

Chapter 2

Background

Development of the treaty-making process

2.1 A treaty is an agreement between states that is binding under international law. The power to enter into treaties is an executive power granted under section 61 of the Constitution. The power to implement treaties is a legislative power granted by section 51(xxix). Under this constitutional framework, decisions about negotiating, signing or becoming party to a treaty are taken by the executive. The decision to pass implementing legislation—which is necessary because treaty commitments are not automatically incorporated into Australian law—is made by the parliament. The Department of Foreign Affairs and Trade (DFAT) is the lead commonwealth agency on treaty-making processes.

2.2 In the years after Federation, the parliament was involved in the approval of treaties before their ratification and, in some cases, the actual treaty itself as negotiated by the British Government (for example, the Anglo–French Treaty of 1919) required this form of approval. According to Professor Anne Twomey, up until the mid-1970s, it was still common practice for governments to seek parliamentary approval of treaties where commonwealth legislation was needed to implement them:

Approval was normally included in the statute which gave effect to the treaty, and the treaty would be ratified after the statute was enacted but before it came into effect. However, this practice began to lapse in the late 1970s.¹

2.3 In 1961, Prime Minister Menzies announced measures to keep parliament informed about treaty matters. This would involve tabling in both houses the text of treaties at least 12 sitting days before the government was to commit itself to the treaty by ratifying it. However, this practice soon fell into disuse and by the late 1970s treaties were being tabled in bulk every six months. While little attention was initially paid to the abrogation of the Menzies rule, by the early 1990s further initiatives were implemented to improve the flow of information about treaties to the parliament. The Minister for Foreign Affairs and Trade, Senator Evans and the Attorney-General, Mr Lavarch, announced that the government would supplement the flow of information '...by now tabling, wherever possible, all treaties, other than sensitive bilateral ones, before action is taken to adhere to them'. Notwithstanding this initiative, the government continued the practice of tabling treaties in large batches every six months, preventing any opportunity for detailed examination and scrutiny by the parliament.²

1 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, p. 23.

2 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, pp 29-30.

Treaty-making reform package of 1996

2.4 The Legal and Constitutional Affairs References Committee's 1995 inquiry into the Commonwealth's treaty-making power and external affairs power was the most comprehensive and detailed examination of these issues undertaken by a parliamentary committee. It was the culmination of mounting pressure to reform the treaty-making process in Australia. There had been growing concern about:

- a perceived loss of national sovereignty;
- a democratic deficit through lack of parliamentary scrutiny of treaty-making;
- absence of accountability and insufficient information for the public to assess the merits of particular treaties; and
- the impact of treaties and the use of the external affairs power on the federation.

2.5 The committee's report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, included ground-breaking recommendations most of which were accepted by government.³ The government's response acknowledged that the report: '...provides a sound basis for the reform of aspects of the treaty-making process as it affects Australia, particularly as the Committee was able to reach unanimity on the recommendations put forward'. As a number of recommendations envisaged legislation to bring them into force, the response noted that it was important for the government: '...to move quickly to put the new processes in place and that this is best done through non-legislative means'.

2.6 The reforms introduced by government in June 1996 consisted of five main pillars:

- tabling of treaties in parliament at least 15 joint sitting days before binding treaty action is taken by the government;
- preparation of a National Interest Analysis (NIA) and associated material for each proposed treaty action;
- establishment of the Joint Standing Committee on Treaties (JSCOT) whose mandate is to inquire into and report on matters arising from treaties. Other than in exceptional circumstances, the government does not take binding treaty action until JSCOT has reviewed and reported on the treaty. Other parliamentary committees may also consider specific proposed treaties;
- establishment of the Treaties Council as an adjunct to the Council of Australian Government; and
- establishment on the internet of the online Australian Treaties Library.

3 Legal and Constitutional Affairs References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

2.7 The government gave an undertaking to review the reforms after they had been in place for two years. The review process commenced by DFAT in July 1998 was completed in August 1999. The review report found that while overall the reforms are 'working well' there was scope for building on improvements already made to the NIAs and for enhancement of the internet Australian Treaties Library. The report claimed that the reforms have greatly improved scrutiny, transparency and consultation in the treaty-making process, and community awareness of treaties.⁴

State and territory issues

2.8 At the time the 1996 reforms were introduced, there was considerable interest from state and territory parliaments about their respective roles in the treaty-making process. The Federal-State Committee of the Victorian parliament, which was established in May 1996, presented its first and landmark report, *International Treaty Making and the Role of the States*, arising from its inquiry into overlap and duplication of roles and responsibilities between the Commonwealth and the states.⁵ The main purpose of the inquiry was to seek evidence on the effectiveness of the 1996 reform package from a states' perspective, and the broader issue of the role of the states in the treaty process. The report's introduction made two main observations:

...if the States do not become more directly involved in Australia's negotiation of international obligations, they will be unable to influence matters which have a potentially enormous impact on their traditional jurisdiction.

