Chapter 3

The role of parliament in treaty making

3.1 As outlined in Chapter 2, the executive government has the power to enter into treaties under the Constitution. Parliament's main role in the treaty-making process is to implement treaties once they have been signed by passing implementing legislation.

3.2 The role of the parliament in the treaty-making process has long been the subject of discussion in Australia. The issue continues to attract the attention of the community and of stakeholders interested in the negotiation of large and complex trade agreements. This chapter provides background on previous reform attempts and practices in other jurisdictions, and analyses proposals aimed at strengthening parliament's role in the treaty-making process.

Introduction

3.3 The role of parliament in the treaty-making process has been the subject of debate in Australia for several decades. In 1985 the Constitutional Convention was established to undertake a fundamental review of the Australian Constitution. The Constitutional Convention, and the Advisory Committee on the Distribution of Powers that reported to it, both recommended that the status quo with regard to the role of parliament in treaty making be retained.[1] However, dissenting reports were submitted to the Advisory Committee by Mr Geoff Lindell,[2] and the Constitutional Commission by Professor Leslie Zines.[3] Both reports concluded that the arguments in favour of greater parliamentary participation in the treaty-making process were sufficiently persuasive to justify adoption of a system of parliamentary approval on a trial basis.

3.4 There have been several initiatives for parliamentary scrutiny of treaty-making, including attempts to legislate for parliamentary approval of treaty action. In 1994, the Australian Democrats introduced the Parliamentary Approval of Treaties Bill 1994 and re-introduced it in a revised form in 1995, but the bill lapsed due to the calling of the 1996 election. The bill established a mechanism similar to the disallowance of regulations, so that a treaty would be deemed to be approved without a notice of motion being moved to oppose it 15 sitting days after its tabling in each house. The important point is that the bill was not designed to force the executive to

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1 Constitutional Commission, *Advisory Committee on the Distribution of Powers Report*, June 1987, pp84-85; Constitutional Commission, *Final Report of the Constitutional Commission*, 1988, Volume Two p. 731.

2 Constitutional Commission, *Advisory Committee on the Distribution of Powers Report*, June 1987, p. 233.

3 Constitutional Commission, *Final Report of the Constitutional Commission*, 1988, Volume Two, p. 745.

enter into a treaty or to give parliament the power to enter into treaties. It would only have enabled parliament to prohibit the executive from entering into a treaty.[4]

3.5 The introduction of the 1996 reform package and the Department of Foreign Affairs and Trade's (DFAT's) 1999 review, which concluded that the reforms were operating well and there was no need for further change, put the issue of parliamentary approval of treaties on the political back-burner for the better part of ten years.

3.6 In 2003, the Foreign Affairs, Defence and Trade References Committee's inquiry into the General Agreement on Trade in Services and the proposed Australia-United States Free Trade Agreement revisited the issue of parliament's involvement in in the process of negotiating bilateral and multilateral trade agreements. Chapter 3 of the 2003 report, 'Treaties and the parliamentary process', included an overview of the Constitution and the treaty-making process, a summary of the *Trick or Treaty?* report and the 1996 reforms, the work of Joint Standing Committee on Treaties (JSCOT) and a discussion of the process of stakeholder consultation and the level of parliamentary scrutiny of treaties.[5]

3.7 In light of the evidence received from submitters, the committee recommended that the government introduce legislation to implement a process for parliamentary scrutiny and endorsement of trade treaties. The process was to include parliament voting on a treaty and any implementing legislation in an 'up or down' vote (either accepting or rejecting the package in its entirety).

3.8 The government rejected the committee's recommendation in a lengthy response, arguing:

> …the report's recommendation on trade treaties and the Parliamentary process would be unworkable. It would circumscribe the capacity of the Government to secure the best possible trade outcomes from trade negotiations. It would undermine the Executive's constitutional authority to sign treaties.[6]

3.9 The response concluded that it was the government's view that the twin objectives of promoting trade growth and ensuring that appropriate consultation is undertaken with the broader community '…are best met by current Parliamentary and consultation processes and practices'.[7]

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4 Department of the Parliamentary Library, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper No. 15 1999–2000, pp 35-36.

5 Foreign Affairs, Defence and Trade References Committee, *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*, November 2003

6 Government Response to the report of the Senate Foreign Affairs, Defence and Trade References Committee— *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*

7 Government Response to the report of the Senate Foreign Affairs, Defence and Trade References Committee— *Voting on Trade: the general Agreement on Trade in Services and an Australia-US Free Trade Agreement*

3.10 In February 2012, the Hon Bob Katter MP introduced the Treaties Ratification Bill 2012 which contained only one substantive provision: that the Governor-General must not ratify a treaty unless both houses of parliament have, by resolution, approved the treaty.

