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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.
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> The Constitutional Commission, when considering a proposal for the parliamentary approval of treaties, rejected it on the ground that:
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> > *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