REVIEW ARTICLE*

International Law and Australian Federalism edited by BRIAN R OPESKIN and DONALD R ROTHWELL, (Australia: Melbourne University Press, 1997) pp xviii + 379. Recommended retail price $59.95 (ISBN 0 522 84685 8).

The publication of this collection of essays entitled *International Law and Australian Federalism* is another recognition of the significance of international law to Australia's legal system. The book consists of a collection of eleven chapters written principally by academic lawyers, but also with input from a former judge and government lawyers at both the Commonwealth and State levels. The title suggests a focus on issues of international law in relation to the Australian federal system. This is in fact the case. But the issues considered go beyond traditional federalism concerns such as the division of power between different levels of government. Some chapters are concerned with conflict between different levels of government, some focus on conflicts between different institutions of government in relation to the use and application of international law. Other chapters focus on the role of international law in the Australian domestic legal system.

The collection is notable for assembling in one place well written and well researched chapters covering a breadth of issues related to the interaction between international law and the Australian legal system. The collection in every chapter draws on considerable previous writing on aspects of the matters covered. This is evidenced from a perusal of the sixteen pages of bibliography which lists an extraordinary amount of previous material on which the various contributors have relied. The bibliography in itself is thus of immense value to those who are looking for further sources. It lists material in the area of political science, a large number of pieces of legal writing, both historical and more recent, and a number of important government publications. The large number of entries in the bibliography attests to the considerable interest that there has been in Australia over the years in the broad issues raised by the title of the volume. One of the most significant achievements of the work is to bring the previous work together in an up-to-date form.

By assembling an analysis of the relevant issues in the one place, the editors make a major contribution to Australian legal literature. In many ways, the editors have produced for Australia the equivalent of Professor Henkin's book,

* Henry Burmester QC, Chief General Counsel, Australian Government Solicitor

Foreign Affairs and the Constitution, first published in 1972 with a new edition in 1995, which details the United States position. Interestingly, that text does not appear in the bibliography. However, the scope of the issues covered by the volume under review differs significantly from that dealt with by Professor Henkin. His primary focus is on the special features of the United States Constitution dealing with treaties and the particular roles of the President and Congress in the conduct of foreign affairs. This serves to highlight the fact that each federal State tends to have its own special features which prevent any broad application of the Australian experience in relation to international law elsewhere or the direct application in Australia of experience from elsewhere.

In Australia's case, the *Constitution* is largely silent on international law and foreign policy issues. It has been largely judicial developments in relation to matters like the external affairs power and more recent judicial exposition about the importance of international law in the development of Australian domestic law which have highlighted many of the interesting legal issues that arise from the impact of international law on the Australian legal system. What many of the chapters disclose is the greater relevance of the English system compared to the United States in relation to issues such as the incorporation of international law or Parliament's role in relation to treaties. However, the volume deals with a much wider range of issues than one finds in the book by Professor Mann entitled *Foreign Affairs in English Courts* (1986). That is a modest work reflecting the absence in the English system of many of the significant and distinctive federalism issues which confront Australia.

The first chapter in the book is written by Opeskin, one of the Editors. It examines international law and federal states and deals with the special way in which federal states cope with treaty obligations. This includes discussion of various mechanisms such as federal clauses which have been devised to meet some of the peculiar concerns of federal states. What the chapter makes clear is the reluctance in recent times to accord federal states any special status or privileges on the international stage. In that area, a federal state is no different from any other state.

The second chapter, by Professor Shearer, deals with the relationship between international law and domestic law. This is not a federalism issue, but deals with a fundamental issue in the Australian legal system that permeates many of the following chapters. It considers the English and the Australian approach to the incorporation into domestic law of treaties and customary international law in a comprehensive and perceptive manner. To some extent the same issues are considered in a separate chapter later in the book by Sir Anthony Mason on international law as a source of domestic law. The transformation theory wins out over direct incorporation of international law. This seems a correct analysis of the state of the authorities. What is striking, however, is the unresolved nature of the issue in terms of definitive judicial precedent.

One of the principal justifications for the transformation theory is that it best preserves the role of Parliament in changing the law. As certain of the subsequent chapters highlight, however, Parliament has played a very minor role even in relation to significant treaties. The renewed debate over Parliament's

role does, however, raise for debate whether it is not appropriate, at the same time as giving Parliament a greater role, to adopt some form of self-executing treaties doctrine or some greater direct incorporation of international law. The prospect of Australia following the position adopted in some countries and providing by constitutional provision for the incorporation of international law seems remote. This does not mean there is not room for some lesser alternative. The chapters by Shearer and Mason should stimulate debate on these types of issues.

Chapters 3 and 4 deal respectively with *"International Law and the Executive"* by Anne Twomey and *"International Law and Legislative Power"* by Donald Rothwell. These chapters highlight the conflict between the executive and the legislature in terms of their respective roles in this area. The chapter on the executive, in particular, draws on the recent Senate Report on treaty-making which examined in some detail the process of treaty-making in Australia, the scope of the executive treaty-making power and the involvement of Parliament in that process.[1] This chapter concludes with a summary of the Government's response to the Senate Committee Report. Many of the issues canvassed in the chapter remain matters for further examination as part of the current review into the revised procedures for treaty-making which is, at present, being undertaken by the Minister for Foreign Affairs and the Attorney-General. The chapter on legislative power contains a comprehensive review of the judicial interpretation accorded to the external affairs power in the *Constitution*. This is a useful summary of the various aspects of the external affairs power. It is certainly much more than a power to implement treaties. Related to these two chapters is chapter five on the implementation of treaties in Australia, written by Bill Campbell, the Head of the Office of International Law in the Attorney-General's Department. This is a valuable chapter explaining, from the practical point of view of a person closely involved in government, the way in which the different methods of treaty implementation are chosen and some of the difficulties that can arise with the various methods of implementation.

