The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 128

Inquiry into the Treaties Ratification Bill 2012

August 2012
Canberra

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Deputy Chair	Senator Simon Birmingham	
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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

   (i) either House of the Parliament, or

   (ii) a Minister; and

c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of recommendations

2 Previous Parliamentary initiatives to scrutinise the treaty making process

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.

3 Treaties Ratification Bill 2012

Recommendation 2

That the *Treaties Ratification Bill 2012* not be passed by the House of Representatives or the Senate.

1

Introduction

Purpose of the report

1.1 This report contains the Joint Standing Committee on Treaties' review of the *Treaties Ratification Bill 2012* ('the Bill') that was introduced into the House of Representatives on Monday, 13 February 2012, by the Hon. Robert Katter MP, (Kennedy).

1.2 The Bill has only one substantive provision:

> *The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification.*

Selection Committee consideration

1.3 Under Standing Order 222, the House of Representatives' Selection Committee may refer bills it considers controversial or as requiring further consultation or debate to the relevant standing or joint committee.[1]

1.4 On 16 February 2012, the House of Representatives Selection Committee referred the Bill to the Committee for inquiry.[2]

1.5 Mr Katter outlined his reasons for introducing the Bill in his First Reading Speech.[3] Driven by his concern that the treaties Australia is entering into

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1 House of Representatives Standing Orders 222 (a) iii.

2 House of Representatives Selection Committee, Report No. 44, Consideration of Bills, 16 February 2012, p. 3.

3 *Hansard*, House of Representatives, 13 February 2012, pp. 28-29.

are economically damaging to Australian agriculture and manufacturing and that Australia's sovereignty is being eroded,[4] Mr Katter has introduced this Bill to address what he perceives as the undemocratic nature of treaty negotiation and implementation.

> To enable the representatives of the people to have a genuine say in the formulation and approval of treaties is important for two reasons. Treaties ought to be treated like laws because they have a legally binding effect. They have a direct impact on people, especially when it is a serious impact such as costing people their jobs and costing children job opportunities. Treaties ought to be determined by the parliament after proper debate. This process enables public awareness of what is being proposed and a thorough analysis of the consequences of what is being proposed. Certainly, on occasions there is the odd discussion or consultation involving vested interest groups, usually the ones that are involved with the treaty that will benefit by it—usually overseas corporations. Public awareness of the public engagement process simply does not happen.[5]

1.6 Copies the *Treaties Ratification Bill 2012*, and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/index.htm

Conduct of the Committee's review

1.7 Submissions for this inquiry were invited with a closing date of Friday 11 May 2012. Extensions were available on request.

1.8 Five Submissions were received and their authors are listed at Appendix A.

1.9 The Committee held a public hearing in Canberra on 25 June 2012 to take evidence on the Bill.

1.10 Transcripts of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website:

4 The Hon. Robert Katter MP, *Committee Hansard*, 25 June 2012, pp. 1-6.

5 House of Representatives Selection Committee, Report No. 44, Consideration of Bills, 16 February 2012, p. 3.

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/ratification_bill/hearings.htm

1.11 A list of witnesses who appeared at the public hearings is at Appendix B.

2

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]

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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]

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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

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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]

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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.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/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

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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,

16 Odgers, Chapter 18.

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.

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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.

3

Treaties Ratification Bill 2012

Introduction

3.1 The *Treaties Ratification Bill 2012* (the Bill) introduced into the House of Representatives on Monday, 13 February 2012, by the Hon Robert Katter MP, (Kennedy), has only one substantive provision:

> *The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification.*

3.2 This chapter will analyse the Bill from three perspectives:

- constitutional;
- practical; and
- political.

3.3 Although other models of Parliamentary review exist overseas which may be drawn upon to reform the Australian scrutiny of treaties process, the Bill is a very short document which allows no room for amendment without a comprehensive change of its intent.

Constitutional questions

3.4 Section 61 of the Constitution places the formal responsibility for treaty-making with the executive rather than the Parliament and the constitutionality of the Parliament's ability to override the executive Government drew informed comment.

