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THE TREATY MAKING PROCESS IN AUSTRALIA

A REPORT CARD ON RECENT REFORMS

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I. INTRODUCTION

In *Minister for Immigration and Ethnic Affairs v Teoh Ah Hin,*[1] the High Court of Australia held that the ratification of an international treaty[2] by the federal executive government created a legitimate expectation under domestic administrative law that the Executive and its agencies would act in conformity with that treaty. This decision fuelled debate on Australia's current system for entering into treaties, with considerable discussion on whether the Australian Parliament should play a greater role in the treaty making process.

The executive is given the power to enter into treaties under section 61 of the Australian Constitution. Criticisms of the present system focus primarily on the perceived lack of public or parliamentary scrutiny of international instruments that the Executive signed and ratified. Interest in treaties reached a peak when the Senate Legal and Constitutional References Committee (Senate Committee) conducted a review of the treaty making power after receiving a reference in December 1994. The ensuing Report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995 Report),[3] was tabled in November 1995 and contained a number of recommendations. In 1996, the Australian government set about implementing some of these recommendations.

On 2 May 1996, the Minister for Foreign Affairs, Alexander Downer, announced changes to the treaty making process that "will provide proper and effective procedures enabling the Parliament to scrutinise

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[1] (1995) 183 Commonwealth Law Reports 273.

[2] In this article, the term 'treaty' is used in a broad sense to mean any kind of international agreement.

[3] 1995, Senate, Canberra.

intended treaty action".[4] He emphasised that treaties, the fundamental instruments of international law, would have an increasing influence on Australia's domestic system and laws since issues such as trade, the environment and human rights needed to be handled effectively through international agreements.[5]

Since the reforms that ensued are significant, this article will discuss them at length with particular focus on the Parliament's enhanced role in the treaty making process. Also, comments will be made on the Parliament's power to regulate the executive's exercise of the treaty making power. As background to the instituted reforms, the history of the Australian treaty making process will be outlined before discussing suggestions for reform.

II. CONSTITUTIONAL POWER TO ENTER INTO TREATIES

Section 61 of the Constitution vests the Executive power of the Commonwealth in the Crown and provides that the power is exercisable by the Governor-General as the Crown's representative. This power is expressed to extend "to the execution and maintenance of this Constitution, and of the laws of the Commonwealth", but the section does not specifically refer to treaties.

The negotiation and conclusion of treaties fall within the common law prerogative powers of the Crown that were previously exercised by the sovereign exclusively on the advice of British ministers. When Australia became an independent State the same powers in relation to the conduct of Australia's foreign relations came to be exercisable by the Governor-General on the advice of Commonwealth ministers[6] under section 61 of the Constitution, generally speaking. In *Victoria v Commonwealth,*[7] the High Court endorsed the following proposition:[8]

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[4] Commonwealth, Hansard, House of Representatives, 2 May 1996 at 231.
[5] Ibid.
[6] See Zines, "The growth of Australian nationhood and its effect on the powers of the Commonwealth" in Zines L (editor), Commentaries on the Australian Constitution (1977, Butterworths, Sydney) 1.
[7] (1996) 187 Commonwealth Law Reports 416.
[8] Ibid 478 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, quoting Latham CJ in R v Burgess; ex parte Henry (1936) 44 Commonwealth Law Reports 608, 644.

> The execution and maintenance of the Constitution [under section 61] involves...the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane.

Currently, the Executive makes the decision to enter into treaties and the Executive Council gives the formal act of approval. The Executive Council decision must be based on the following: Cabinet approval or assurances that the matters fall within the scope of existing policy; agreement by all relevant Ministers; and the Prime Minister has at least been informed of the action.[9] Once Executive Council approval is obtained, either the Prime Minister or the Minister for Foreign Affairs has inherent authority to sign treaties. Other Ministers or officers may sign but they require full powers to be issued in advance, signed by the Minister for Foreign Affairs.[10] Under the existing legal framework, executive action on treaty making is free from formal legislative control or scrutiny. However, this has not prevented questions from being asked about whether the current arrangements should be changed to give the Parliament a greater role in the making and ratification of international treaties.

III. PRIOR TREATY PRACTICES AND THE NEED FOR REFORM

In the past, the Parliament's role in the treaty making process was, generally speaking, limited. In the Westminster Parliament, treaties are currently tabled according to the 'Ponsonby Rule'. In 1924, Arthur Ponsonby introduced this rule when he was British Under-Secretary of State for Foreign Affairs.[11] The rule obliges the British government to let treaties lie on the table of the Parliament for 21 days after signature and before ratification and to submit important treaties to the House of Commons for discussion. Its application is limited to treaties that place 'continuing obligations' on the United Kingdom where a further formal act to signify commitment is required after signature and the matter is not one of 'urgency'. In 1990-1991, the Select Committee on the

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[9] Department of Foreign Affairs and Trade, The Negotiation, Conclusion and Implementation of International Treaties and Arrangements (1994, Department of Foreign Affairs and Trade, Canberra) 14.

[10] Ibid 11.

[11] United Kingdom, Hansard, House of Commons, 1 April 1924 at 2001.

