

Previous Parliamentary initiatives to scrutinise the treaty making process

Introduction

2.1 The *Treaties Ratification Bill 2012* is not the first initiative to attempt to strengthen the Parliament's supervisory role in the making of treaties. Previous initiatives have shaped the current system of review. This chapter will provide an historic background of the evolution of the parliamentary oversight process of treaty making, culminating in the establishment of the Joint Standing Committee on Treaties (JSCOT).

Background

2.2 Australian governments have always considered that the negotiating of and ultimate agreement to treaties is a matter for the executive government and does not require approval of the Parliament. This contrasts with the situation in the United States of America, where the President requires the advice and consent of two-thirds of the Senate before making a treaty. In Britain treaties are not ratified until 21 days after the text is laid before Parliament, although the government may modify this procedure in cases of urgency or when other important considerations arise.¹

1 Odgers Senate Practice, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap18. accessed 7 March 2012. (Hereafter referred to as 'Odgers, Chapter 18').

- 2.3 Treaties may be incorporated or referred to in legislation where their provisions are to be applied as part of Australian law.²

History of reform initiatives

1983 – Senator Brian Harradine

- 2.4 A notice of motion was given in the Senate in 1983 by Senator Brian Harradine (Independent – Tasmania) for the establishment of a Senate standing committee to consider and report in respect of treaties. Such a standing committee was to examine:
- (i) whether Australia should undertake to be bound by that treaty if that treaty is not already binding upon Australia, and
 - (ii) the effect which Australia's being bound by that treaty has or would have upon the legislative powers and responsibilities of the Australian States.³
- 2.5 This motion arose from concern about the scope of the external affairs power under Section 51 of the Constitution, and the power of the Commonwealth Parliament to legislate to enforce treaties entered into by the government, as interpreted by the High Court in *Commonwealth v State of Tasmania 1983*.⁴ The motion to establish the committee was not moved, but a notice in the same terms was given in each session after 1983.

1994-1995 – Senator Bourne's *Parliamentary Approval of Treaties Bill*

- 2.6 Prior to the introduction of the *Treaties Ratification Bill 2012*, it had already been suggested that the Parliament could legislate to provide that treaties not enter into force for Australia until approved by each House.
- 2.7 The tabling of 36 treaties on 30 November 1994 led to a debate on the need for some more formal means of scrutiny of treaties by the Senate. The establishment of a committee to scrutinise treaties was then under consideration by Senators. The treaties tabled on that day included those under negotiation or active consideration for Australia.⁵

2 Odgers, Chapter 18.

3 Odgers, Chapter 18.

4 Known colloquially as 'The Tasmanian Dam Case', http://www.envlaw.com.au/tasmanian_dam.html, accessed 15 March 2012.

5 Odgers, Chapter 18.

2.8 In 1994, Senator Vicki Bourne (Democrats NSW) introduced the *Parliamentary Approval of Treaties Bill* which would provide for treaties to be approved in the absence of any parliamentary action or, if raised for consideration in either House, by resolution of that House. A revised version of this Bill was introduced in 1995.⁶

2.9 Senator Bourne was particularly concerned at the emergence of what former Governor-General, Sir Ninian Stephen, called the 'democratic deficit'. As part of her Second Reading Speech, Senator Bourne stated:

It is a fundamental democratic principle that an executive government should seek parliamentary approval before making a treaty binding upon Australia. Treaty making has historically been an executive prerogative, but the growth in the number and scope of international agreements has meant that the *status quo* can no longer be justified.

When Sir Ninian Stephen used the term 'democratic deficit' in a lecture last year, his concern was with treaties which transfer power from national to supranational bodies. I would add that there is a real deficit wherever rights and obligations are imposed on Australian citizens, under international law, without Parliament's consent. There is no popularly elected assembly which is empowered to approve, amend or reject the imposition of that obligation. That is a clear and unjustified democratic deficit.⁷

2.10 Under the Bill the Minister would be required to:

- i. publish a declaration in the Gazette when it was proposed that Australia enter into a treaty;
- ii. the treaty would then have to be tabled in each House of Parliament within fifteen sitting days of gazettal;
- iii. the members of each House would then have fifteen sitting days to give a notice of motion requesting that the treaty be considered by that House.
 - a. If no notice of motion was given within the 15 sitting days, the treaty would be deemed to have been approved;
 - b. If a notice of motion was given, no action could be taken by the executive to bring the treaty into effect until the

6 Odgers, Chapter 18.

7 Senator Bourne, Second Reading Speech, *Hansard*, 31 May 1995.

treaty had been approved by the relevant House of the Parliament.

