Treaties Ratification Bill 2012

Submission to the Parliament of Australia

Joint Standing Committee on Treaties

Mark R. Diamond ***PhD***

Background

On 13 February 2012, the Hon Bob Katter — Member for Kennedy, Queensland — introduced the Treaties Ratification Bill (a private member's bill) to the House.

If enacted, the law would require that the Governor General not ratify a treaty unless "both Houses of the Parliament have, by resolution, approved the ratification".

Should the bill be supported?

The power to execute treaties, either with other nation states or with international organizations, is one of the ancient Crown prerogatives. In Australia that prerogative is effectively vested in the executive government. What justification can there be for removing or limiting the prerogative?

Mr Katter's main argument is focused, rather narrowly, on the effect that he believes some existing international trade agreements have had on the interests of the Australian people generally and on the interests of his own constituents specifically.

Although the effect of specific trade agreements might provide some justification for removing or limiting the Crown prerogative to execute treaties, I believe that there are more compelling reasons for doing so. Put very briefly, those reasons are concerned with the very different legal environment that exists now as compared with that which existed at the time of Federation. The altered legal landscape has resulted from one case in particular, with modifications by later cases.

In its judgement in the *Tasmanian Dams Case,*[1] the High Court revealed that the external affairs powers of the Commonwealth[2] permitted the Commonwealth government to make laws that enforced the provisions of treaties into which it had entered, even when no specific head of power relevant to the content of that treaty was given in s 51 of the *Constitution*. In effect, the executive branch of the government could extend the power of the Commonwealth, beyond that which appeared to exist at the time of Federation and without reference to the Parliament, by entering into treaties with other nations.

The more recent judgement in the *Malaysian Solution Case*[3] seems to suggest that when the Commonwealth enters into a treaty — relevantly in that case, the *Convention Relating to the Status of Refugees* (1951) as amended by the *Protocol Relating to the Status of Refugees* (1967) — it not only acquires additional powers but also acquires obligations. One interpretation of the judgement in the *Malaysian Solution Case* is that a treaty binds the Crown and limits the effect of other statutes unless those statutes contain words that grant the Crown express immunity from the treaty.

Taken together, the package of power and obligation that treaties have been revealed to entail can be seen to belong more properly to the Parliament than to the

[1] *Commonwealth v Tasmania* (1983) 158 CLR 1
[2] *Australian Constitution* s 51(xxix)
[3] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)

executive. That gives good grounds for supporting the main thrust of the Treaties Ratification Bill.

Secondary matters

A secondary issue that arises is whether the *manner* provided by the Treaties Ratification Bill for limiting the existing Crown prerogative is a sensible one. Australia is currently a party to almost 2000 treaties, many of which represent technical amendments to previously existing treaties.[4] To require that each of the two Houses of the Parliament resolve to approve the ratification of a treaty might be overly onerous and demanding of the time of the Parliament.

An alternative, would be to draft the Treaties Ratification Bill so that the "resolution" requirement was changed to something similar to that which obtains in the case of disallowable legislative instruments. Specifically, the Parliament might require that a treaty be tabled in each House of the Parliament prior to it being considered for ratification by the Governor General. In the absence of any objection in either House within a prescribed period of time, the treaty could be ratified by the Governor General, but if an objection were made to the treaty in either House, then an alternative, "resolution" process could be required.

The author

Dr Mark Diamond has previously published on issues related to the law of negligence. He maintains a blog relating to public policy, research and statistics at www.markdiamond.com.au .

[4] For example: International Telecommunications Union's World Administrative Radio Conference Dealing with Frequency Allocations in Certain parts of the Spectrum (WARC-92), Incorporating Partial Revision of the Radio Regulations of 5 December 1979, and Final Protocol