Treaty making in Australia is a process dominated by the executive. Although Australia's entry into treaties can have a huge consequence for the scope of State Parliamentary activity, there is currently no State Parliamentary involvement in Australian treaty making. Current Commonwealth-State consultation on treaty issues takes place entirely through bureaucratic arrangements.⁶

2.9 It was the committee's view that this absence of parliamentary involvement constituted '...a lack of democratic participation in the generation of international legal obligations for Australia'. Moreover, it argued that the interests of democracy and federalism were best served if state parliaments sought an enhanced role in the process of treaty-making and treaty implementation.

2.10 The report recommended that the Victorian parliament establish and adequately resource a treaties review committee with responsibility to advise the parliament on all matters concerning international treaty-making in Australia. The committee's functions would be:

4 Commonwealth of Australia, *Review of the Treaty-Making Process*, August 1999.

5 Federal-State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997.

6 Federal-State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997, p. xvi.

- to acquire and bring together documentation and information relevant to Australian treaty-making, from all sources, as soon as it becomes available;
- to table in parliament, and on a regular basis, the schedule of Australia's treaty negotiations;
- to scrutinise NIAs;
- to prepare State Interest Analyses for those treaties of particular concern to Victoria;
- to monitor the work of other bodies and organisations dealing with treaty matters; and
- to commission research into the effects of international treaty making on the states, and on the Australian federal system.⁷

2.11 The committee further recommended that the tabling arrangements and process of scrutiny to be carried out by the new treaties review committee be instituted across all Australian state parliaments. The government's formal response stated that while it strongly supported the report's central theme that states have a greater involvement in Australia's treaty-making processes, it did not support the introduction of legislation to prescribe a single committee as a counterpart to JSCOT: 'The Parliament itself should determine how to deal with treaty matters in general and with particular treaties'.⁸ Nor did the government support the recommendation that such a review committee be established across all state parliaments, on the grounds that the constitutional arrangements of each state are a matter for the state and it would be inappropriate to propose amendments to other states' constitutions.

2.12 In June 1999, JSCOT, in association with the Australasian Study of Parliament Group, convened a seminar on the role of parliaments in treaty-making to coincide with the government's own review process. The then Chair of JSCOT, Mr Andrew Thomson MP, described the seminar as a historic event:

It was the first occasion on which representatives from the Commonwealth and State legislatures (and other interested organisations and individuals) gathered to consider how best to contend with an important and evolving issue—the role that parliaments can and should play in scrutinising the making of international law.⁹

2.13 The purpose of the seminar was to explore opportunities for Australian parliaments to become more aware of and involved in the process of treaty-making. Building on the work of Victoria's newly created Federal–State Committee in this

7 Federal–State relations Committee, *International Treaty Making and the Role of the States*, Parliament of Victoria, October 1997, pp 77-78.

8 Government Response, Report of the Federal–State relations Committee on *International Treaty Making and the Role of the States*, April 1998.

9 Joint Standing Committee on Treaties, Report 24, *A Seminar on the Role of Parliaments in Treaty Making*, August 1999, Forward.

area, the seminar generated a number of proposals for greater parliamentary involvement in treaty-making that would see more information about treaty proposals provided to state parliaments, more effective community consultations on treaty-making, and better cooperation between the Commonwealth and state and territory parliaments.

2.14 Two proposals stand out. First, a proposal by the Western Australian parliamentary participants (which sought to encapsulate the recommendations of the Victorian Federal–State Committee) included that all state and territory governments establish standing committees to review all matters concerning treaties; that protocols be established to enable such committees to be provided with all relevant information relating to each treaty; and that the Commonwealth only take binding action on any treaty after JSCOT has received representations on the matter from state and territory parliaments.