- iv. If the treaty was not approved, then the executive would not have the power to enter into the treaty. Provision was also made for approval of reservations to treaties.⁸

2.11 According to the critics, the Bill exhibited a number of flaws:

- i. The Bill did not make any exceptions for sensitive treaties.
- ii. The Bill did not deal with the issue of urgent treaties.
- iii. Clause 9 of the Bill exhibited two problems:
 - a. Firstly, when there is a reservation by Australia in respect of a treaty proposed to enter into force in respect of Australia, this proposed Bill applies to the reservation as if the reservation were a treaty.
 - b. Second, is that each reservation would be subject to a separate gazettal and disallowance procedure.
- iv. The Bill did not appear to apply to the withdrawal of a reservation.
- v. Finally, the requirement in the Bill for a treaty impact statement which was expressed in mandatory language could give rise to problems.⁹

2.12 Ultimately the Bill was not passed, though it was restored to the Senate's Notice Paper in May 1996, November 1998 and February 2002.

1995: The 'Trick or Treaty?' Report

2.13 Senator Bourne's Bill and the corresponding debate highlighted concerns about the lack of parliamentary scrutiny and control of treaties. This contributed to a comprehensive examination of the subject and a report by the Senate's Legal and Constitutional References Committee in 1995.¹⁰

8 Glen Cranwell, 'The Case for Parliamentary Approval of Treaties in Australia', *Murdoch University Electronic Journal of Law*, Vol 8 Number 4, December 2001, <http://www.murdoch.edu.au/elaw/issues/v8n4/cranwell84.html>, accessed 16 March 2012.

9 Glen Cranwell, 'The Case for Parliamentary Approval of Treaties in Australia', *Murdoch University Electronic Journal of Law*, Vol 8 Number 4, December 2001, <http://www.murdoch.edu.au/elaw/issues/v8n4/cranwell84.html>, accessed 16 March 2012.

10 Trick or Treaty? Commonwealth Power to Make and Implement Treaties, November 1995, http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legc_on_cte/completed_inquiries/pre1996/treaty/report/index.htm accessed 15 March 2012.

Known as *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, the Committee's report was published in November 1995.

- 2.14 A number of central issues were identified from the evidence and submissions received for the *Trick or Treaty?* inquiry. Concerns were raised about the impact of international treaties on the Australian federal system and Australian sovereignty. Concerns were also identified in relation to the degree of consultation undertaken by the Government prior to entering into and ratifying treaties. Finally, the issue of the respective roles of the Parliament and the Government, and in particular the executive, in treaty making was raised.¹¹
- 2.15 The Committee's recommendations had five main objectives:
- to increase the information available to the public about treaty making;
 - to improve consultation with the States in relation to treaty making;
 - to improve consultation with the public, industry and interested groups in relation to treaty making;
 - to strengthen the role of Parliament in relation to treaty making; and
 - to put forward a mechanism which can accommodate the federal system.¹²

1996 – The establishment of the Joint Standing Committee on Treaties

- 2.16 After the 1996 Federal election, the incoming Howard Government responded favourably to the Committee's report.
- 2.17 It agreed to table treaties in both Houses before ratification, establish a treaties council for consultation with the states, and move for the establishment of a joint committee for parliamentary scrutiny of treaties. The joint committee – the current (JSCOT) – was subsequently established.¹³
- 2.18 In a ministerial statement in 1996, the then Minister for Foreign Affairs, the Hon Alexander Downer MP, foreshadowed the Committee's

11 Austlii, Treaty Law Resources, "Senate - Legal and Constitutional References Committee Commonwealth Power to Make and Implement Treaties - Report Executive Summary" <http://www.austlii.edu.au/au/other/dfat/reports/tortexs.html>, accessed 16 July 2012.

