

Australian Practices of Treaty Making

Paper by Dr Andrew Southcott MP, Chair, Joint Standing Committee on Treaties, Parliament of Australia, given at the

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I am pleased to be able to share with you this afternoon some aspects of Australian practices of treaty-making, with a particular focus on parliamentary scrutiny of treaty actions which have been proposed by the Australian Government.

Executive Government and Parliament - powers

Under the Australian Constitution, treaty-making is the formal responsibility of the Executive Government. Decisions about the negotiation of multilateral conventions, including:

- determination of objectives
- negotiating positions
- the parameters within which the Australian delegation can operate, and
- the final decision as to whether to sign and ratify, are taken at Ministerial level, and in many cases, by Cabinet.

While bilateral agreements which conform to a 'model text' are not normally referred to Cabinet, they are considered by Ministers in a meeting of the Federal Executive Council prior to approval being given for signature of the treaty by Australia.

So treaties are agreed at a very high Executive Government level.

The Australian Constitution, however, does not confer on the Parliament any formal role in treaty making. Nevertheless, in practice, the Australian Parliament plays an important role in examining all proposed treaty actions - through our committee, the Joint Standing Committee on Treaties. It also has a central role in relation to the implementation of the obligations under a treaty if legislation is required for Australia to fulfil those obligations.

The Joint Standing Committee on Treaties was established almost ten years ago in May 1996 as part of wide-ranging reforms to the treaty-making process. I will

talk more about the Committee in a moment. But first, a few words on the background to the reforms.

Reforms to the treaty-making process

Prior to 1996 there had been some attempts to introduce measures which would keep the Parliament more informed about treaty matters. For example, in 1961 the then Prime Minister committed the Government to a general rule that it would lay on the tables of both the Senate and the House of Representatives, for at least twelve days, the text of treaties which had been signed for Australia, or to which Australia contemplated accession.

This rule was gradually eroded. While in the 1960s and the early 1970s treaties were tabled individually or in small groups to comply with this commitment, by the late 1970s they began to be tabled in bulk after periods of about six months. This meant that at least half of the treaties had already been ratified before they were tabled. Australia was therefore obliged by international law to comply with them before they were tabled, thereby denying any meaningful Parliamentary scrutiny or input.

As Australia entered into a period of negotiating a broader range of treaties, some of them quite controversial, it became increasingly recognised that the role played by the Parliament in the treaty process was inadequate. With this came pressure for reform.

Concerns were raised in relation to the impact of international treaties on the Australian federal system. As you would be aware, Australia is a federation with a Commonwealth Government as well as State and Territory Governments. Treaties entered into by the Commonwealth Government could potentially impact on the States and Territories, and therefore concerns were raised about how much consultation had been undertaken by the Commonwealth Government prior to entering into and ratifying treaties.

In view of this, in December 1994 the Senate asked its Legal and Constitutional References Committee to inquire into the Commonwealth's treaty making power and the external affairs power. A year later, in November 1995, the Senate Committee presented its findings to the Parliament with proposals for reform. The Committee's report provided a sound basis for the reforms to the treaty-making process.

The 1996 Reforms

Broadly speaking, the reforms focused on two areas:

- consultation between the Commonwealth and the States/Territories

- Parliamentary scrutiny of proposed treaty actions.

As I mentioned a moment ago, concerns had been raised about the obligations imposed on the States and Territories by the Commonwealth Government entering into treaties.

There are also circumstances where treaties cannot be ratified without compliance by the States/Territories, through the passage of legislation by their own parliaments.

Either way, it was evident that better consultation mechanisms were needed between the Commonwealth and the States/ Territories. Two main bodies were established – the *Treaties Council* and the *Standing Committee on Treaties* (not to be confused with the Parliamentary Joint Standing Committee on Treaties which I will come to in a moment).

Treaties Council

The role of the Treaties Council is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories. The Treaties Council is chaired by the Prime Minister and comprises, in addition to the PM, all Premiers of the States and Chief Ministers of the Territories.

Standing Committee on Treaties

The other body, the Standing Committee on Treaties, consists of senior Commonwealth and State and Territory officers. It meets twice a year, or more often if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories. Specifically, its role is to:

- decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements
- monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories
- ensure that appropriate information is provided to the States and Territories, and
- co-ordinate as required the process for nominating State and Territory representation on delegations where such representation is appropriate.

In identifying treaties of importance to the States and Territories, the Standing Committee on Treaties takes into account the potential of proposed treaties to

affect the finances or future policy decisions of the States and Territories or the need for their participation in implementation, including legislation.

Parliamentary scrutiny of proposed treaty actions

Once consultations have concluded and the treaty texts are agreed with the other Party or Parties, the proposed treaty actions are tabled in both Houses of the Australian Parliament. Generally speaking, bilateral treaties are tabled after signature and prior to binding treaty action being. Tabling prior to signature is avoided, as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed, unless both parties agree to disclosure. Multilateral treaties may be tabled at any stage before binding action is taken, once the treaty text is finalised.

Under Australian practice treaties are divided into two categories:

- category 1 treaties are those of major political, economic or social significance which are likely to attract considerable public interest. These treaties lie on the table for at least 20 days before binding action is taken
- category 2 treaties are for the most part uncontroversial in nature and relatively routine in form, and are tabled for 15 days.

In introducing the reforms in 1996 the Government stated that it would not ratify a treaty unless it could be assured that the action proposed was supported by national interest considerations. It falls to the Parliament –through the Joint Standing Committee on Treaties - to provide that assurance by carefully scrutinising proposed treaty actions.

In order to do this the Parliament needs to know the Government's rationale for entering into a particular treaty. Therefore, in addition to the treaty text, a range of other documents are also tabled. These documents form the basis of the process of scrutiny.

