AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANISATION – SUBMISSION TO JOINT STANDING COMMITTEE ON TREATIES BY K.M.CORKE AND ASSOCIATES

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1. I refer to the abovenamed inquiry, being conducted by the Committee.

2. In the time available, I wish to concentrate my remarks on the issue of possible contradictions between international treaties dealing with trade and related matters and other multilateral agreements.

"Silo Thinking" in the Development of International Treaties

3. My basic observation is that by and large, treaties appear to be developed in individual public policy "silos".

4. That is, for the most part treaties are developed by those specialist components of public administration having administrative responsibility for the particular subject matter covered by the treaty, aided and abetted by those non-government organisations with especial interest in the particular subject area.

5. This is illustrated by the number of different agencies (both Australian and international) involved in decision making listed in the *Schedule of Multilateral Treaty Action*, tabled twice yearly in both Houses.

6. It would appear that as a general rule, there is little real co-ordination between bodies developing treaties.

Conflict in Treaties

7. The concern is that this can lead to areas where there can be what can be called "direct collision" between treaty obligations.

8. I note some of the comments made in Chapter 9 of the Senate's Legal and Constitutional References Committee's important November 1995 work *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.

9.12 Professor Don Greig of the Australian National University was also critical of Government advice that the convention was in conformity with Australian law. He identified a conflict with laws on international child abduction convention, which themselves implement a treaty to which Australia is a party……..

9.13 Professor Greig pointed out that while the *Convention on the Civil Aspects of International Child Abduction* (the Hague Convention) requires a kidnapped child to be returned to the jurisdiction from which he or she is taken, the *Convention on the Rights of the Child* provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Hence the *Family Law (Child Abduction Convention) Regulations 1986* appear to conflict with the *Convention on the Rights of the Child*.

9. The International Law Commission of the United Nations is involved, amongst other things, with the codification of international law. I note a comment contained in Chapter VII of the *International Law Commission Report, 1996*[1]

241. A potentially important set of relationships is currently rather neglected. We refer to the work of the United Nations and other specialised bodies with legal implications or responsibilities. At least it is appropriate for bodies with specific responsibilities in a given field to be asked to exchange information and to comment on the Commission's work where relevant – *but at present the various component parts of the United Nations system operate largely in isolation from each other*. (My emphasis)

10. Thus,as the body of international law grows, so can the opportunity for conflict.

12. Article 26 of the *Vienna Convention on the Law of Treaties* provides:

Every treaty is binding upon the parties to it and must be performed by them in good faith.

13. It seems to make sense that if you sign a treaty, you should honour it.

14 That is undoubtedly why the High Court in *Minister of State for Immigration and Ethnic Affairs v. Teoh* [2] decided that even though the terms of a treaty isn't incorporated into municipal law until relevant legislation is enacted by Parliament, if the Executive signs a treaty there was a legitimate expectation *the Executive* would honour the terms of a treaty in the way it acts.

15. McHugh J. dissented from this decision, He noted:

Junior counsel for the Minister informed the Court that Australia is a party to about 900 treaties. Only a small percentage of them has been enacted into law. Administrative

[1] www.un.org/law/ilc/reports/1996/chap07.htm
[2] 183 CLR 273. The relevant effect of *Teoh* will be extinguished should Parliament pass the Administrative Decisions (Effect of International Instruments) Bill 1999

decision-makers would have to ensure that their decision making complied with every relevant convention…….

16. His Honour was undoubtedly influenced from the equally common sense view that a decision maker would end up in knots if he had to adhere to every possible duty created in a treaty. With so many treaties, there is bound to be some degree of inconsistency.

The Way in Which Treaties are Drafted

17. This is particularly so, given the way in which international treaties are drafted.

18. As I said in a submission made to the Inquiry into a NSW Bill of Rights being conducted by the Legislative Council Standing Committee on Law and Justice[3]:

> 3.1 The terms of many "rights" contained in treaties are drafted in a vague manner. This makes ascertainment of rights and obligations difficult.
>
> 3.2 In *Project Sky Blue v. Australian Broadcasting Authority*[4], the High Court observed:
>
> > "Furthermore, while the obligations of Australia under some international obligations are clear, many international conventions and agreements are expressed in indeterminate language as the result of compromises made between contracting State parties. Often their provisions are more aptly described as goals to be achieved, rather than rules to be obeyed……"
>
> 3.3 The Commonwealth Parliament's Joint Standing Committee on Treaties has, in equal terms, remarked the terms of the *United Nations Convention on the Rights of the Child* is cast in general terms often open to a number of interpretations.[5]

19. Although a treaty has to be construed having regard for the scope and purpose for the creation of the treaty, there will be occasions where the scope and purpose of one agreement may overlap the subject matter dealt with by another treaty.