3.11 On 16 February 2012, the House Selection Committee referred the bill to JSCOT for inquiry. JSCOT found that the bill, if passed, would create problems for both 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.[8]

3.12 Not surprisingly, JSCOT recommended that the bill not be passed by the House or the Senate. It is interesting that as part of its inquiry into the bill, JSCOT took the opportunity to summarise previous parliamentary initiatives to scrutinise the treaty-making process. As a result of its overview, JSCOT noted that it had previously called for greater transparency in trade agreement negotiations, particularly in the context of concerns expressed by witnesses to its 2008 inquiry into the Australia-Chile Free-Trade Agreement. At that time it had 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 environment impacts which are expected to arise.[9]

3.13 The JSCOT report on the Treaties Ratification Bill 2012 expressed disappointment that the process for greater transparency recommended in its 2008 report had not been taken up by the government. Accordingly, the committee repeated its recommendation in a slightly abbreviated form:

> 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.[10]

3.14 JSCOT concluded its report by noting that notwithstanding its activities and numerous previous inquiries:

> …there appears to remain a conviction in parts of the community that true Parliamentary approval can only consist of direct approval by both

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8 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

9 Joint Standing Committee on Treaties, Report 95, *Australia-Chile Free Trade Agreement*, October 2008, p. 35.

10 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

> chambers as has been advocated by the reform attempts described [in this report].[11]

3.15 The issue of parliamentary approval of treaties continues to attract the community's attention and that of stakeholders involved in the negotiation of large and complex trade agreements.

Practices in other jurisdictions

3.16 Direct comparison of the Australian treaty-making process and the processes in other jurisdictions is difficult, as Australia has a different constitutional structure in place. However, it is useful to consider how other jurisdictions balance the respective roles of their executive and legislative branches of government in respect of treaty-making.[12]

United Kingdom

3.17 Traditionally, the treaty-making power in the United Kingdom is a power of the Crown, exercised by the Secretary of State for Foreign and Commonwealth Affairs. The role of parliament in the negotiation and conclusion of treaties is limited, although as in Australia, parliament has a role in passing implementing legislation to give effect to treaties in domestic law.[13]

3.18 From 1924, the United Kingdom had a requirement known as the 'Ponsonby Rule' that certain treaties subject to ratification be laid before parliament, with a short explanatory memorandum, for 21 sitting days. It was then open to the House of Commons to debate the treaty.[14]

3.19 In 2010, the United Kingdom significantly reformed its system of parliamentary scrutiny of treaties, enacting the *Constitutional Reform and Governance Act 2010*. Under this act, the Ponsonby Rule was replaced by a statutory process laid out in section 20. In short, these statutory changes make it unlawful for the government to ratify a treaty if the House of Commons repeatedly disallowed ratification. The House of Lords does not have the power to disallow treaty ratification, but can require the government to produce further explanatory information.[15]

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11 Joint Standing Committee on Treaties, Report 128, *Inquiry into the Treaties Ratification Bill 2012*, August 2012, p. 15.

12 The *Trick or Treaty?* report contains an overview of treaty-making practices in other federations which details the process in some countries not discussed here.

13 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2013, p. 168.

14 The Ponsonby Rule was said to apply where a treaty 'places continuing obligations' on the United Kingdom, where a further formal act to signify commitment is required after signature and where the matter is not one of "urgency"'. C. Saunders, 'Articles of Faith or Lucky Breaks', 17 *Sydney Law Review* 150, p. 170.

15 *Constitutional Reform and Governance Act 2010* (UK), s. 20

European Union

3.20 The 28 European Union (EU) members still largely control their own foreign relations. However, on some topics the EU endeavours to speak with one voice as it holds more weight as a single negotiating bloc. Trade policy is an exclusive power of the EU—only the EU and not individual member states can legislate on trade matters and conclude international trade agreements.

3.21 The European Commission negotiates with a trading partner on behalf of the EU. The Commission requests authorisation to negotiate a trade agreement with a trading partner from the Council, which sets out the general objectives to be achieved. While negotiations are ongoing, the Commission reports regularly to the Council and the European Parliament.

3.22 Once negotiations are complete, the Commission presents the deal to the Council to decide on signature and conclusion of the agreement. After signature, the agreement is sent to the European Parliament, which has the power to vote either for or against the agreement ahead of ratification. Where the agreement contains provisions that relate to areas of member state responsibility, the agreement must also be ratified by member states in accordance with their ratification procedures.

3.23 The committee received evidence in relation to the EU's new policy around transparency of trade negotiations which was published by the College of Commissioners in November 2014. Under the new approach, all 751 members of the European Parliament, and in some cases their staff, will be granted access to texts currently made available to a select group of law makers (members may inspect restricted text in a reading room). The Commission is also seeking to classify fewer documents as 'restricted' to make them more accessible outside the confines of a reading room.[16]

United States

3.24 Unlike in many other countries, including Australia, when the United States ratifies a treaty it immediately becomes part of the 'supreme law of the land'. This means that a treaty provision that is sufficiently clear and precise to be applied as if it is a statute will be considered 'self-executing', and treated as equal to an Act of Congress. As such, there is considerable uncertainty around which treaty provisions are self-executing, and which require legislation to implement.[17]

3.25 There are several ways for the President to secure the authority to enter a treaty:

- Under Article II of the Constitution, the president can ratify a treaty with the 'advice and consent' of two thirds of the Senate. The Senate can vote not only on whether to accept or reject the treaty in its entirety, but can

16 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 5.