European Communities of the House of Lords estimated that about 25% of United Kingdom treaties were subject to this rule.[12]

Previously, Australian parliamentary practice closely mirrored that of the United Kingdom. In 1961, Prime Minister Robert Menzies introduced a modified form of the Ponsonby Rule in Australia stating that treaties signed by Australia, including those that the government was contemplating acceding to, would be tabled in both houses of Parliament. He added that, in general, the government would not proceed to ratification or accession unless the treaty had lain on the table for at least twelve sitting days.[13] The rule applied to all treaties that would not otherwise come before the House, namely, those to be implemented by legislation.

This rule was gradually eroded in practice. While in the 1960s and early 1970s treaties were tabled individually or in small groups to comply with this commitment, by the late 1970s treaties began to be tabled in bulk after periods of about six months. Treaties were often tabled after they had been ratified or had otherwise come into force, instead of being tabled twelve sitting days before this took place thereby foreclosing any parliamentary participation in the treaty making process. As Anne Twomey pointed out:[14]

> [O]n 30 November 1994, out of the 11 bilateral treaties tabled, 7 had already come into force. On the same date, out of the 25 multilateral treaties tabled, 16 had already been ratified or acceded to, and only 9 required further action before coming into effect. Accordingly, in the case of approximately two-thirds of the treaties tabled, Australia was already obliged by international law to comply with them before they were tabled, denying any meaningful kind of parliamentary scrutiny.

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[12] Saunders, "Articles of faith or lucky breaks? The constitutional law of international agreements in Australia" (1995) 17 Sydney Law Review 150, 170.

[13] Commonwealth, Hansard, House of Representatives, 10 May 1961 at 1693.

[14] Twomey A, Procedure and Practice of Entering and Implementing International Treaties, Parliamentary Research Service Background Paper No 27 (1995, Department of the Parliamentary Library, Canberra) 8.

The Australian practice of tabling treaties in batches was the subject of recent criticism in the Westminster Parliament where the British Minister for Overseas Development, Baroness Chalker of Wallasey, compared it unfavourably with the Ponsonby Rule.[15] Another problem with the procedure of tabling large numbers of treaties every six months was the lack of time for any detailed parliamentary scrutiny.

In Australia, treaties were tabled in the House of Representatives under the deemed tabling provision of Standing Order 319 that allowed papers to be:

> delivered to the Clerk who shall cause them to be recorded in the *Votes and Proceedings*. Papers so delivered to the Clerk shall be deemed to have been presented to the House on the day on which they were recorded in the Votes and Proceedings.

This deemed tabling procedure operated such that there was no provision for parliamentary debate on the tabling of treaties.[16] In the Senate where treaties were actually tabled, the time allocated for their debate was often as little as half an hour for over a hundred treaties.[17]

In October 1994, the government introduced further initiatives to improve the flow of information on treaties to the Parliament. In a joint press release, the Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, referred to the practice of tabling treaties twice yearly together with an explanatory memoranda. They stated:[18]

> The Government will supplement this information flow by now tabling, wherever possible, all treaties, other than sensitive bilateral

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[15] United Kingdom, Hansard, House of Lords, 28 February 1996 at 1560-1561.

[16] Commonwealth, Hansard, House of Representatives, 23 October 1995 at 2696. Procedures have since been amended so that treaties are now directly tabled in the House of Representatives.

[17] Twomey, "International law and the executive" in Opeskin B and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 69, 88.

[18] Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney General, Michael Lavarch, "Government slams opposition hypocrisy on treaties", 21 October 1994.

> ones, before action is taken to adhere to them. We will also take steps to increase the possibility of participation by Members of Parliament on various treaty negotiating delegations. And we will be happy to offer full briefings on treaties under consideration or negotiation to any Member or Senator who asks for them.

This statement was significant because it was the first time the government acknowledged that it had ceased to comply with the Menzies rule of 1961 and, instead, tabled treaties after Australia had adhered to them rather than before ratification. Subsequently, in a Senate Estimates Committee hearing, Senator Evans declined to re-commit the government to the rule of tabling treaties at least 12 sitting days before ratification. He stated:[19]

> I am not proposing to make a commitment that the government will wait for any specified period of time following the tabling... [T]abling treaties is not intended to be an exercise in ascertaining Parliament's views about whether or not Australia should become a party.

Thus, tabling was presumably intended to merely inform Parliament and the general public of action already taken, which was inconsistent with principles of executive accountability and democratic government.

More recently, the Department of Foreign Affairs and Trade committed itself to tabling lists of multilateral treaties that the government was negotiating or considering for adherence.[20] The Department also agreed to table treaties outside the normal six-month batches where there was significant interest in the treaty except in cases of urgency.[21] Even with these rules, the previous procedures remained a fairly weak fetter on executive power and attempts at parliamentary supervision of the Executive remained subject to familiar limitations, such as the effect of strict party discipline and the absence of sufficient support staff.[22]

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[19] Commonwealth, Hansard, Senate Estimates Committee, Department of Foreign Affairs and Trade, 29 November 1994 at 158.

[20] 1995 Report 97.

[21] Commonwealth, Hansard, Senate Legal and Constitutional References Committee, 14 June 1995 at 691 per Mr C Lamb (Legal Adviser to the Department).

[22] Saunders C, International Treaties and the Constitution, Paper presented to the

Under these practices, while it was open to the Senate to refer a treaty to a committee, this was rarely done. Subsequent reforms to the treaty making process led to new tabling procedures for treaties and the establishment of a Joint Standing Committee on Treaties (Joint Standing Committee). These reforms are discussed in Part V below.

