintain a proper regard for the fundamental rights of the subjects of the criminal justice process.

The Conference will include both plenary session discussions and workshop sessions. Specific issues covered will include: - the effect of human rights instruments on non-parties; the protection of human rights in national courts; co-operation in the interception of communications and privacy rights; regulatory co-operation; the rule of non-inquiry in extradition; fundamental rights in mutual assistance cases and extradition cases involving refugees and asylum seekers.

We anticipate that the Conference will be of particular interest to - Government officials involved or potentially involved in the administration of laws relating to extradition, mutual assistance in criminal matters and transfer of prisoners; judicial officers, prosecutors and others whose work may be affected by decisions involving the balancing of fundamental human rights and the need for countries to assist each other in the administration of criminal justice; and human rights commissioners and those dealing with issues of international human rights in the context of criminal justice.

One of the major benefits provided by The Oxford Conference is opportunity for practitioners and experts from around the world to share experiences and to meet their counterparts. Accordingly the Conference is residential with the cost including student type accommodation, all meals and the full conference facilities. Programmes and Registration Details will be available from:

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