17 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2013, p. 175.

also amend the treaty. By taking this approach, there is no requirement to consult with the House of Representatives.[18]

- The President can also enter into 'executive agreements', which can be ratified without the consent of the Senate. While considered treaties under international law, these generally relate to foreign relations or military issues rather than those impacting on the rights and obligations of citizens.[19]
- Under the Trade Promotion Authority (or 'fast-track negotiating authority'), Congress can grant the President temporary power to negotiate trade agreements. In this situation, Congress has the power to approve or disapprove the final treaty, but cannot amend it. This approach does not require a two thirds majority in the Senate.

Trade Promotion Authority

3.26 The Trade Promotion Authority (TPA) was last in effect from 2002 to 2007. Legislation to re-authorise TPA was introduced in the Senate and the House as the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* in April 2015. This could allow for an up or down vote on the TPP and any other trade negotiations concluded by 2018 when the current version of the bill expires.[20] At the time of writing, the bill had passed both the US Senate and House of Representatives.

3.27 As transparency arrangements under the Trade Promotion Authority differ from other treaty-making processes in the US, they are worth considering in more detail. According to Associate Professor Weatherall:

> The Congress enacts TPA legislation that defines negotiating objectives (including specific provisions that limit the President's authority to liberalise trade in the US) and prioritises for trade agreements, and establishes consultation processes.
>
> The various notification and consultation requirements of TPA in the US are designed to achieve greater transparency in trade negotiations, and maintain some role for Congress in shaping trade policy.[21]

3.28 Under the US' general treaty-making process, negotiating texts are not made available to members of Congress. The Obama administration has developed a practice of allowing members of Congress to see draft negotiating texts. However:

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18 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth power to make and implement treaties*, November 1995, p. 168.

19 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth power to make and implement treaties*, November 1995, p. 168.

20 Stefan A. Riesenfeld and Frederick M. Abbott, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, Martinus Nijhoff Publishers, Dordrecht, 1994, p. 302.

21 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 2.

> The process is highly controlled. Texts may be viewed but there is no capacity to take notes or retain copies of text. Staff with security clearance may view texts with Members but may not view texts unless the member of Congress is present.[22]

3.29 The bill in its current form would formalise the existing practice of the Obama administration with respect to access for members of Congress to draft treaty text by requiring that the United States Trade Representative provide members of Congress and their cleared staff (in the presence of the member), as well as appropriate committee staff, access to pertinent documents relating to trade negotiations, including draft texts and classified materials.[23] Access to text is still provided in a manner that is restricted through the use of confidentiality agreements and dedicated reading rooms.[24] The guidelines would also require the President to consult with congressional advisory groups (CAG), in both chambers, made up of members of Congress.[25]

Canada

3.30 The treaty-making process in Canada bears strong resemblance to the process in Australia. As in Australia, the executive branch of government has the power to negotiate, sign and ratify international conventions and treaties.[26] Parliament is responsible for implementation of the treaty through domestic legislation (if required).[27] While implementing legislation is usually passed by parliament, in 1988 the Senate refused to pass the proposed Canada–United States Free Trade Agreement Implementation Act, thereby triggering an election.[28]

3.31 While the executive is responsible for ratification of the treaty, parliament has long had some involvement in the process. In 2008, the federal government implemented a policy of ensuring treaty texts are tabled in the House of Commons 21 sitting days prior to the treaty coming into effect. The House of Commons can debate the treaty and pass a motion recommending the action to be taken; however, such a vote has no legal force and is a courtesy on the part of the executive.[29]

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22 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 4.

23 This information is sourced from a May 2015 Congressional Research Service Research Report, quoted by Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 2.

24 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 1.

25 Associate Professor Weatherall, Answer to Question on Notice, 27 May 2015, p. 4.

26 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 1.

27 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 3.

28 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 4.

29 Library of Parliament, *Canada's Approach to the Treaty-Making Process*, November 2012, p. 3.

New Zealand

3.32 New Zealand's treaty-making process also closely resembles that in Australia. As in Australia, entry into treaties is a power of the executive government, while the parliament has responsibility for implementing legislation. Under New Zealand's parliamentary treaty examination process, all multilateral treaties and major bilateral treaties of particular significance are presented to the House of Representatives before binding treaty action is taken. Once presented, the treaty stands referred to the House Foreign Affairs, Defence and Trade Committee, which may inquire into the treaty (or refer it to a more relevant committee). The government does not take binding treaty action until a committee report is handed down or 15 sitting days have elapsed (except in urgent cases), and if implementing legislation is necessary, binding treaty action will not be taken until the required legislation is passed.[30]

A strengthened role for parliament

3.33 A majority of submitters argued that parliament needs a strengthened role in the treaty-making process, though not all were convinced it was necessary to implement a system of parliamentary approval of treaties.

3.34 DFAT argued that reform of parliament's role in treaty-making was not required. DFAT's submission stated:

> DFAT respects the balance that has been secured in the treaty-making process between the respective roles of the Executive, which has formal responsibility under the Constitution for treaty-making, and the Parliament, which plays a significant role in relation to scrutiny and implementation of treaties.[31]

3.35 Mr Andrew Hudson from the Export Council of Australia agreed that the current system achieved a balance between the executive and parliament. He told the committee:

> We would think that there could be improvements to how society and industry can engage inside the confidential ring… but we think broadly, procedurally we have got a pretty good system.[32]

3.36 The perspective of DFAT and the Export Council of Australia was at odds with the majority of submitters that did not consider the respective roles of the executive and parliament to be well-balanced. Dr Patricia Ranald from the Australian Fair Trade and Investment Network (AFTINET) argued that parliamentary scrutiny of treaties needs strengthening as trade agreements now include detailed treatment of topics that would previously have been subject to government legislation. As she explained to the Committee:

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30 New Zealand Ministry of Foreign Affairs and Trade, *The Treaty making process in New Zealand*, updated 12 January 2015, http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php.