It had been argued that one explanation for the minimal role of the Parliament could be found in the legal status of treaties in Australian domestic law and in the view that:[23]

> Parliament will normally have the opportunity to debate a treaty prior to action to become a party (since the usual practice is to pass legislation before agreeing to a treaty).

However, in specific instances, legislation was unnecessary if existing practices or legislation were sufficient to meet the obligations imposed by the treaty or where the obligations were imposed solely on the government, in which case the obligations could be met by executive practice.[24] If legislation was deemed necessary, Australia's 'official' policy was not to ratify the treaty nor accept its obligations until the appropriate legislation was in place. The Department of Foreign Affairs and Trade stated:[25]

> The Minister for Foreign Affairs cannot recommend to the Executive Council that Australia become party to a treaty where the Federal or State legal position would be at variance with obligations to be assumed under the proposed treaty when it enters into force for Australia. Any legislation required to meet its treaty

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Australian Bar Association Conference, Noosa, Queensland, July 1994 at 10.

[23] Department of Foreign Affairs and Trade, Australia and International Treaty Making Information Kit (1994, Department of Foreign Affairs and Trade, Canberra) 8.

[24] Attorney-General's Department, "Submission to the Inquiry by the Senate Reference Committee on Legal and Constitutional Affairs into the External Affairs Power" in Submissions to the Senate Legal and Constitutional References Committee: External Affairs Power, Section 51(xxix) of the Constitution (1995, Senate Legal and Constitutional References Committee, Canberra) (Senate Committee Submissions) Volume 4 at 681, 699.

[25] Department of Foreign Affairs and Trade, The Negotiation, Conclusion and Implementation of International Treaties and Arrangements (1994, Department of Foreign Affairs and Trade, Canberra) para 56.

> obligations must be in place by the time Australia consents to be bound by the treaty. This means that any new legislation must be passed before that time – the assumption cannot be made that Parliament, Federal or State, will necessarily pass implementing legislation after that consent is given.

However, in spite of the official policy requiring all necessary legislation to be in place before a treaty was ratified, fairly recently, there were examples where treaties were entered into while Australia's domestic laws remained in conflict with the treaty's requirements. One example was the 1982 International Labour Organisation Convention No 158 on the termination of employment.[26]

The necessity to limit the Parliament's role was not apparent. In the past, legislation was passed to approve the ratification of treaties. According to Anne Twomey, 55 cases of parliamentary approval were sought before ratification took place between 1919 (when Australia became active internationally) and 1963 (after the tabling procedure was introduced).[27] A common method used to gain parliamentary approval was for the Parliament to pass a Bill that not only changed the law to conform to the treaty but also included an express provision approving the treaty's ratification. For example, section 7 of the 1975 Racial Discrimination Act (Cth) provided the approval for Australia to ratify the 1966 Convention on the Elimination of All Forms of Racial Discrimination. In cases where the Parliament refused to pass the legislation, the treaty was not ratified.[28] However, this practice of

[26] The Commonwealth executive ratified this treaty in February 1993 shortly before the 1993 general election and at a time when the law in a number of States did not comply with the treaty's provisions. Thus, the treaty's implementation in Australia was largely dependent on the outcome of the election and the requisite legislation was not enacted until after the election.

[27] Twomey A, Procedure and Practice of Entering and Implementing International Treaties, Parliamentary Research Service Background Paper No 27 (1995, Department of the Parliamentary Library, Canberra) 7 citing Campbell, "Australian treaty practice and procedure" in Ryan K (editor), International Law in Australia (1984, 2nd edition, Law Book Company, Sydney) 53, 54.

[28] For example, see the Parliament's failure to pass the 1973 Human Rights Bill (Cth) that was intended to implement the 1966 International Covenant on Civil and Political Rights prior to its ratification. Clause 6 of the Bill provided: "Approval is given to ratification by Australia of the International Covenant on Civil and Political Rights and the Convention on the Political Rights of Women." The failure of the Bill to pass

seeking parliamentary approval for the signing and ratification of significant or controversial treaties seemed to have fallen into disuse.

Despite the apparent lack of parliamentary involvement in the decision to enter into treaties, the Westminster Parliament may limit the executive's power to enter into treaties. For example, section 6 of the 1978 European Parliamentary Elections Act (UK) precludes the ratification of a treaty that increases the European Parliament's powers unless "approved by an Act of Parliament".[29]

IV. PROPOSALS FOR REFORM

Over time, it became increasingly common to hear calls for greater parliamentary involvement in decisions to undertake international obligations in Australia.[30] This indicated a growing concern that the treaty making system did not involve adequate public consultation and the system was not sufficiently accountable. Australia was not alone in these concerns. For example, the New Zealand Law Commission released an issues paper on treaty making and implementation that raised the possibility of legislative consultation.[31]

On 23 August 1983, Senator Brian Harradine gave a notice of motion in Australia's Senate to establish a Standing Committee on Treaties to scrutinise and report on treaties tabled in that House.[32] The motion was not moved although it was re-introduced every session since 1983. In 1987, Geoffrey Lindell (Member of the Distribution of Powers Advisory Committee to the Constitutional Commission) proposed a statutory requirement that Australia ratified treaties subject to one of

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through the Parliament meant that the Executive did not ratify the Covenant at that time. However, the Fraser government ratified it subsequently in 1980.