12 Austlii, Treaty Law Resources, "Senate - Legal and Constitutional References Committee Commonwealth Power to Make and Implement Treaties - Report Chapter 17 Recommendations", <http://www.austlii.edu.au/au/other/dfat/reports/tort17.html>, accessed 16 July 2012.

13 Odgers, Chapter 18.

establishment and its terms of reference which included only conducting inquiries into treaty actions once they were tabled in Parliament:

The government will propose the establishment of a Joint Parliamentary Committee on Treaties to consider tabled treaties.¹⁴

2.19 The point was acknowledged by the then Opposition:

The joint house committee will be able to look at these matters only after they have been signed by Australia.¹⁵

2.20 However, the Committee could, of its own volition, seek private informal briefings on treaties under negotiation and/or seek a reference from a Minister or either chamber to conduct a formal inquiry into a treaty action under negotiation.

2.21 As part of DFAT's treaty making processes, a list of current treaty negotiations could be provided to JSCOT through the Secretariat. This would allow the Committee's Chair and Deputy Chair to consider whether more in-depth briefings to the Committee are required for particular treaty actions.

JSCOT– modus operandi

2.22 Given that the Committee is examining a proposed alternative process through which parliamentary oversight of treaties is to be conducted, the Committee feels it appropriate to discuss how JSCOT currently reviews treaties.

Tabling of treaties in Parliament

2.23 Major treaty actions along with their supporting National Interest Analyses (NIAs) are tabled in Parliament and are divided into three categories:

- **Category 1** treaties which the Committee is required to report on within 20 joint sitting days;
- **Category 2** treaties which the Committee is required to report on within 15 joint sitting days; and
- **Category 3** treaties are considered to be 'Minor treaty actions' which the Committee generally approves without a full inquiry.

14 House of Representatives, *Hansard*, 2 May 1996, p. 233.

15 Hon Laurie Brereton MP, House of Representatives *Hansard*, 2 May 1996, p. 236.

- Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest. A recent example is an amendment to the *International Convention Against Doping in Sport Annex I - Prohibited List - International Standard* (Appendix C, JSCOT Report 123).

Receiving submissions and public hearings

- 2.24 After tabling, JSCOT will invite responsible Government departments / or agencies to nominate officers to give evidence at public hearings concerning the proposed treaty action. Advertisements are also put out inviting interested parties and members of the general public to review and comment on the treaties through a submission to the Committee.
- 2.25 Public hearings are then held where the Committee invites the relevant Government agencies and any other individuals or organisations it sees fit to put their points of view.
- 2.26 The Committee may hold only one hearing and only take evidence from the relevant government agency for routine treaties. However, for more controversial treaties the Committee may take evidence from several witnesses. For example, for the recent review of the *Anti-Counterfeiting Trade Agreement* (JSCOT Report 126), the Committee held three hearings and spoke to over twenty witnesses – many of whom were critical of the treaty.
- 2.27 Occasionally site visits are conducted – for example the Committee may wish to inspect a satellite ground station if the agreement is an extension of a treaty covering that ground station’s use.

Producing a report

- 2.28 The Committee Secretariat then, with the assistance of the various submissions and public hearing evidence, drafts a report on the Chair’s instructions and the report is then presented to the Chair for review.
- 2.29 Once satisfied, the Chair then approves the draft being sent to the members of the Committee and a report consideration is held where members can debate suggested amendments. Generally, reports are agreed to by all members though on occasion there are dissenting reports.
- 2.30 The final report – either with or without a dissent – is then tabled in both houses of the Parliament. Normally, both the Chair and the Deputy Chair will speak to the Report when it is tabled and other members are also free to make a statement should they wish to.

Government response

- 2.31 Following tabling, the Government may be required to produce a response to some of the report's Recommendations regardless of whether the Committee supports the treaty or not.
- 2.32 Each department or agency is required to prepare a response to the particular treaty for which it is the sponsor, and responses should be prepared and tabled within a three month timeframe. The lead department or agency is responsible for consulting with other agencies that may be affected by the Committee's Recommendations. The Government's responses, which may involve agreement, agreement-in-principle or rejection of the Committee's Recommendations, are also tabled in the Parliament for public scrutiny.