31 *Submission 74*. p. 1.

32 Mr Clark, *Committee Hansard*, 5 May 2015, p. 48.

> Our argument is that since trade agreements are now dealing with all these issues that would normally be decided through an open democratic process domestically involving public discussion and parliamentary legislation, then the trade agreement process needs to be a lot more open…there is a whole lot in the text that is very important that Parliament does not get to vote on.[33]

3.37 This point was also made by union representatives. As Ms Kearney, Australian Council of Trade Unions (ACTU), stated:

> We have seen over recent decades the significant expansion of trade agreements beyond reduction in tariffs or taxes on imports, and so the demand for a more open and democratic process for trade agreements has grown, because they are increasingly dealing with an expanding range of other regulatory issues which would normally be debated and legislated through the democratic parliamentary process and which have deep impacts on Australians' lives.[34]

3.38 Associate Professor Weatherall pointed out that it is not just that trade agreements are covering topics not previously included in international agreements, but also that the agreements themselves are highly prescriptive. She told the Committee:

> The nub of the issue now is that IP chapters look like legislation, and they are at that level of detail. Traditionally, power to make legislation and to specify domestic policy at that level of detail has lain with parliament. If we are going to make agreements at that sort of level we need the same sort of parliamentary input and public input that we would have into legislation, because that is the level we are talking about…[35]

> More generally it is about the change in the topics that the trade agreements are now covering. The focus has shifted from tariff setting to behind the border domestic regulation issues. Once you are really impacting in detail on all sorts of domestic regulation issues, then I think you need much more public and parliamentary input.[36]

3.39 Several submissions suggested that, in a number of key fora, transparency had decreased and this justified strengthening the role of parliament. As Ms Hepworth explained:

> Traditionally, copyright was decided in very open, transparent multilateral fora… 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.[37]

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

34 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 1.

35 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 8.

36 Associate Professor Weatherall, *Committee Hansard*, 4 May 2015, p. 9.

37 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

Parliamentary approval of treaties

3.40 As outlined above, there have been several attempts to legislate for parliamentary approval of treaties, none of which have been successful. However, support for parliament to have the power to approve or disapprove proposed treaty action remains firm in some parts of the community.

3.41 Many submissions captured a level of public discomfort with parliament's current role. As Ms Alanna Hardman explained:

> I have very real concerns that such treaties can become law without having to be put to the Parliament of Australia for debate and approval, prior to agreement. International trade treaties have ramifications for many Australian citizens (and citizens of foreign nations) and it is important for there to be public discussion on the merits or otherwise of aspects of trade treaties that may have the potential to conflict with our rights…[38]

3.42 Professor Lindell's submission supported adoption on a trial basis of a statutory system of parliamentary approval, as outlined in his dissenting report to the Advisory Committee on the Distribution of Powers in 1987.[39] A number of organisations also endorsed a system of parliamentary approval. Dr Ranald from AFTINET explained:

> We want more involvement by parliament. That means that we believe the parliament should vote on the whole text, not just the implementing legislation. We have consulted, and various constitutional experts have made submissions…They agree that there is no constitutional barrier to cabinet referring its ability to sign trade agreements to parliament so that parliament can vote on the whole agreement, and then having it go back to cabinet, if it is approved, for them to do the technical signing process.[40]

3.43 Mr Dettmer, ACTU, agreed that a system of parliamentary approval was necessary due to a 'democratic deficit' that exists in the current system, in which executive governments can enter treaties without the consent of parliament. He told the committee:

> What we now have…is, of course, a process of any number of issues, which really are the sovereign responsibility of the parliament, being the subject of treaties with foreign governments, which then somehow preclude the democratic process from having any oversight or involvement…[T]his democratic deficit is something which we believe is a signal failure on the part of successive governments…[41]

3.44 Dr Rimmer also favoured a system of parliamentary approval of treaties suggesting that trade agreements could be used to 'fast track' policy changes without parliamentary scrutiny:

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38 *Submission 11*, p. 1.

39 *Submission 1*, p. 1.

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

41 Mr Dettmer, *Committee Hansard*, 5 May 2015, p. 3.

> Both in Australia and elsewhere, like the United States, there is some concern that if you do not get your way through normal processes and if you stick something into a trade agreement, that might be a means to fast track something that might be otherwise politically unpalatable or unpalatable to the public.[42]

3.45 Submissions from Dr Rimmer, the ACTU and the National Tertiary Education Union (NTEU) referred to the views of constitutional experts Professor George Williams, Professor Hilary Charlesworth and Professor Ann Twomey, published in other contexts, to argue that a greater role for parliament is consistent with the Constitution. For example, according to the ACTU submission:

> Based on the historical development of treaty-making in Australia, Professor Twomey argues that it would be constitutional for the treaty-making power of the Executive to be limited by a provision of the approval of both Houses of Parliament.
>
> Professor Twomey notes that there are several examples in the Westminster system in which the decisions of the Executive on international agreements are subject to Parliamentary approval.[43]

Committee view

3.46 The committee was persuaded by evidence that the context of treaty making—particularly in relation to trade treaties—had changed dramatically in recent decades and that a review of parliament's role in treaty-making is necessary.