[29] See also 1993 European Communities (Amendment) Act (UK) section 2.

[30] See generally Downing S, Treaty making Options For Australia, Parliamentary Research Service Current Issues Brief No 17 (1996, Department of the Parliamentary Library, Canberra) 4-11.

[31] New Zealand Law Commission, The Making and Implementation of Treaties: Three Issues for Consideration (1993, Law Commission, Wellington). See also Second Reading Debate on the 1996 Treaties (Parliamentary Approval) Bill (UK), United Kingdom, Parliamentary Debates, House of Lords, 28 February 1996 at 1530-1564.

[32] Commonwealth, Hansard, Senate, 23 August 1983 at 8.

two conditions. They were (1) the approval of both houses of Parliament or (2) the non-disallowance by either House within a specified period.[33] The majority in both the Constitutional Commission and the Distribution of Powers Committee disagreed with Mr Lindell's proposal. Although Professor Leslie Zines and Sir Rupert Hamer (minority Members of the Consitutional Commission) supported Mr Lindell's proposal,[34] the majority of the Commission stated:[35]

> A requirement that Parliament or its Houses consent to the ratification of all treaties would therefore often give non-government supporters in the Senate the power to override executive policy supported by the Government and the House of Representatives.

Industry groups recently called for greater parliamentary involvement by requiring treaties to be tabled before signature and subjecting them to the scrutiny of parliamentary committees.[36] There were also calls for the Senate to take a hand in the ratification process[37] including calls for reform to the entire treaty-making process from individual Senators. [38]

In 1994, the Australian Democrats introduced a Bill on Parliamentary Approval of Treaties into the Senate. In 1995, this Bill was re-

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[33] Advisory Committee on the Distribution of Powers, Report (1987, Canberra Publishing and Printing Co, Canberra) 234.

[34] Ibid 745-746, 749.

[35] Constitutional Commission, Final Report, Volume 2 (1988, Australian Government Publishing Service, Canberra) 745.

[36] Reforms to Australia's Treaty Making Process Proposed by Australian Industry, A Proper Role for Parliament, Industry and the Community in Australian Treaty Making, 13 January 1994, reprinted in "Australia's treaty making processes: Industry's reform proposals" (1994) 109 Business Council Bulletin 6. The relevant groups were the National Farmers' Federation, Australian Mining Council, Council for International Business Affairs, Metal Trades Industry Association, Australian Chamber of Commerce and Industry, Business Council of Australia, Environment Management Industry Association, and National Association of Forest Industries.

[37] For example, McGuinness, "Parliament left behind in embrace of international treaties", The Australian, 18 May 1994.

[38] For example, Senator Kemp advocated increasing the Parliament's role when approving multilateral treaties: see Senator Kemp, Submission to the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, January 1994.

introduced in a revised form[39] but lapsed when the 1996 federal election was called. The Bill covered both bilateral and multilateral treaties since it was specified to apply to "any agreement or proposed agreement in writing between two or more countries" under clause 3. Clause 4 provided:

> Action by which a treaty would enter into force in respect of Australia must not be taken before the treaty is approved in accordance with this Act.

Under clause 5(2), the Minister was obliged to publish a declaration in the *Gazette* whenever it was proposed that Australia should enter into a treaty. The treaty had to be tabled in both houses of Parliament within 15 sitting days of gazettal. The members of each House had this period to give a notice of motion requesting the House to consider the treaty. If there was such a notice the Executive had no power to give effect to the treaty until approved by that House. On the other hand, if there was no notice the treaty was deemed approved under Clause 6. Under Clause 9, the Bill made provision for the approval of reservations to treaties.

The Bill also required the tabling of a treaty impact statement. Clause 5(3) specified the matters to be addressed in the statement as follows:

1. the reasons for Australia becoming a party to the treaty;
2. any advantages and disadvantages for Australia if the treaty entered into force;
3. the obligations imposed on Australia by the treaty;
4. any economic, social and environmental effects if the treaty entered or did not enter into force in respect of Australia,
5. including the cost of compliance with the treaty;
6. the likely effects of any subsequent protocols to the treaty;
7. the measures that could or should be adopted to implement the treaty; and
8. the government's intentions in relation to such measures, including the requisite legislation.

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[39] 1995 Parliamentary Approval of Treaties Bill (Cth). See generally Bourne, "The implications of requiring parliamentary approval of treaties" in Alston P and anor (editors), Treaty Making and Australia: Globalisation versus Sovereignty (1995, Federation Press, Sydney) 196.

In the Australian Senate in 1994, Grant Chapman (Liberal Senator from South Australia) introduced the International Obligations (Senate Approval) Bill. The Bill, never debated, had the following objectives:

1. adoption of a cooperative national approach to external affairs by the Commonwealth and the States acting through the Senate;
2. definition of the Commonwealth's role in external affairs;
3. subjection of the Commonwealth executive to the principles and mechanisms of accountability and transparency when exercising external affairs powers; and
4. prevention of disputes between the Commonwealth and States over external affairs to the greatest practicable extent.