These three chapters highlight the dynamic nature of the arrangements between the three arms of government and the two levels of government in relation to treaty making. In the last two and a half years since the establishment of a standing parliamentary committee on treaties, much of the previous focus by governments and commentators on the process for consultation between levels of government has been transferred to a focus on the parliamentary forum. The Committee has proved a success and has tackled controversial issues like the proposed Multilateral Agreement on Investment and the Convention on the Rights of the Child. It is too early, however, to tell whether the balance between Parliament and the Executive has fundamentally altered. The three chapters by Twomey, Rothwell and Campbell respectively are an excellent analysis of the situation reached prior to the establishment of the parliamentary committee. They confirm, if needed, that the respective roles of Parliament and Executive

1 Report by the Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

are much more complicated than the simplistic view often propounded by proponents of democratic deficit in relation to treaties. At the same time, the chapters provide background and explanation for the changes now underway in terms of the treaty making process.

The role of international law in judicial affairs is dealt with in two chapters. The first, concerned with judicial review of international affairs, is by Geoffrey Lindell and considers issues associated with justiciability and various limits on the role of the courts in matters involving international law. This includes issues such as the act of State doctrine and the use of executive certificates. The chapter has already been quoted in a footnote to a High Court decision in relation to this latter issue[2]. There is also a chapter on international law and administrative discretion by Professor Allars. This focuses, in particular, on the decision in the *Teoh* case[3], but also on other administrative law doctrines in relation to which there may be scope for raising matters of international law. The chapter contains some discussion of statutes and the common law and the role of international law in relation to them. In this area, the chapter tends to overlap with the chapters already mentioned by Professor Shearer and Sir Anthony Mason.

Professor Allars has been among the many critics of the proposed anti-*Teoh* legislation - the *Administrative Decisions (Effect of International Instruments) Bill*. This has now been introduced into two Commonwealth Parliaments, but not dealt with before an election was called. The Joint Standing Committee on Treaties has recommended that consideration recommence as a matter of priority. This may mean introduction of a bill on this issue a third time. The chapter by Allars provides a thoughtful analysis of issues related to the *Teoh* decision. Anyone associated with advising government on the *Teoh* issues will need to give careful consideration to her views. Sir Anthony Mason in his chapter also has an interesting suggestion in this area (p.226).

Professor Charlesworth contributes a chapter on international human rights law and Australian federalism. This tends to be a more polemical chapter than the others contained in the collection. It criticises the largely political response by the Executive and Parliament to the implementation of international human rights law, but notes the greater willingness of the courts to take account of issues in this area. Increasing resort to international complaint mechanisms under various human rights treaties points to the continuing significance of this area.

There is a chapter by Brian Galligan and Ben Rimmer on the political dimensions of international law in Australia. This is written from a political science perspective. I found this chapter the weakest of those in the collection. Perhaps this is because, as a lawyer, I relate more to the legal analysis of issues. The problem with the chapter, however, is its simplistic assertions of an executive dominated system, with allegations of 'abuse' of the treaty making power, but with little detailed examination of the situation to support the

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2 *Attorney-General v. Tse* (1998) 154 ALR 414.
3 (1995) 183 CLR 273.

conclusions. The previous chapters point to the depth and complexity of the picture overall. The political scientists, like so many non-legal commentators, appear to see a much more simple situation than, it is suggested, in fact exists. Finally, there is a conclusion provided by Professor Crawford entitled, *International Law and Australian Federalism: Past, Present and Future*. The three chapters by Charlesworth, Galligan and Rimmer, and Crawford contain useful insights which complement the other chapters.

In the preface to the book, the editors indicate that the reason for the volume of essays "has grown out of a policy debate on the impact of international law on Australian law, which was ignited in the early 1980's by the High Court's controversial decision in *Commonwealth v. Tasmania*[4] (Tasmanian Dam Case) and has continued to smoulder, and occasionally flare up, in the 1990's as a result of several controversial incidents." This may have provided the motivation for the editors to assemble the collection. However, the reason for the book, and its considerable value, arises from the unavoidable requirement for law makers, legal advisers and judges to be acquainted with the role and relevance of international law to much of their work. This book testifies to the need for all areas of government to understand the relevance of international law. As some of the fundamental issues are increasingly debated, such as the role of Parliament in treaty-making, this inevitably stimulates debate in relation to other issues. Thus, as already mentioned, if Parliament is to have a role in the acceptance by Australia of treaty obligations, perhaps this calls for a rethink as to whether there is not scope for treaties to be self-executing in Australian law. At the same time, the increased willingness of the courts to have regard to international instruments, particularly in the human rights field, stimulates debate about the interpretation of treaties and the need to protect Parliament's role in making law.

In conclusion, I recommend that anyone interested in the role of international law in Australia purchase a copy of this collection. It is certainly designed for a specialist market, but it is also of value to the much wider community of persons interested in the political and legal arrangements by which Australia responds to globalisation and the impact of international arrangements.

4 (1983) 158 CLR 1.