20. The "direct collision" spoken of earlier will occur.

21. For such an example, I merely refer to an article written by the Chairman of this Committee, entitled *The Dangers of Secret Treaty-Making – The Biosafety Protocol as a Case Study*.[6]

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[3] *Can Parliament be Trusted – the Role of a Parliament in Establishing the Social Rules of a Community in the 21st Century* – as posted on the home page of the NSW Legislative Council's Law and Justice Standing Committee's Inquiry into the NSW Bill of Rights

[4] *Project Sky Blue v. Australian Broadcasting Authority* [1998] HCA 28, del. 28 April 1998 at para.96

[5] In its report on the *Convention on the Rights of the Child* at p.x., your Committee said "The articles of the terms of the Convention are couched in general terms which are open to a number of interpretations. While this allows State parties a margin of appreciation in implementing the Convention in a manner compatible with their culture, this has led to continuing confusion and concern about its implementation."

The Danger

22. I now come to the burden of my submission. Because of the "silo" manner of treaty development, interest groups representing different value sets are likely to actively participate in those treaties that are likely to further their public policy objectives, either:

    a) in ignorance of; or

    b) so as to defeat

    public policy developed in other international obligations.

23. Moreover, the politics of the day may lead the Commonwealth to enact legislation incorporating the terms of a treaty to satisfy a political need of the day (and thus incorporate the provision into municipal law), in derogation of other obligations contained in other treaties.

24. The "losers" may be surprised that the interests they presumed would be regulated by the terms of one treaty can be prejudiced by inserting into municipal law the terms of another treaty, which also "covers the field" of the first treaty.

25. The New Zealand Court of Appeal once heard an argument, in which a deportee argued the New Zealand Government had to take account of the *International Covenant on Civil and Political Rights*. Although it didn't have to determine the point, it said of the contrary proposition:

> That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window dressing…….there must be hesitation about accepting it.[7]

26. It is desirable for the Commonwealth not to be in the position where it can be so accused.

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[6] *The Institute of Public Affairs Review* Volume 52 Number 2 July 2000 at p.23
[7] *Tavita v. Minister for Immigration* (1994) 2 NZLR 257 at 266

A Possible Solution

27. So as to eliminate these concerns, an analysis of the text of proposed treaties should be undertaken to see if there is any "direct collision" between other treaties that are implemented or proposed. Such an analysis would need to be performed as soon as there is a draft sufficiently settled to allow the task to be undertaken, and best published as soon as practicable after the general community is first advised that a relevant treaty is being negotiated.

28. In this paper "direct collision" means that by following the terms of one treaty means that the terms of another cannot be followed. [8]

29. The illustration relating to the treatment of kidnapped children, cited earlier, would be one such example.

30. This will consume resources. However, the idea is not inconsistent with the Committee's intention of removing the way in which Australia enters into treaty obligations from the shadows.

31. As discussed in the *Australia and International Treaty Making Information Kit* under the heading "Enhancing Consultations"

> Because it is not always possible to know all the community groups which might wish to contribute to the process of setting Australia's *objectives and positions* (my emphasis), the Government prepares a list of all multilateral treaties under negotiation or review which can be found on the Australian Treaties Library Internet site……..

32. The proposal enhances this philosophy as it allows:

- people with a relevant interest to become aware of changes which may effect those interests; and

- the conduct of an informed debate *prior* to signing any treaty as to what are the *real* priorities of the country (e.g. trade issues *vis-a-vis* environmental, "human rights" and labour standards)……..instead of ratifying first, then arguing how mutually exclusive treaty obligations are to be implemented into municipal law, in a manner driven more by politics of the day rather than by an integrated view of how Australian public policy can be enhanced.

[8] This applies a test for inconsistency between Commonwealth and State laws enunciated by Barwick CJ in *Blackley v. Devondale Cream (Vic.) Pty.Ltd* (1968)117CLR 253 at 256.

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