3.47 The committee acknowledges evidence from submitters in support of a process of parliamentary approval of treaties, including a mechanism similar to that which is used to disallow legislative instruments. Balancing the power of the executive to act unilaterally and decisively in the national interest with the need for democratic deliberation through parliamentary oversight is a recurring theme in the debate on this issue.

3.48 A question that the committee has attempted to resolve is: how far should parliament's role in treaty-making go, and should it be underpinned by legislation similar to the bills introduced by the Australian Democrats in the 1990s and by the Hon Bob Katter MP in 2012. While the committee believes it is necessary to strengthen the role of parliament, it is not convinced that a dramatic recasting of the respective roles of parliament and the executive is desirable or necessary at this point in time. None of the evidence before the committee made a compelling case for change of this nature.

3.49 The committee acknowledges the view of some legal experts referred to in evidence that limiting the power of the executive by making treaty action conditional upon approval of both houses of parliament may be consistent with the Constitution. However, the fact that underlying constitutional authority for such a course of action may exist is not, by itself, an argument for proceeding down the path of parliamentary

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42 Dr Rimmer, *Committee Hansard*, 5 May 2015, p. 60.

43 *Submission 36*, p. 12.

approval. This is not the only way for parliament to play a meaningful role in the treaty-making process.

3.50 Alternatives exist that are more achievable and reflect a practical balancing of executive authority and parliamentary oversight. In arriving at this view the committee notes that there have been previous attempts to introduce a system of parliamentary approval, none of which have gained significant political traction to date. The committee considers it unlikely that renewed efforts down this path would prove successful in the short to medium term. The remainder of this chapter outlines other proposals to strengthen parliament's role in the treaty-making process that were raised in evidence.

Parliamentary access to treaty text

3.51 A proposal raised by submitters to strengthen parliamentary oversight was that parliamentarians be given access to draft treaty text during negotiations, on a confidential basis. Currently, the level of access to draft treaty text varies between agreements. However, in the case of major trade agreements with confidential negotiations, the practice of successive governments appears to have been for access to texts to be restricted to cabinet ministers and public servants from the relevant departments.

3.52 A number of submitters were in favour of parliamentarians being able to access draft negotiating text or other information about the progress of negotiations before an agreement is signed by cabinet. The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) described allowing parliamentarians and other stakeholders access to negotiating texts as a 'bare minimum',[44] citing the US example and arguing that Australian parliamentarians should receive at least as much access to draft text as their foreign counterparts.[45]

3.53 Associate Professor Weatherall's submission stated:

> One of my concerns at present is that Australian members of Parliament and Australian stakeholders are at a distinct disadvantage compared to their counterparts overseas…In terms of members of Parliament, my understanding is that in both Europe and the US, at least some parliamentary representatives have access to detailed ongoing briefings into the progress of agreements. There seems to me to be little reason why JSCOT, or a subcommittee of JSCOT, could not have similar opportunities for ongoing review and discussion during important negotiations.[46]

3.54 At the committee's public hearing on 4 May 2015, AFTINET argued that it should be mandatory for the text of agreements to be released for public and parliamentary discussion before the decision to sign is made or recommended by cabinet. While it is difficult to establish a clear picture of how many of Australia's

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44 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

45 *Submission 78*, p. 15.

46 Associate Professor Weatherall, *Committee Hansard*, 5 May 2015, p. 6.

negotiating partners share draft treaty text with parliamentarians that are not members of cabinet, this practice at least occurs in the United States.

3.55 The committee understands that Australian parliamentarians were advised during a briefing by DFAT officials on 1 June 2015 that they would be given an opportunity to view the negotiating text of the TPP, subject to signing a confidentiality agreement preventing disclosure for up to four years after entry into force or, if no agreement enters into force, four years after the last round of negotiations. The confidentiality agreement required members of parliament and their staff not to divulge text or information obtained in the briefing, or to copy, transcribe or remove the negotiating text.

Committee view

3.56 The committee can see no good reason why parliamentarians and their advisers—at the very least, members of JSCOT—should not be able to access information on treaty-making, especially draft negotiating text, on a confidential basis throughout key stages of the treaty negotiation process. This would be consistent with contemporary developments in the US and the EU and with the secrecy provisions around the TPP negotiations.[47]

3.57 The fact that access was recently granted to parliamentarians to view the draft treaty text for the TPP is evidence that such a system is consistent with Australia's international obligations and can be administratively workable. This reform would improve treaty transparency and put Australian parliamentarians on a level playing field with their international counterparts.

3.58 Access could come in one of two ways. First, members of parliament and their staff could gain access during negotiations and sign a confidentiality agreement not to disclose draft text until negotiations are concluded and the final agreement is tabled in parliament, and therefore in the public domain. Second, access could be restricted to dedicated reading rooms for one or two days and at intervals following the conclusion of each major round of negotiations. Under this arrangement there would be no capacity to take notes or make copies of text.