In the same parliamentary chamber in December 1994, Senator Dee Margetts moved unsuccessfully to amend the 1994 Sales Tax (World Trade Organization Amendments) Bill to prevent the Bill from entering into force until another Act was passed that provided the following:

> [T]hat persons representing the Commonwealth in or before the World Trade Organisation may not enter into any agreement or arrangement which has or may have the object or effect of altering or overriding any law of the Commonwealth, unless that object or effect...has been approved by a resolution of each House of the Parliament.

Although the proposals were unsuccessful they demonstrated the cross-party consistency of concerns over treaty making and a common theme that problems were resolvable with greater parliamentary involvement in the processes. On 30 October 1994, Alexander Downer (then Federal Opposition Leader) announced the Coalition Parties' proposals to establish a Joint House Treaties Committee when in government.[40]

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[40] Downer A, Address to the Fourth Federal Council of the Liberal Party, Albury, 30 October 1994 at 12-13. See also Williams, "Establishing an Australian Parliamentary Treaties Committee" (1995) 6 Public Law Review 275; Williams, "Australia's treaty making processes: The Coalition's reform proposals" in Alston P and anor (editors), Treaty Making and Australia: Globalisation versus Sovereignty (1995, Federation Press, Sydney) 185.

As stated above, in December 1994, the issue of the treaty making power was referred to the Senate Committee for inquiry and report. This Committee tabled the 1995 Report in November 1995 and made eleven recommendations to improve: (1) access to information on treaties; (2) consultation with non-government organisations and the States; and (3) parliamentary scrutiny of treaties.[41] Ultimately, the Committee recommended that a joint parliamentary committee be established to scrutinise treaties instead of parliamentary involvement in ratification. In May 1996, the Australian government made administrative and political judgments on the various recommendations and options presented.

V. THE 1996 REFORMS

On 2 May 1996, the newly elected coalition government tabled its response to the 1995 Report.[42] While accepting many of the Report's recommendations, it watered down the Report's impact by declining to enact the proposals in legislation and rejecting the recommendations that would use significant government resources. Irrespective, three major reforms in parliamentary treaty practice eventuated.[43]

First, treaties were to be tabled in both houses of Parliament at least 15 sitting days before the government takes definitive treaty action. Secondly, a National Interest Analysis (NIA) was to be included with every treaty tabled in the Parliament and made available to the State and Territory governments and the public. Thirdly, the Joint Standing Committee was established. As stated by Alexander Downer, the reforms were meant to overcome the "democratic deficit in the way treaty making ha[d] been carried out in the past"[44] and the Joint

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[41] 1995 Report 300-304. See generally Twomey, "Treaty making and implementation in Australia" (1996) 7 Public Law Review 4.

[42] Government Response to the 1995 Report tabled in the Senate on 2 May 1996 (Government Response). See generally Williams, "Treaties and the parliamentary process" (1996) 7 Public Law Review 199.

[43] The reforms were reviewed in 1999: see Department of Foreign Affairs and Trade, Review of the Treaty making Process (1999, Department of Foreign Affairs and Trade, Canberra). For a more detailed discussion see Part VI(a) below.

[44] Commonwealth, Hansard, House of Representatives, 2 May 1996 at 231. On "democratic deficit" see Stephen, "The expansion of international law – Sovereignty and external affairs" (1995) 39:1-2 Quadrant 20, 22.

Standing Committee was to provide the means for greater community involvement in the treaty making process.[45]

(a) Tabling of Treaties

The Senate Committee recommended that the system of tabling treaties became formalised in legislation and all treaties be tabled in both houses of Parliament at least 15 sitting days before the treaties were entered into.[46] Although this period seemed short, the 15 sitting day requirement translated into 30-100 calendar days depending on parliamentary sitting patterns. Although the government accepted the recommendation, it stated that administrative procedures and not legislative enactment would implement the recommendation.[47]

The Committee strongly recommended legislating to prevent the gradual neglect or abandonment of commitments made by previous governments to implement such administrative procedures. For example, legislation that buttressed the recommended tabling commitment would prevent it from meeting the same fate as the others before it as they moved from being a rule, to a general practice, to a practice more honoured in the breach.[48] Since a formal amendment would have to be proposed and justified in order to change the system the Committee felt that this would prevent the problem recurring.

The practice on bilateral treaties had to change as well. According to past practice, several bilateral treaties entered into force upon signature. This was due to the negotiation and content of bilateral treaties, such as trade treaties, being widely regarded as confidential processes until signature, thus making it impossible or impractical to table the treaties in the Parliament without breaching this confidentiality. As a result, Australian practice on bilateral agreements has moved to a two-stage

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[45] Joint Statement by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams, "Government announces reform of treaty making", 2 May 1996 at 2.

[46] 1995 Report 266.

[47] Government Response 14.

[48] Twomey, "International law and the executive" in Opeskin B and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 69, 94.

process: the signing is followed by an exchange of notes signifying that the constitutional processes of the parties are complete. In between these two stages, the treaty is tabled in the Parliament. Similarly, if the government intends to terminate or denounce a treaty, or accept amendments or create new reservations to an existing treaty, the proposals have to be tabled at least 15 sitting days before any binding action is taken.