3.5 Dr Anne Twomey provided an overview of the arguments that were put forward during the previous debates on parliamentary scrutiny of the treaties making process. In 1995, former Solicitor-General, Sir Maurice Byers, argued that while the Parliament may have the power to legislate to regulate the manner in which the executive exercises its powers to enter into treaties, it cannot take away the power of the executive to enter into treaties or make the exercise of that power conditional upon parliamentary consent.[1]

3.6 Other experts disagreed. For example:

- Professor Winterton observed that the power to enter into treaties is a prerogative power, which can be abrogated or controlled by legislation; and
- Professor Enid Campbell agreed that section 61 of the Constitution does not entrench prerogative power, but she also qualified that, while the Parliament could abrogate a prerogative power, it could not confer that power upon itself.[2]

3.7 Because the Commonwealth Parliament has legislative power, not executive power, any attempt by the Parliament to ratify a treaty would threaten the constitutionality of that ratification. However:

> …if… the Parliament did not purport to exercise the power to ratify treaties, but instead made the approval of its two houses a condition precedent to the exercise by the Government of its executive power to do so (as proposed under this Bill) then Professor Campbell thought that this would not give rise to any separation of powers problems.[3]

3.8 Dr Twomey agrees with both Professors Zines and Lindell who expressed the view that legislation requiring parliamentary approval prior to the executive ratifying a treaty would most likely be constitutionally valid.[4]

3.9 Dr George Williams also agreed with Dr Twomey:

> I have also looked at the submission of Professor Twomey and I agree with her conclusions and the statements made… I think it is possible for parliament to legislate to not take over the ratification function but to make it subject to a decision of parliament whether

1 Dr Anne Twomey, *Submission 3*, p. 2.
2 Dr Anne Twomey, *Submission 3*, p. 2.
3 Dr Anne Twomey, *Submission 3*, p. 2.
4 Dr Anne Twomey, *Submission 3*, p. 2.

> that ratification should go ahead. That leaves the function where it should be, with the executive, but just makes the exercising of that function conditional upon parliament not indicating that it wants to veto that. That, I think, is consistent with other areas where the High Court has indicated very clearly that the prerogatives of the Crown, the executive functions, can be subject to parliamentary modification. I do not think there is anything particular in this area that would indicate strongly against that. Certainly, the prevailing opinion is that, so long as it does not go beyond that conditional nature, that is something that is very likely to be upheld by the High Court.[5]

3.10 Although the Committee has not sought a formal legal opinion on this question, informed comment supports the argument that the Bill would likely be constitutional.

Practical issues

3.11 Although the Bill may be constitutional, there are a number of practical difficulties that would be encountered should this Bill pass. First, the large number of treaties that are signed annually and second, the need for the executive to be able to act promptly should a treaty need to be signed and ratified quickly due to an international crisis.

Number of treaties

3.12 Since the Joint Standing Committee on Treaties was established in 1996, it has reviewed over 600 treaty actions at an average of almost 40 treaties per year. Given the existing time constraints on the Parliament, needing to have both Houses of the Parliament, by resolution, approve the ratification of each treaty as the Bill demands would be unwieldy and impractical.

3.13 Dr Twomey explained:

> …the majority of treaties are of a standard form where the main issues have already been negotiated in the past and there are duplicating issues: extradition treaties or treaties concerning pacts and all those sorts of things. The difficulty is dealing with parliamentary time—how much time needs to be taken up in approving these things and doing it in a timely manner. Other

5 Professor George Williams, *Committee Hansard*, 25 June 2012, p. 2.

> countries in practice have found that it is very difficult if parliaments have to give positive approval by way of a resolution in each house for each particular treaty before it can be ratified. There have been difficulties in achieving that in a timely manner.[6]

3.14 Even the sponsor of the Bill, Mr Bob Katter MP (Kennedy), conceded that this was the likely outcome of the Bill:

> If every one of these treaties has to go into the parliament, it will gum up the operations of the Parliament of Australia.[7]

3.15 Mr Katter may be proposing his Bill as a mechanism to severely reduce the number of treaties into which Australia enters. The Committee thinks that an isolationist approach by Australia in the twenty-first century is unrealistic and counter to Australia's national interest. On this basis, Mr Katter's Bill should not be passed or, at the very least, be substantially amended from its original form or intent.

Emergency treaties

3.16 A further criticism of the Bill – which, again was also canvassed in the mid-1990s debate – was that of treaties that needed to be signed and ratified at short notice. Dr Twomey again provides a pertinent example:

> At the time, when the *Trick or Treaty* report was being developed by the Senate legal and constitutional committee, the example that was used by the government was: 'What if there's an emergency in, say, East Timor and we need instantly to be able to put in a peace-keeping force in order to avoid some horrible escalation of violence and we need to negotiate a treaty immediately to support that and parliament's not sitting for three months—what do we do then?' Although those sorts of emergencies happen very rarely, when they do happen you want to have some facility to allow you to deal with that.[8]

3.17 Given the basic nature of the Bill, there is no provision to address this type of short term requirement. This inflexibility again hints at the Bill's intention to severely restrict Australia's ability to enter into treaties.