3.59 The current system, under which parliamentarians may only see draft text after an agreement has been authorised for signature and it is too late for the agreement to be changed, does not allow for meaningful parliamentary scrutiny. The committee considers allowing parliamentarians access to draft negotiating texts—as was done recently for the TPP—to be a sensible reform that is overdue.

47 The committee's understanding is that the confidentiality agreement that Australia entered into for the TPP negotiations (detailed in Chapter 4) should not prevent parliamentarians from viewing draft text as (1) the agreement specifically mentions that 'government officials' are allowed to view draft texts; and (2) it has been the Obama administration's practice to allow members of Congress to see draft texts.

Recommendation 1

3.60 The committee recommends that parliamentarians and their principal advisers be granted access to draft treaty text upon request and under conditions of confidentiality throughout the period of treaty negotiations. The committee recommends that the government provides an access framework and supporting administrative arrangements.

3.61 The issue of access to the negotiating texts for stakeholders other than parliamentarians is explored in Chapter 4.

Parliamentary committees

3.62 As discussed in Chapter 2, after trade agreements have been authorised for signing by cabinet, the text is tabled in parliament for up to 20 sitting days and reviewed by JSCOT. Currently, there are three categories of treaties:

- Category 1 major treaties which JSCOT is required to report on within 20 joint sitting days;
- Category 2 treaties which JSCOT is required to report on within 15 joint sitting days; and
- Category 3 treaties which are considered to be minor treaty actions and which JSCOT generally approves without a full inquiry.

3.63 The following sections provide a brief overview of JSCOT and the Parliamentary Joint Committee on Human Rights and examine proposals to strengthen their respective roles in the treaty-making process.

Joint Standing Committee on Treaties

3.64 A central element of the government's 1996 reforms was the creation of JSCOT. A joint committee of the federal parliament, JSCOT reviews treaties during the tabling period and issues a report containing recommendations as to whether, and under what circumstances, a treaty should be ratified. JSCOT was appointed to inquire into and report on:

a. matters arising from treaties and related National Interest Analyses (NIAs) 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

iii. 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.[48]

3.65 JSCOT is seen as one of the key elements of parliament's scrutiny over treaties. Professor Gillian Triggs, Head of the Human Rights Commission, told the Committee: 'I think that the JSCOT national interest analysis process that emerged from the "Trick or Treaty" report has been extremely valuable.'[49] DFAT's Senior Legal Advisor advised the committee that JSCOT has issued reports addressing 134 different treaty actions:

> I wanted to highlight the diverse range of subject matters. It is interesting that three topics alone accounted for almost 40 per cent of those treaty actions. They were tax, civil aviation and the environment. There were 12 treaty actions concerning trade, which amounts to around nine per cent of total treaty actions. There were of course many other subject matters which were covered by JSCOT in that period, including treaties on defence, fisheries, human rights, development assistance, extradition, social security and arms control.[50]

Criticisms of current role

3.66 Three main criticisms of JSCOT's current role were raised in evidence: it comes too late in the treaty-making process; it rubber-stamps agreements already signed by the government; and it is not adequately resourced to undertake the scrutiny which is required for large and complex agreements. These are examined in more detail below.

3.67 The main criticism of the current process is that the review JSCOT conducts occurs after an agreement is signed, when it is generally not possible to reopen negotiations to adopt proposed changes. This, according to Dr Moir, while welcome for getting some issues into the public realm: '…makes a mockery of the role of parliament in a democracy…[w]hen JSCOT raises concerns, the government simply ignores them'.[51] This point was made by Ms McGrath, Australian Industry Group, who told the Committee:

> The current model of signing and then going to JSCOT does not really make any sense. There seems little value in reviewing it after it has been signed. On any issue that we do have, we are always told, 'It has been negotiated. We cannot open that again.' It really makes a mockery of the whole point of a review.[52]

3.68 Associate Professor Weatherall's experience supported this criticism:

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48 Parliament of Australia, *Joint Standing Committee on Treaties,* http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties

49 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 16.

50 Ms Cooper, *Committee Hansard*, 4 May 2015, p. 28.

51 *Submission 68*, p. 9.

52 Ms McGrath, *Committee Hansard*, 5 May 2015, p. 20.

> Under current processes the evidence I might have given on [KAFTA] comes too late. By the time JSCOT or this committee looked at the Korea FTA it could not be changed; it was take it or leave it.[53]

3.69 Dr Ranald from AFTINET agreed that this is a major problem, telling the committee: 'JSCOT is handicapped by the fact that it cannot actually change the text. The text has already been signed.'[54]

3.70 The Law Council submission drew attention to the fact that JSCOT's resolution of appointment provides the means to undertake reviews of treaties during the negotiation process and before they are concluded and signed by the government. Specifically, it authorises JSCOT to inquire and report on any questions relating to a treaty whether or not negotiated to completion or referred to it by a minister or either house of parliament. Notwithstanding this power, the submission stated:

> It is our understanding that there has never been an instance in which the Minister for Foreign Affairs has referred a treaty to the Committee during the negotiation stage to assist the Government in determining its position in relation to the treaty negotiation or its response to the position of other countries.[55]