2003 – The Senate Foreign Affairs, Defence and Trade References Committee, Voting on Trade

- 2.33 Notwithstanding the establishment of the Joint Standing Committee on Treaties, the Senate Foreign Affairs, Defence and Trade References Committee, in its report *Voting on Trade*, suggested further reforms. They recommended a scheme of parliamentary involvement in negotiation of trade agreements and procedures for approval by both Houses of such agreements.¹⁶ Their report stated:

Recommendation 2

The Committee recommends that the government introduce legislation to implement the following process for parliamentary scrutiny and endorsement of proposed trade treaties:

- a) Prior to making offers for further market liberalisation under any WTO Agreements, or commencing negotiations for bilateral or regional free trade agreements, the government shall table in both Houses of Parliament a document setting out its priorities and objectives, including comprehensive information about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
 - b) These documents shall be referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for examination by public hearing and report to the parliament within 90 days.
 - c) Both Houses of Parliament will then consider the report of the Joint Standing Committee on Foreign Affairs,
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- Defence and Trade, and then vote on whether to endorse the government's proposal or not.
- d) Once parliament has endorsed the proposal, negotiations may begin.
 - e) Once the negotiation process is complete, the government shall then table in parliament a package including the proposed treaty together with any legislation required to implement the treaty domestically.
 - f) The treaty and the implementing legislation are then voted on as a package, in an 'up or down' vote: i.e., on the basis that the package is either accepted or rejected in its entirety.

The legislation should specify the form in which the government should present its proposal to parliament and require the proposal to set out clearly the objectives of the treaty and the proposed timeline for negotiations.¹⁷

2.34 Citing Section 61 of the Constitution – which states that treaty-making is the formal responsibility of the executive rather than the Parliament – the Government responded negatively to this recommendation. The Government believed that it would:

- be unworkable;
- circumscribe the capacity of the Government to secure the best possible trade outcomes from trade negotiations; and
- undermine the executive's constitutional authority to sign treaties.¹⁸

2.35 The way in which trade treaties are negotiated continues to be a matter of controversy. The submission to the Committee from the Australian Fair Trade and Investment Network (AFTINET) expresses concern that there has been a trend in trade agreement practice to treat all government regulation as if it were a tariff, to be placed at standstill and then reduced over time. It says that excessive deregulation of banking and financial institutions in the US contributed to the sub-prime mortgage market crisis, which then generated the Global Financial Crisis.

17 Senate Standing Committees on Foreign Affairs, Defence and Trade, *Voting on trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, 26 November 2003, Chapter 3, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/completed_inquiries/2002-04/gats/report/index.htm, accessed 15 March 2012.

18 See 'Government Response' http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/completed_inquiries/2002-04/gats/index.htm, accessed 16 July 2012.

2.36 Their recommendations include that:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective parliamentary and public consultation to take place about whether negotiations should proceed and the context of negotiations.
- There should be regular public and Parliamentary consultations throughout the negotiations and, where possible, negotiating texts should be released. There is precedent for this in World Trade Organisation (WTO) negotiations, where position papers and draft texts are released on the WTO website.
- Before an agreement is signed, comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation.¹⁹

2.37 The JSCOT considered these issues during its study of the Australia-Chile Free-Trade Agreement (FTA) in 2008. At the time, the Committee recommended that:

...prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic regional, social, cultural, regulatory and environmental impacts which are expected to arise.²⁰

2.38 The Committee has previously called for greater transparency and is disappointed that the process has not been pursued.

19 Australian Fair Trade and Investment Network (AFTINET), *Submission 6*, pp. 6-7.

20 Joint Standing Committee on Treaties, Report 95, Chapter 3, 'The Australia Chile Free-Trade Agreement', p. 35.

Recommendation 1

That prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives including the anticipated costs and benefits of the agreement.

Conclusion

- 2.39 The process through which the Joint Standing Committee on Treaties was formed evolved over a number of years in response to calls for greater democratic accountability of the treaty making process.
- 2.40 Notwithstanding the activities of this Committee, there appears to remain a conviction in parts of the community that true Parliamentary approval can only consist of direct approval by both chambers as has been advocated by the reform attempts described here. The *Treaties Ratification Bill 2012* is another proposal in this tradition.