The government may reserve the right to make special arrangements if a treaty is sensitive or requires urgent and immediate implementation. The Senate Committee acknowledged the need for this exception. The rationale is that tabling for a 15-sitting day period may cause significant problems in emergency situations. An oft-cited example of an urgent treaty is the 1994 Bougainville Peace Keeping Treaty that as a matter of necessity was negotiated and entered into force within days. Another example of an urgent treaty tabled under the new procedures is the 1996 Subsidiary Agreement with Japan on Tuna Long-Line Fishing.[49]

(b) Joint Standing Committee on Treaties

To strengthen parliamentary involvement in the treaty making process, the Senate Committee recommended the establishment of a joint House parliamentary committee on treaties. This Committee is to be given broad powers to scrutinise existing treaties and treaties that Australia contemplates entering into. Concerning the latter, the Committee is to consider whether reservations or declarations are to be made upon ratification. Further, the Committee has to inquire into how the treaties are to be implemented and how they are to be dealt with in the future.[50]

The reforms were implemented in part by the establishment of the Joint Standing Committee on 30 May 1996 that held its first meeting on 17 June 1996. The 16 Committee Members are from all political parties and represented in both houses of Parliament. The Committee's terms of reference allow it to inquire into and report upon the following:[51]

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[49] See Joint Standing Committee on Treaties, Two International Agreements on Tuna, Third Report (1996, Australian Government Publishing Service, Canberra).
[50] 1995 Report 267.
[51] House of Representatives, Votes and Proceedings, 30 May 1996 at 235.

(a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
(b) questions relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the Committee by:
    (i) either House of Parliament; or
    (ii) a Minister; and
(c) such other matters as referred to the Committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

In the period May 1996 to March 2001, the Committee presented 37 reports covering more than 190 treaty actions.

The Committee has taken a broad view of its mandate, particularly that found in paragraph (a) above. The Committee has taken the view that it is authorised to institute inquiries into past and future treaty actions of its own accord. As a result, it has inquired into prospective treaty actions such as the proposed Multilateral Agreement on Investment[52] and past treaty actions to which Australia has already bound itself such as the 1989 Convention on the Rights of the Child.[53]

Although the 1995 Report recommended that the Joint Committee be given the power to inquire into treaties that Australia had previously ratified, there was no specific mention of this power in the Committee's powers of appointment. This has resulted in at least an argument that the Committee was intended only to have a prospective power. To date, this interpretation by the Committee of its own power has not been formally challenged. Thus, this issue is one of interest only in so far as the interpretation may lessen in importance the necessity for references

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[52] Joint Standing Committee on Treaties, Multilateral Agreement on Investment: Interim Report, Fourteenth Report (1998, Australian Government Publishing Service, Canberra); Joint Standing Committee on Treaties, Multilateral Agreement on Investment: Final Report, Eighteenth Report (1999, Australian Government Publishing Service, Canberra).

[53] Joint Standing Committee on Treaties, United Nations Convention on the Rights of the Child, Seventeenth Report (1998, Australian Government Publishing Service, Canberra).

of matters by the Parliament, the Minister for Foreign Affairs or other Ministers.[54]

It was not envisaged that the Committee would examine every treaty in detail. Indeed, the Committee confirmed this in its First Report:[55]

> Some treaties or 'Executive Agreements', such as extradition agreements or double taxation agreements, will not warrant separate scrutiny on each occasion. Nonetheless the Committee reserves the right to examine the operation of such arrangements in general terms, should it so desire.

From the Committee's practice to date, it appears that the Committee will scrutinise such 'template' agreements upon the first example coming before it and this could not be the subject of separate comment.

On the procedure that seems to have been adopted, the Joint Standing Committee on Treaties has found that the most effective way to deal with a group of treaties is to hold a public hearing to work through the series as soon as practicable after the tabling of the treaties. Decisions are then made on whether to hold a separate inquiry into a particular treaty. If not, the public record material is used to write a report that is tabled as soon as practicable and with the 15-day rule always foremost in mind. If a separate inquiry is initiated public hearings are scheduled and advertised in national and regional media outlets.[56]

The public hearings enable government departments, individuals and interested organisations to put their positions before the Committee, and more importantly, enable the Committee Members to question the witnesses. A recent example of this scrutiny process was seen in the defence treaty on the stationing of a Singapore helicopter squadron at the Army Aviation Centre in Oakey. The public hearing conducted in

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[54] Devereux, "Treaties process – one year in operation" (1997) 5 Proceedings of the Australian and New Zealand Society of International Law 209, 214.

[55] Joint Standing Committee on Treaties, First Report (1996, Australian Government Publishing Service, Canberra) 4.

[56] See Taylor W, Trick or Treaty – An Australian Perspective, Speech presented to the Internationalizing Communities Conference, University of Southern Queensland, 28 November 1996 at 9.

Toowoomba raised a number of community concerns on issues such as housing and the provision of essential services. Consequently, the Committee recommended that these issues be resolved.[57]

The 15-sitting day criterion places limitations on the amount of consideration that may be given to the large number of treaties that may be tabled in batches during the parliamentary year. In most cases, the Committee is able to report on the treaties before the expiry of this period for parliamentary consideration. However, the Committee in its First Report has acknowledged that sometimes the inquiries may take longer.[58] The government responded by stating that as far as practicable the Executive would delay a treaty's ratification until the Committee has had a chance to consider the issues.[59]

Once the Committee reports were tabled, the government gave an undertaking that it would respond to the findings in due course. However, the Committee seemed concerned by the timeliness of the government's responses to its reports. For example, in its Ninth Report of August 1997, the Committee stated that "it [wa]s a matter of concern that the Government's response [to the Third Report] ha[d] not yet been tabled".[60] However, this may cause some difficulties particularly in cases where the Committee is called to consider the same topic or decide on whether to reiterate earlier comments.