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6 Dr Anne Twomey, *Committee Hansard*, 25 June 2012, p. 1.

7 The Hon. Robert Katter MP, *Committee Hansard*, 25 June 2012, p. 5.

8 Dr Anne Twomey, *Committee Hansard*, 25 June 2012, p. 2.

Political issues

3.18 The political composition of the Parliament, and in particular the Senate, also makes this Bill's operation, should it be passed, very difficult. Although the government-of-the-day has, by definition, control of the House of Representatives it seldom has a majority in its own right in the Senate.

3.19 In recent times, there has been a third political party or grouping that has the balance of power in the Senate – such as the Australian Democrats in the 1990s or The Greens in the current Parliament. The government-of-the-day has to negotiate with these parties or groupings to get its legislation enacted into law. In one case, Senator Brian Harradine of Tasmania, effectively held the balance of power by himself in the late 1990s. One individual could, along with the political opposition, frustrate the legislative agenda of an elected government.

3.20 While this is generally considered appropriate for the review of domestic legislation passed in the House of Representatives, it is unsuitable for the approval of treaties as it is the executive – not the Parliament – that has the authority to negotiate international agreements. Dr Twomey explained:

> If the approval of *both* Houses were required before a treaty could be ratified by the executive, this would potentially take control of a significant part of Australia's foreign policy out of the hands of the Government and place it in the hands of whoever holds the balance of power in the Senate. This could make it extremely difficult for the Government to develop and implement Australia's foreign policy in a consistent and considered manner and would potentially result in conflicting messages being sent about Australia to foreign nations. It might also be economically detrimental to Australia if it is shut out of international trade blocs and organizations and impeded from fully implementing Australia's economic policy.
>
> The Constitutional Commission, when considering a proposal for the parliamentary approval of treaties, rejected it on the ground that:
>
> > *A requirement that Parliament or its Houses consent to the ratification of all treaties would therefore give non-government supporters in the Senate the power to override executive policy supported by the Government and the House of Representatives.*
>
> Questions also arise as to what would be achieved by such a change. The reality is that treaties are negotiated between

> governments. Realistically, a Parliament is not capable of negotiating a treaty as this is inconsistent with its status, role and method of operation.[9]

3.21 The Bill's sponsor, Mr Katter MP, agreed with this conclusion as this following exchange demonstrates:

> **Mr Laurie Ferguson**: Minor political parties are determining their position on other things—let us put food to one side; your main concern is trade in food—but there are thousands of these treaties. We start to have a situation where minor parties in the Senate hold the government to ransom—I am talking about negotiations—and the whole thing comes to a standstill. I think there are some very negative outcomes to this. I put that to you…
>
> … do we not have a situation here where this country's international negotiating situation, its ability to agree to things et cetera is basically held to ransom by who-knows-who in the Senate?
>
> **Mr Katter:** Well, I agree with your point. Undoubtedly, there is an argument there. I think it is morally wrong that the argument should be there but the truth of the matter is that it is.... So I have to go along with you and say that that is reality. Yes, it is a good point that you make.[10]

3.22 This exchange suggests that no Government is going to reduce its treaty-making powers to the extent suggested by this Bill.

Other international practices

3.23 The brevity of the Bill makes it essentially impossible to amend without a major change to its intent. Had the possibility to amend existed, perhaps some of the reform attempts made in other countries could have been used to improve the Bill and with it the treaties review process.

The United Kingdom

3.24 The Australian Parliament is derivative of, though not entirely the same as, the Westminster Parliament in the United Kingdom and thus it is worth reviewing the reforms made there.

9 Dr Anne Twomey, *Submission 3*, p. 3.

10 *Committee Hansard*, 25 June 2012, pp. 3-4.

