



Australian Government

Australian Government response to the
Joint Standing Committee on Treaties' report:

Report 128
Inquiry into the Treaties Ratification Bill 2012

March 2014

Recommendation 1: That 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.

The Government does not accept this recommendation.

The powers to negotiate and enter into treaties are executive powers within section 61 of the Australian Constitution. Accordingly, formal responsibility for treaty making and negotiation lies with the Executive. The Government nevertheless considers that the Parliament has a significant role in scrutinising treaties prior to binding treaty action being taken and in passing legislation to give effect to them where necessary. The Joint Standing Committee on Treaties (JSCOT) plays an important part in fulfilling Parliament's role in this respect. The Government remains of the view that its capacity to effectively pursue the national interest while allowing for appropriate public consultation is best met by current parliamentary and consultation processes.

The Government currently provides information about treaties under consideration or negotiation in a variety of ways. The nature and extent of public consultation is determined by the scope and importance of the proposed treaty and can include statements to the Parliament, press releases, information published on agency websites, calls for public submissions and face-to-face consultations with industry and civil society representatives. The purpose of such consultations is to inform the public about the Government's priorities and objectives and to afford an opportunity for comment. In addition, regular consultations are conducted with the States and Territories through the Standing Committee on Treaties.

Notwithstanding its commitment to stakeholder consultation, the Government is constrained in what it can disclose about prospective and ongoing treaty negotiations. Making detailed information about Australia's negotiating position publicly available prior to the commencement of negotiations would limit Australia's room for manoeuvre in the negotiations. Adopting the Committee's recommendation could circumscribe the capacity of Australia's negotiators to secure the best possible outcomes for Australia in the treaty negotiations.

Any statement of negotiating priorities and objectives made at the outset of treaty negotiations would be of limited value in assessing the eventual treaty outcomes. Negotiating priorities commonly develop over the course of negotiations, and eventual treaty outcomes reflect compromises acceptable to all Parties. While negotiators operate within defined parameters, it is generally not possible to predict accurately the full range of commitments which will be incorporated into the final agreement until negotiations are concluded. Similarly, any advance assessment of costs and benefits would necessarily be based on a range of assumptions which may or may not prove correct. The Government considers the current practice of tabling treaties after they are concluded enables the Parliament to make a more meaningful assessment of their impact on the national interest, based on the actual rights and obligations they contain.

Treaties do not become legally binding on Australia until the Government formally undertakes to perform the obligations set out in the treaty by taking binding treaty

action (ratification, acceptance, approval or other formal mechanism provided for in the treaty). Until binding treaty action is taken, Australia is only obliged to refrain from acts which would defeat the object and purpose of the treaty¹. Other than in exceptional circumstances, the Government does not take binding treaty action, or introduce legislation to give legal effect to treaty provisions in Australia, until after JSCOT has reviewed and reported on the treaty and its advice has been taken into account. Existing treaty tabling arrangements therefore afford ample opportunity for the Parliament to express its views on treaties well before a final decision is made on whether they become binding on Australia.

The Government notes Recommendation 1 does not state how the Parliament would conduct an assessment of proposed treaty negotiations. If it is intended that JSCOT enquire into and report on proposed treaty negotiations prior to their commencement, this could delay the start of negotiations and further impinge on the Government's negotiating flexibility. The Government further notes the recommendation does not make any allowance for urgent or sensitive treaties. Finally, adding another step to the treaty process would have resource implications for the responsible agencies, which the Government does not consider to be justified.

Recommendation 2: That the *Treaties Ratification Bill 2012* not be passed by the House of Representatives or the Senate.

The Government notes that this is a decision for the Parliament.

¹ *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969), Article 18