There is no doubt that the active manner in which the Committee has operated in the short time since its inception has enhanced substantially the role of the Parliament in the treaty making process. The issue on which it has expressed most concern is consultation. In announcing the new treaty making process, the Minister for Foreign Affairs stated that consultation would be the 'key word' and that the reforms would

[57] Joint Standing Committee on Treaties, The Oakey Agreement: Australia and Singapore, Sixth Report (1997, Australian Government Publishing Service, Canberra) 16-19, 25. See also Evans C, "Policy development, scrutiny and the treaty making process", Research and Analysis, June 1997.

[58] Joint Standing Committee on Treaties, First Report (1996, Australian Government Publishing Service, Canberra) 4.

[59] See the Government's Response to the First Report: Commonwealth, Hansard, Senate, 14 May 1997 at 3149.

[60] Joint Standing Committee on Treaties, Amendments to the Bonn Convention, Ninth Report (1997, Australian Government Publishing Service, Canberra) 4.

"ensure that every Australian individual and interest group with a concern about treaties issues has the opportunity to make that concern known".[61] In his statement when tabling the Committee's Tenth Report on 20 October 1997[62] the Chairman of the Committee referred to:[63]

> a perceived difficulty in changing the narrow view of consultation that exists in several departments and agencies. Unfortunately, that situation persists. Clearly it is in the unambiguous interest of the Executive and of the Parliament to enhance the process of consultation.

There have been occasions when consultation with interested parties has been inadequate. For example, the Seventh Report acknowledged that time constraints did not allow 15 sitting days to elapse before Australia's decision to withdraw from the United National Industrial Development Organisation became effective. Nevertheless, the Committee still stressed in this case that consultation with affected parties should have occurred before the decision was announced in accordance with the principles found in the reforms.[64]

Another important issue for the Committee was the need to consider whether further international treaty action could flow from the treaty. When commenting on the Agreements on Promotion and Protection of Investments with Chile and Peru, the Committee suggested that these agreements could be complemented by the negotiation of double taxation agreements with both States.[65] On the proposed Investment Protection and Promotion Agreement with Pakistan, the Committee noted that ratification would undermine the credibility of Australia's

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[61] Commonwealth, Hansard, House of Representatives, 2 May 1996 at 231.

[62] Joint Standing Committee on Treaties, Tenth Report (1997, Australian Government Publishing Service, Canberra).

[63] Commonwealth, Hansard, House of Representatives, 20 October 1997 at 9184 per Mr Taylor. See also Campbell B, New Federal Treaty Processes, Paper presented to the Conference on the Impact of International Law on Australian Law: Recent Developments and Challenges, University of Sydney, 28 November 1997 at 4-5.

[64] Joint Standing Committee on Treaties, Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997, Seventh Report (1997, Australian Government Publishing Service, Canberra).

[65] Joint Standing Committee on Treaties, Treaties Tabled on 15 and 29 October 1996, Fourth Report (1996, Australian Government Publishing Service, Canberra) 13, 15.

protests to Pakistan over the latter's nuclear tests. Thus, the Committee recommended that the treaty not be ratified until the Australian government announced publicly the resumption of Ministerial and senior official contacts with Pakistan.[66] This shows that the Committee does not consider treaties in a vacuum and is prepared to look at the wider bilateral and multilateral context and make suggestions and recommendations that go beyond the specific treaty being considered.[67]

In some cases, the Committee made recommendations on the future negotiation of treaties. For example, in its Fifth Report on Restrictions on the use of Blinding Laser Weapons and Landmines (the Fifth Report)[68] the Committee noted weaknesses in the existing Protocols to the 1980 Inhuman Weapons Convention. As a result, it recommended that the government should take every opportunity during periodic reviews to ensure that the weaknesses of Protocol IV were corrected to ensure its increased effectiveness in preventing the use of such laser weapons.[69] Despite the Committee having a majority of government members, its Reports have frequently been critical of government treaty actions. For example, when the Committee's Fifth Report supported Australia's destruction of its anti-personnel landmines stockpile, except for a small number to be retained by the Australian Defence Forces, two government Senators dissented.[70]

(c) National Interest Analysis and Treaty Impact Statement

In the 1995 Report, the Senate Committee considered that a treaty impact statement should accompany treaties when they were tabled.[71]

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[66] Joint Standing Committee on Treaties, Fifteenth Report (1998, Australian Government Publishing Service, Canberra) 58-60.

[67] Contrast the discussion below on the national interest analysis.

[68] Joint Standing Committee on Treaties, Restrictions on the Use Blinding Laser Weapons and Landmines, Fifth Report (1997, Australian Government Publishing Service, Canberra). See also Twomey A, Federal Parliament's Changing Role in Treaty Making and External Affairs, Parliamentary Research Service Research Paper No 15 (1999, Department of the Parliamentary Library, Canberra) 34.