The primary document is the *National Interest Analysis* (NIA). The NIA provides details about a proposed treaty and gives reasons why Australia should enter into the proposed treaty. The NIA includes information about:

- the possible economic, environmental, social and cultural impact of the treaty
- a description of the major provisions of the treaty and the obligations they impose on Australia

- any direct costs to Australia of compliance with the treaty, for example, contributions to international organisations provided for in the treaty, costs of establishing any new domestic agency as a direct result of entering into the treaty
- a description of the measures Australia intends to take or has taken to implement the treaty, including any legislation.

It also includes:

- a statement setting out the consultations which have occurred in relation to the treaty between the Commonwealth and/or State and Territories and with community and other interested parties, and a summary of the views of those parties.
- whether the treaty provides for withdrawal or denunciation and if so, what procedures apply
- a Regulation Impact Statement (where a treaty could affect business regulation or restrict competition)
- a country brief (in the case of a bilateral treaty)

Once a treaty is tabled in Parliament it stands automatically referred to the Joint Committee on Treaties for inquiry.

And now, to the work of the of the Joint Standing Committee on Treaties —

JSCOT, as we call it, is established at the beginning of each new Parliament by a resolution of both the Senate and the House of Representatives. The resolution sets out its role, that is, to inquire into and report upon any matters arising from treaties and related National Interest Analyses and proposed treaty actions presented to the Parliament. It is also possible for the Committee to receive a reference from either House or from a Minister, but this does not happen very often.

JSCOT consists of 16 members – three of whom are here today – from both Houses of the Parliament and representing all parties. The composition is nine members from the Government parties (the Government has a majority on the Committee) and seven non-Government members. Nine members are appointed from the House of Representatives and seven from the Senate.

The Committee elects the Chair from a Government party (I am a Liberal Party Member of Parliament) and its Deputy Chair from a non-Government Party. Kim Wilkie, our Deputy Chair, is a member of the Australian Labor Party.

Although we have 16 members, our quorum is three members in attendance.

JSCOT has the power to call for witnesses to attend public hearings and for documents to be produced. The Committee may meet at any place in Australia. For example, just a little over a year ago the Committee reviewed the Australia-United States Free Trade Agreement. The Committee travelled to capital cities around Australia – Sydney, Melbourne, Hobart, Adelaide, Perth, Brisbane - over a period of two weeks to take the views of Australian citizens and organisations on the proposed Agreement.

Most of our work, however, takes place in Canberra.

The usual procedure after treaties are tabled in the Parliament is to advertise in a national newspaper inviting comments (submissions) from anyone who may be interested in a particular treaty. This provides an avenue for Australian citizens to make known their views on a particular treaty.

Earlier in this presentation I mentioned that treaties are tabled for a period of either 15 or 20 sitting days before binding action is taken. It is during this period that we conduct our review of the proposed treaty actions.

A public hearing is held early in the 15/20 day period. If submissions have been received we may invite the providers of the submissions to give evidence at the hearing. Officials from the Departments which have negotiated the treaties are called before the Committee to answer our questions. The hearings are open to anyone who may wish to attend as an observer. The proceedings are televised and broadcast. The Hansard transcript is publicly available to anyone who wants it.

Following the public hearings the draft report is written, with the assistance of the secretariat. It is worth mentioning that the report is drafted for the Chair of the Committee in the first instance. I then present it to the members of the Committee for their consideration at a private meeting of the Committee.

When we are happy with the draft and our conclusions, we will recommend either that the Government take – or not take - binding treaty action. On occasions the Committee has recommended that a treaty be entered into providing certain other actions occur. At this stage, the Committee formally adopts the Chair's draft as the Report of the Committee. Arrangements are made for it to be tabled in both Houses by the 15th (or 20th) sitting day.

There are occasions, of course, when not all members are in agreement with the conclusions and they do not support the recommendations. It is open for the dissenting members to write a report which is attached to the Committee's report and tabled in the Parliament at the same time. However, most of the proceedings of the Committee are conducted in a bi-partisan spirit.

As a general rule both the Deputy Chair and I speak to the report at the time it is tabled in the House. A Senator tables the report, along with my Tabling Statement, in the Senate, usually on the same day.

As a matter of interest, the Australian House of Representatives has operated a second chamber, known as the Main Committee, over the last ten years. In this Chamber – which is set up like a parliamentary chamber - non-controversial legislation is debated. Reports of committees may be referred to the Main Committee for continuation of the debate and any member of the Parliament may contribute to that debate.

With the tabling of the report, the Committee's involvement in the progress of the proposed treaty action ends. The Government considers the Committee's findings and, where the Committee has recommended that binding treaty action be taken, moves towards ratifying and implementing the treaty. If the Committee has made any other recommendations the Government responds formally to the Committee's recommendations by tabling a Government Response in the House. It should be noted that the Committee's recommendations are advisory – the Government is not bound by them – but it is fair to say that the Government has taken the Committee's recommendations into account throughout the period from 1996.

Since 1996 the Committee has tabled 65 reports which contain the findings, conclusions and recommendations following the review of 333 proposed treaty actions. The Committee is currently in the process of reviewing a further eleven treaties.

In conclusion, what I have set out for you today is the way Australia has chosen to make the treaty making process more transparent. Our current process is a response to concerns about the impact of international law on Australian law and policy. It is considered that the only way for these concerns to be resolved is for more information to be publicly available and for our elected representatives to ensure that any international obligations entered into truly reflect our national interests. To this end the Joint Standing Committee on Treaties was established.

However, a dedicated treaties committee is not the only way to go about scrutinising treaties. I understand that some parliaments refer treaties to their

foreign affairs committees, and others to specialist committees with expertise in relevant portfolio areas. Creating a committee dedicated to considering treaties is just our way of going about it.