2.15 The second proposal, also triggered by the 1996 report of the Victorian Federal–State Relations Committee, was that all Australian parliaments contribute to the establishment of an inter-parliamentary working group on treaties. This was designed to give effect to the recommendation of the Federal–State Relations Committee that the Treaties Committee should liaise with state parliaments in conducting its treaty reviews. It was recommended that the inter-parliamentary working group on treaties:

- consist of members from all the parliamentary committees represented at the seminar;
- act as a forum for promoting public awareness of proposed treaty actions and encouraging wider parliamentary scrutiny of treaty making;
- meet every six months to review upcoming treaty actions; and
- be supported by secretariats of the states' respective committees on a rotational basis.¹⁰

2.16 Recognising the expression of support for the intent behind the proposal and its specific content, the seminar organisers noted that the proposal would stand in the seminar's records for the further consideration of seminar participants and all other interested parties. The seminar acknowledged that state and territory parliaments have a right to be involved in aspects of treaty-making; the valuable role that state and territory parliaments can play in improving public awareness of proposed treaties; and the need for state and territory parliaments to provide sufficient resources to allow parliamentarians to monitor treaty events.

2.17 There is no evidence to suggest that any of the practical proposals arising from the Victorian parliament committee report (1997) or the JSCOT seminar (1999) to enhance the role of parliaments in treaty-making ever gained traction or have been revisited by state or territory parliaments. State and territory involvement in the treaty-

10 Joint Standing Committee on Treaties, Report 24, *A Seminar on the Role of Parliaments in Treaty Making*, August 1999, p. 16.

making process may no longer be the burning issue that it once was in the mid-1990s (further evidence on this issue is considered in Chapter 4).

Further change

2.18 During the launch of an enhanced Treaties Database in August 2002, the Minister for Foreign Affairs, the Hon Alexander Downer MP, announced two significant changes to the treaty-making process:

- the tabling period for treaty texts and NIAs was increased from 15 to 20 joint siting days for a subset of treaties—specifically, those of major political, economic and social significance; and
- the NIAs were required to be accompanied by additional background reports.

2.19 Further refinements to the process since 2008 included the introduction of a mechanism by which minor treaty actions would be referred to JSCOT without a requirement for tabling (unless the committee deemed tabling necessary), and with an Explanatory Statement rather than a NIA. The purpose of this change was to prevent JSCOT devoting time and resources to the examination of minor treaty action. There was also a requirement for each NIA to include an attachment on consultation and for a Regulation Impact Statement to be tabled in parliament together with the treaty text and NIA.¹¹

Current process

2.20 The process created from the 1996 reforms, including additional changes introduced in 2002 and since 2008, remains in place today. During the inquiry, DFAT advised the committee that while the department plays a role in every treaty negotiation, it does not always play the lead role. However:

Where we do not [play the lead role] we are always involved in finalising the text, and we also always have a role in ensuring that the Australian treaty making requirements are met. Our key priority when we do that is to ensure that we are receiving the best possible outcome for the national interest.¹²

2.21 In terms of how DFAT approaches and manages the treaty-making process, the committee was told that once a mandate to start negotiations has been sought from the cabinet and the foreign minister in consultation with other ministers:

Consultations with industry, civil society and other interested parties are almost invariably undertaken at an early stage in the process, depending on the complexity of negotiations, and they will continue, usually, throughout the negotiations...DFAT's general approach is to consult early so that the negotiating strategies are informed by a broad range of interests and

11 Department of Foreign Affairs and Trade (DFAT), *Submission 74*, p. 9.

12 Ms Cooper, Senior Legal Adviser, *Committee Hansard*, 4 May 2015, p. 28.

priorities. The consultation process may include media releases, calls for public submissions and multiple rounds of face-to-face consultations.¹³

2.22 DFAT advised that, in relation to all agreements, officials from the relevant departments are involved in negotiations, attend negotiation sessions and are part of a working group which includes the Health, Attorney-General's and Agriculture departments:

A lot of departments are involved...There is no restriction. It is not as if the Department of Foreign Affairs and Trade would tell a department, who considered that their interests were affected, that they could not attend.¹⁴

2.23 DFAT's supplementary submission provided further details, especially in relation to the process of negotiating an agreement. Negotiations on trade agreements involve extensive consultation throughout the entire negotiating process with a wide range of stakeholders. This generally includes:

- calls for written submissions from stakeholders and the public;
- formal stakeholder consultation meetings, which are advertised and open to the public, and involve community groups, NGOs, trade unions, academics, peak industry bodies and business;
- meetings and other communication with interested groups, by DFAT and other departments, throughout the negotiations; and
- consultation with state and territory governments through regular meetings of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) and the Senior Officials' Trade and Investment Group (SOTIG).¹⁵

2.24 According to the DFAT submission:

Views expressed in consultations and written submissions are considered carefully by Australian Government negotiators. Consultations allow negotiators to understand the broad range of interests and views across the community, help identify commercially significant impediments to increasing Australia's economic links with our trading partners and guide Australia's negotiating position throughout the negotiations.¹⁶

2.25 For large and complex trade agreements such as the Trans-Pacific Partnership (TPP), the department involves up to 30 negotiators from within the Office of Trade Negotiations during the process. The Office of Trade Negotiations also includes the Trade Law Branch which is responsible for the overall legal elements of trade negotiations. In relation to the TPP negotiations, DFAT described Australia's negotiation process in the following terms:

13 Ms Cooper, Senior Legal Adviser, *Committee Hansard*, 4 May 2015, p. 29.

14 Ms Holmes, Assistant Secretary, *Committee Hansard*, 4 May 2015, p. 32.

15 DFAT, *Supplementary Submission 74.1*, p. 1.

16 DFAT, *Supplementary Submission 74.1*, p. 1.

DFAT has convened over 1000 stakeholder briefing sessions on TPP negotiations since May 2011, including with State and Territory Governments, peak industry bodies, companies, academics, individuals, trade unions, consumer and other special interest groups and other organisations representing civil society. In these consultations, DFAT officials have updated stakeholders on the progress in the negotiations, discussed Australia's approach to the negotiation of issues of interest and received views and comments.¹⁷

2.26 In addition, DFAT advised that it held public stakeholder consultations in state capitals, most recently on 26 March 2014 in Melbourne and 27 March 2014 in Sydney. Such consultations are open to businesses, civil society and interested members of the public, and were advertised on the DFAT website. Since March 2014, consultations have been more specific and issue based. Invitations were sent to DFAT's regularly updated TPP stakeholder contact list, which includes over 450 individuals and organisations that have indicated interest in the TPP. Senior TPP negotiators have attended the briefings and provided information on the progress of negotiations. Negotiators are also available to answer follow-up questions after the briefing session via email, teleconference or in person.¹⁸

The changing face of treaties

2.27 The committee heard compelling evidence that the scope and reach of bilateral and multilateral trade agreements is significantly different today from just a few decades ago. This is due to the complexity and subject matter of trade agreements, which extend well beyond traditional issues of trade and tariffs; reaching into areas of domestic policy, law and regulation, and the changing environment in which agreements are negotiated. The issue was captured by Professor Moir's submission:

Because our trade agreements now cover so many aspects of our regulatory system, they need [to] be far more cautious and careful in their analysis than they are currently getting. These regulatory systems affect important areas of not only our economy but also our society. Some, including patents, potentially affect our core competitive capabilities into the future. These issues are far too important to be negotiated in secret in close association with the interests of very large firms.¹⁹

2.28 Until 2001, Australia had an international trade policy focused on the World Trade Organisation and, apart from concluding a free trade agreement with Papua New Guinea, was a proponent of non-discrimination in international trade. According to the Law Council of Australia: 'Australia moved away from that position in 2001, when it negotiated a free trade agreement with Singapore, and has been negotiating as many FTAs as it can ever since'.²⁰

17 DFAT, *Supplementary Submission 74.1*, p. 2.

18 DFAT, *Supplementary Submission 74.1*, p. 2.

19 *Submission 68*, p. 19.

20 Dr Williams, Law Council of Australia, *Committee Hansard*, 5 May 2015, p. 25.

2.29 Historically, multilateral treaties were primarily designed to ensure peace and manage conflict between sovereign states. As early as the 14th and 15th centuries most bilateral agreements provided for trade and the safe passage of ambassadors. According to the Australian Human Rights Commission:

The law of diplomacy and the law of the sea were the formative treaties of the Middle Ages and moving into trade treaties in the 18th, 19th and 20th centuries. It has been a very long process developing the content. I think the point that is really made is that post the Second World War there was a huge development of international human rights law, but equally many thousands of committees negotiated bilaterally, regionally and multilaterally to cope with trade.²¹