3.71 Another criticism of JSCOT that emerged from the inquiry was the committee's tendency to recommend that the implementing legislation be passed.[56] As Dr Ranald told the committee:

> The main problem with the JSCOT process is that they only get to look at the agreement after it has been signed, and they cannot change it. JSCOT have frequently made assessments which are quite critical of trade agreements. So, in that sense, they have taken an independently critical position…
>
> Because JSCOT is a joint committee and the majority of members are government members, they usually recommend that the agreement go forward, that the legislation be passed through parliament.[57]

3.72 Dr Moir told the committee that even when JSCOT does issue recommendations, the government is not compelled to follow them. She told the Committee:

> My main interaction with JSCOT was on the Anti-Counterfeiting Trade Agreement. I thought JSCOT put forward an excellent report on that, which was very grounded in the evidence. I thought the government's response to that was grossly

53 Ms Weatherall, *Committee Hansard*, 4 May 2015, p. 8.

54 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 17.

55 *Submission 89*, p. 2.

56 The one exception is the committee's 2012 report on the Anti-Counterfeiting Trade Agreement which the committee recommended a delay in implementation following the agreement's rejection by the European Union.

57 Dr Ranald, *Committee Hansard*, 4 May 2015, p. 17.

> disrespectful of parliament. From that, I conclude that the JSCOT process simply has no effect, whatsoever.[58]

3.73 Several witnesses considered that JSCOT is too under-resourced to cope with an increasing number of large and complex agreements. Ms Kearney, President of the ACTU, explained: 'JSCOT can hardly scrutinise massive and complex documents with the diligence necessary in the time it has, and the committee is hard pressed by its large workloads.'[59] This view was echoed by AFTINET which argued:

> Because the JSCOT has the task of reviewing all treaties, it has a very heavy work schedule and has to review several treaties at the same time. This means that in many cases it receives very few submissions and holds only one hearing in Canberra. It can only justify holding public hearings outside Canberra if it receives many submissions and there is evident public interest in the agreement.
>
> The committee is therefore hard pressed to thoroughly analyse trade agreements, which are highly technical documents of 1000 to 2000 pages each.[60]

Strengthening the role of JSCOT

3.74 Evidence before the committee supported the view that JSCOT's oversight role could be significantly improved depending on the nature of the treaty and the required level of transparency. One suggestion was that the JSCOT process should mirror the Joint Parliamentary Committee on Intelligence and Security process where the government and opposition members of that committee are able to receive private briefings on a secure and confidential basis.

3.75 Another suggestion raised in evidence by the NTEU, AFTINET and the ACTU was that a subcommittee of JSCOT be created which would be dedicated to reviewing trade agreements with a second subcommittee examining all other non-trade agreements. The ACTU submission put the suggestion in the following terms:

> Given the complexity and the differences between trade agreements and other treaties…it would be more practical for the Joint Committee to have two sub committees, one dealing with trade agreements and the other dealing with all other treaties. The trade sub-committee would have more time and capacity to play a greater role in the parliamentary process.[61]

3.76 Other submitters argued that JSCOT should be involved earlier in the treaty-making process. Ms Hepworth from the ADA together with the ALCC suggested that JSCOT could play a role in reviewing and approving a government's negotiating mandate at the time Australia decides to enter negotiations, telling the committee: 'The negotiation mandate and conditions of negotiation should be approved by JSCOT prior to negotiations commencing…'[62]

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58 Dr Moir, *Committee Hansard*, 5 May 2015, pp 53-54.

59 Ms Kearney, *Committee Hansard*, 5 May 2015, p. 2.

60 AFTINET, *Submission 52*, p. 9.

61 *Submission 36*, p. 9.

62 Ms Hepworth, *Committee Hansard*, 4 May 2015, p. 2.

3.77 Other witnesses suggested that JSCOT could have some direct input into the treaty negotiation process. In fact, nothing in JSCOT's terms of reference prevents this from occurring, but in practice it has not occurred. Associate Professor Weatherall noted:

> I certainly think one option would be for JSCOT to have a more expanded role, including during negotiations…In theory, JSCOT could do it now but they do not.[63]

3.78 The Australian Human Rights Commission suggested that in the future JSCOT should play a role in relation to the coordination of Australia's obligation to provide a periodic report to the relevant United Nations treaty monitoring body. Currently the reporting process is delegated to three government departments consulting with relevant federal, state and territory bodies, civil organisations and other stakeholders. The Commission believed that there is scope to develop a more consolidated mechanism, in line with the UN's treaty body strengthening process, for the development of periodic reports to better meet human rights treaty obligations. An Australian standing national reporting and coordination mechanism, or SNCRM: '…might involve formalising an inter-departmental committee approach, with clear terms of reference of how it operates across all of Australia's human rights obligations, with a resources secretariat coordinated by one department'.[64]

3.79 The Commission told the committee that an Australian SNCRM that reported to JSCOT is preferable to current arrangements:

> It would certainly be a much more efficient way of coordinating and reporting and partly because, although…different departmental bodies are dealing with different treaties, the substantive Australian provisions in relation to them overlap. They are simply duplicated, and it becomes an extremely cumbersome process to do it the way we are doing it at the moment. We suggest that it does not have to be particularly complex in legal terms but could be simply the creation of the interdepartmental committee and perhaps some minor amendments…to the scrutiny committee provisions to engage them in the process.[65]

Parliamentary Joint Committee on Human Rights

3.80 The Parliamentary Joint Committee on Human Rights (PJCHR) was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* to perform an important scrutiny role in relation to bills and acts of parliament. Specifically, the committee has three core functions:

- examine bills and legislative instruments that come before parliament for compatibility with human rights and report to parliament on that issue;
- examine acts for compatibility with human rights and report to parliament on that issue; and

63 Ms Weatherall, *Committee Hansard*, 4 May 2015, p. 12.

64 *Submission 94*, p. 8.