3.25 In 2010, the UK significantly reformed its system of parliamentary scrutiny of treaties. The reforms provide that the Government must table certain types of treaties in the Parliament, and may not ratify them if, within 21 days, either House has resolved the treaty not be ratified.[11]

3.26 If the House that resolves that the treaty not be ratified is the House of Commons, the relevant Minister may table a statement indicating why the treaty should be ratified with a further 21 day period for the House to resolve not to ratify the treaty. If the House continues to resolve not to ratify the treaty, then the process may continue indefinitely.[12]

3.27 If the House that resolves that the treaty not be ratified is the House of Lords, the Minister may move to ratify the treaty after tabling a statement indicating why the treaty should be ratified.[13]

3.28 The reforms specify that the above process will not apply to a treaty if the relevant Minister is of the opinion that the treaty should be ratified without parliamentary scrutiny. If the Minister takes this path, they must at a later date, table the treaty in both Houses along with an explanation as to why it needed to be ratified without parliamentary scrutiny. This is intended to apply to treaties that are urgent or particularly sensitive.[14]

Ireland

3.29 Amongst the nations that permit a degree of parliamentary involvement in the treaty process is the Republic of Ireland. Ireland's Constitution requires that all treaties entered into shall be presented in the Irish lower house and that the Republic will not be bound to the treaty if it involves a charge on public funds until it has been approved by the Irish lower house. These provisions do not apply to treaties that are technical or administrative in nature.[15]

3.30 In Ireland, treaties are not self-executing (i.e. the treaty becomes part of the law simply by virtue of its ratification), so the Parliament will also have the opportunity to implement a treaty through domestic legislation.[16]

3.31 Before a treaty can be tabled in the Irish lower house it must have been ratified by the executive. The effect of a rejection by the lower house is

11 Dr Anne Twomey, *Submission 3*, p. 5.
12 Dr Anne Twomey, *Submission 3*, p. 6.
13 Dr Anne Twomey, *Submission 3*, p. 6.
14 Dr Anne Twomey, *Submission 3*, p. 6.
15 Dr Anne Twomey, *Submission 3*, p. 6.
16 Dr Anne Twomey, *Submission 3*, p. 7.

that the treaty will not be domestically binding. However, it will still be binding in international law. In other words, the Irish parliament does not have the power to veto the ratification of treaties by the executive.[17]

Continental Europe

3.32 Another approach would be to require parliamentary approval for only a certain class of treaties. This approach has been adopted in countries where parliamentary approval is required, such as France, Italy and Germany.[18] The risk with this approach is that the treaty will be classified wrongly, and then be subject to constitutional appeal on the basis of that wrong classification.[19]

South Africa

3.33 South Africa is an example of a country that has a partial self-executing treaty system. Although the executive is responsible for negotiating and signing treaties, treaties cannot be ratified without the approval of both Houses of Parliament. Technical and administrative treaties are exempt from this requirement. Initially, approval by Parliament was required for all treaties. Such approval was amended in practice because it was too difficult to present all the treaties South Africa entered into to the Parliament in a timely manner.[20] This change is, of course, highly relevant to the Committee's deliberation on this Bill and adds strength to the arguments canvassed above.

Conclusion

3.34 The Bill, if passed as presented, would present problems to both the Parliament and the executive. The sheer number of treaties along with the political nature of the Senate has the potential to overwhelm the Parliamentary process. This, and the Bill's lack of a provision for short-term emergency treaties, makes the Bill unworkable.

3.35 Although other models exist overseas which may add a greater degree of Parliamentary scrutiny to the treaties review process, the Bill is a very

17 Dr Anne Twomey, *Submission 3*, p. 7.
18 Dr Anne Twomey, *Submission 3*, p. 4.
19 Dr Anne Twomey, *Submission 3*, p. 4.
20 Dr Anne Twomey, *Submission 3*, p. 7.

brief document which allows little room for amendment without a comprehensive change of its intent.

3.36 It would appear that the Bill is likely to be constitutional. However, given the practical and political difficulties the Bill would pose for the executive, the Parliament and the treaty making process generally, the Committee cannot support the Bill.

Recommendation 2

That the *Treaties Ratification Bill 2012* not be passed by the House of Representatives or the Senate.

Kelvin Thomson MP

Chair

A

Appendix A – Submissions

1 FamilyVoice Australia

2 Professor George Williams AO

3 Professor Anne Twomey

4 Dr Mark Diamond

5 Australian Manufacturing Workers' Union

6 Australian Fair Trade and Investment Network Ltd

7 Community and Public Sector Union State Public Services Federation Group

B

Appendix B – Witnesses

Monday, 25 June 2012 - Canberra

Individuals

The Hon Bob Katter MP

Professor Anne Twomey

Professor George Williams AO