2.30 However, in recent decades the focus of trade agreements has shifted from tariff setting to issues affecting domestic regulation, law and policy. Trade agreements now typically deal with a broad range of issues directly affecting people's lives including copyright, intellectual property rights, medicines and health care, patents and food labelling and access to good and services. The Public Health Association of Australia voiced its concern about the new and emerging breed of trade agreements that go well beyond traditional trade issues into areas that have previously been matters for domestic policy-making.²²

2.31 The issue was captured in evidence by the Australian Fair Trade and Investment Network (AFTINET), using the TPP as an example:

...the TPP deals with a very wide range of domestic law and policy. We have heard already that pharmaceutical companies want stronger patents on medicines, which would delay the availability of cheaper generic medicines. Media companies want larger copyright payments and restrictions on internet use and so on...Food, alcohol and tobacco companies want to influence government regulation in all of those areas, and in the TPP, the US is very much driving the negotiations on behalf of their major export industries, which these companies are active in.²³

2.32 The main point stressed by witnesses was that trade agreements deal with a range of matters normally the subject of public debate and domestic legislation, and affect a state's ability to regulate in many areas. An example raised in evidence by the Australian Council of Trade Unions (ACTU) was the provision in free trade agreements of immigration rights to nationals from other countries, including for the first time unskilled labour in the case of the free trade agreement with China:

...we understand that within the China free trade agreement, should it be ratified, if there is a project worth \$150 million or more—and that would be a fairly medium-level CBD building—the Chinese company that is the

21 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 14.

22 Dr Gleeson, *Committee Hansard*, 4 May 2015, p. 21.

23 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 15.

proponent or owner of that project can then bring its Chinese nationals here to work on it.²⁴

2.33 The increasing complexity of international trade agreements can sometimes have unintended consequences, especially with regard to intellectual property provisions negotiated in the context of bilateral or regional trade deals.²⁵ Evidence from the Australian Digital Alliance and Australia Library and Information Association pointed to the interplay between intellectual property and investment chapters in complex trade agreements such as the TPP. Ms Hepworth, Australian Digital Alliance, told the committee:

One of the things that we are particularly concerned about is the interplay between the intellectual property chapter and the investment chapter, for example. At the moment, in the Trans-Pacific Partnership, all we know, of course, is that there is an IP chapter and that there is an investment chapter. Looking at some of the investment chapters and IP chapters that have been in recent published agreements such as KAFTA, there is a very clear interplay between them. In KAFTA, for example, we had an ISDS provision that has a very wide definition of expropriation that definitely covers intellectual property but then seeks to sort of carve out an exception for intellectual property as long as it is implemented in accordance with the IP chapter. The practical effect of that is to make the IP chapter subject to ISDS.²⁶

2.34 The Australian Digital Alliance advised the committee of changes in the way copyright treaties have been negotiated over the years:

Traditionally, copyright was decided in very open, transparent multilateral fora. It is a very complex, very involved subject matter; it was originally done in bodies such as WIPO and then the WTO, where all of these issues were very thoroughly and openly explored and thrashed out; and the eventual agreements were very easy to see as a cohesive whole. The inclusion of a very complex subject matter such as copyright—and, I believe, from experts in other areas, increasing complexity in their subject matter as well—in trade agreements has definitely changed the focus of trade agreements and their impacts on Australia. I think that is one very important reason why these things have changed.²⁷

2.35 It was also pointed out that the communications environment in which trade agreements are negotiated today is significantly different from 20 or 30 years ago. It may have been possible in the mid-1980s for treaty negotiators to operate mostly in a confidential environment. However, with the arrival of the internet, the explosion of social media and the way ideas are communicated instantly and on a global scale,

24 Mr Dettmer, ACTU, *Committee Hansard*, 5 May 2015, p. 8.

25 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 1.

26 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 5.

27 Ms Hepworth, Australian Digital Alliance, *Committee Hansard*, 4 May 2015, p. 2.

confidentiality in the context of negotiating free trade agreements has become unenforceable.

2.36 A number of submitters expressed concern that rigid adherence to the principle of confidentiality by successive Australian governments may fuel media speculation on the draft text of trade agreements, and contribute to the politicisation of debate surrounding trade agreements and claims of scaremongering by those raising legitimate concerns. Ultimately it may result in less than optimum trade outcomes for Australia's exporters, especially when other countries adhere to more open and transparent trade negotiation practices. The competing arguments around the issue of confidentiality with respect to negotiating trade deals are considered in more detail in chapter 4.