65 Professor Triggs, *Committee Hansard*, 5 May 2015, p. 15.

- inquire into any matter relating to human rights which is referred to it by the Attorney-General and report to parliament on that matter.[66]

3.81 According to information published on its website, the committee considers the core human rights and freedoms contained in the seven human rights treaties to which Australia is a party.[67] In relation to how it approaches human rights scrutiny:

> The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.[68]

3.82 Under the parliament's current legislative process, any bill required to implement treaties must be accompanied by a statement of compatibility with human rights. The committee views the statements of compatibility as:

> …essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.[69]

3.83 The Australian Human Rights Commission submission noted that while there is significant scope for JSCOT to include a review of the human rights implications of treaties within their reports on their own initiative, currently it does not undertake inquiries of this nature. It was not considered the best option as it would involve drawing expertise from other committees or sources. The Commission was of the opinion that the most appropriate parliamentary committee for this purpose is the PJCHR:

> The PJCHR reports on bills and legislative instruments that are introduced to the parliament for compatibility with human rights. The PJCHR has the human rights expertise to properly consider the human rights implications of bills and other instruments. It would, subject to resources, be able to extend this expertise to

66 Parliament of Australia, *Role of the Committee*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Role_of_the_Committee

67 The seven treaties include International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Violence against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

68 Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility*, December 2014, p. 3.

69 Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility*, December 2014, p. 3.

> consider human rights implications of treaties prior to Parliamentary debate on ratification.[70]

3.84 The Australian Human Rights Commission submission argued that the PJCHR can play a constructive role at the 'primary stage' of the treaty-making process. Specifically, it recommended that a human rights analysis be incorporated into the NIA for category 1 and 2 treaties to promote joint committee consideration of the human rights implications of treaties prior to ratification.[71] President of the Commission, Professor Triggs, told the committee:

> The reason is that…that body has been operating now for the last three years. It has really been…increasingly effective in the sense that it has become more familiar with the treaty processes and the implications of the seven human rights treaties that they deal with. We feel that they have a growing competence, along with the support from their secretariat.[72]

Committee view

3.85 The committee considers it unfortunate that JSCOT's recommendations on changes to treaties are often not accepted as they are received too late in the process to negotiate changes to the treaty. To provide meaningful review, it is essential that JSCOT engage in treaty-making action early enough in the process for its recommendations to be taken into consideration by the government while negotiations are still ongoing.

3.86 As Associate Professor Weatherall pointed out, nothing in JSCOT's terms of reference prevents it from reporting on treaties during the negotiations phase.[73] The relevant question for the committee is how this would best work in practice. The committee's recommendation attempts to lay out workable arrangements for ongoing JSCOT oversight of the treaty-making process. While some take issue with JSCOT's advice not being public, the committee is of the view that this is unavoidable in the case of confidential negotiations. The recommendation should be seen as an effort to create a more meaningful role for JSCOT in holding the government accountable, in a manner that is as transparent as practical given the circumstances.

3.87 The committee was not convinced by the proposal to establish a sub-committee of JSCOT to deal exclusively with trade agreements. Establishing a sub-committee in the absence of additional resourcing would not in itself overcome the perceived issues with the current process, and may actually reduce flexibility and create duplication.

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70 *Submission 94*, p. 7.

71 *Submission 94*, p. 7.

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

73 Associate Professor Weatherall, *Committee Hansard,* 4 May 2015, p. 12.

Recommendation 2

3.88 The committee recommends that the Joint Standing Committee on Treaties adopt a process of ongoing oversight of trade agreements under negotiation. This process is to include:

- **private briefings from the Minister for Trade and Investment and the Department of Foreign Affairs and Trade under conditions of confidentiality at key points during negotiations;**
- **consultation with stakeholders with confidential access to negotiating texts, to enable JSCOT to form an evidence-base for its oversight work;**
- **writing to the minister and inviting the minister to respond to its concerns; and**
- **a summary of its ongoing oversight role, including relevant correspondence with the minister, as an annex to its public report on the agreement.**

3.89 The committee is also of the view that the Australian Human Rights Commission's recommendation with regard to the work of the PJCHR would be a sensible reform. As all bills are currently subject to human rights analysis, there seems little reason to not adopt a similar approach for treaties, especially as the mechanisms are already in place. This relatively new committee has an opportunity to play a greater role in the treaty-making review process and align its existing mandate to the scrutiny of proposed treaties against the backdrop of Australia's international human rights obligations.

Recommendation 3

3.90 The committee recommends that the Parliamentary Joint Committee on Human Rights consider the human rights implications of all proposed treaties prior to ratification and report its finding to parliament.