[69] The Fifth Report para 2.36.

[70] Twomey A, Federal Parliament's Changing Role in Treaty Making and External Affairs, Parliamentary Research Service Research Paper No 15 (1999, Department of the Parliamentary Library, Canberra) 43-44.

[71] 1995 Report 268.

This statement should set out the advantages and disadvantages of entering into the treaty, the economic, social, cultural and environmental effects of the treaty entering into force and the intentions of the government with regard to the implementation of the treaty.

As part of the recent reforms to the treaty process, a national interest analysis (NIA) is prepared and tabled with every treaty tabled in the Parliament.[72] It is designed to facilitate parliamentary and community scrutiny by detailing the reasons for the government's decision to commit Australia legally to a particular treaty. It analyses the following:[73]

1. the impact of the treaty on Australia including the economic, environmental, social and cultural effects;
2. the obligations imposed by the treaty;
3. the treaty's direct financial costs;
4. how the treaty will be implemented;
5. what consultation has occurred in relation to the treaty; and
6. whether the treaty provides for withdrawal or denunciation.

The department or agency sponsoring the treaty presents the NIA in consultation with the Department of Foreign Affairs and Trade. The Department's Treaties Secretariat co-ordinates the operation of the new treaty making process including identifying all the stakeholders.

Besides its primary function of providing information on the treaty in an accessible form the NIA is valuable for several reasons. First, in formulating the NIA, every executive department must bear in mind the Joint Standing Committee practice of examining closely the issue of consultation to see whether or not consultation with all interested parties was completed before the treaty was signed. Secondly, the NIAs provide some evidence of Australia's practice in relation to particular treaties and the manner in which it will interpret those treaties.[74]

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[72] Government Response 17.

[73] Department of Foreign Affairs and Trade, Australia and International Treaty Making Information Kit (2000, Department of Foreign Affairs and Trade, Canberra).

[74] Campbell B, New Federal Treaty Processes, Paper presented to the Conference on the Impact of International Law on Australian Law: Recent Developments and Challenges, University of Sydney, 28 November 1997 at 8.

There have been some criticisms of the manner in which NIAs have been implemented. When considering a proposed double taxation treaty with Vietnam in its Seventh Report, the Committee criticised the Australian Taxation Office for omissions in the NIA and for the NIA itself being unduly complex. The Committee stated:[75]

> Consultation was at the heart of the 1996 reforms to the treaty making process: with State/Territory governments, and with "every Australian interest group with a concern about treaty issues". According to the Minister's statement on 2 May 1996, consultation was to be the key word, "and the government will not act to ratify a treaty unless it is able to assure itself that the treaty action proposed is supported by national interest considerations". In our first report, we recommended that National Interest Analyses include specific details of organisations and individuals consulted and how such consultation occurred. The National Interest Analyses covering the agreement obviously failed to meet this requirement. It was, therefore, hardly surprising that the [Australian Taxation Office] was unaware of the [Australian Society of Certified Practising Accountants'] reservations about the agreement.

Such public scrutiny of the work of the bureaucracy assists in maintaining a high standard of performance by those involved in the development of treaty negotiations.

On the reforms at work, it is useful to look at the Committee's report on the proposed Agreement on Economic and Commercial Cooperation with Kazakhstan.[76] The Committee noted that the NIA and information given to it at the first public hearing were seriously deficient.[77] There was insufficient information on Kazakhstan's commercial environment

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[75] Joint Standing Committee on Treaties, Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997, Seventh Report (1997, Australian Government Publishing Service) 25. See also Brazil, "The impact of treaties and treaty making power on the resources industry" [1997] Australian Mining and Petroleum Law Association Yearbook 49, 73-74.

[76] Joint Standing Committee on Treaties, Eleventh Report (1997, Australian Government Publishing Service, Canberra).

[77] Ibid 13.

including the problems that Telstra (an Australian telecommunication company) experienced in that State. The Committee recommended that Australia should not ratify the proposed agreement at this time and the agreement should not be reconsidered for ratification until and unless Kazakhstan demonstrated good faith in its trade and investment relations with Australia and paid appropriate compensation to Telstra in particular. The Committee recommended also that before any decision was taken to ratify the Agreement on the above basis, a revised NIA should be tabled in both houses of Parliament including the reasons for the new circumstances.[78]

VI. PARLIAMENTARY APPROVAL OF TREATIES

(a) The 1999 Review

The 1995 Report left open the question whether legislation should be introduced to require the Parliament's approval of treaties as opposed to consideration of treaties. The Committee recommended:[79]

> that the issue of what legislation, if any, should be introduced to require the parliamentary approval of treaties be referred to the proposed Treaty Committee for further investigation and consideration.

In response, the government stated as follows:[80]

> The Government considers that it would be sensible to review the experience to be gained from the establishment of a Joint Committee and the implementation of other recommendations before moving to consider the need for an approval or disallowance procedure. Accordingly, the Government will review the initiatives taken to reform the treaty making process after two years. It will give consideration at that time to whether the issue of an approval procedure should be referred to the new Treaties Committee.

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[78] Twomey A, Federal Parliament's Changing Role in Treaty Making and External Affairs, Parliamentary Research Service Research Paper No 15 (1999, Department of the Parliamentary Library, Canberra) 33-34.
[79] 1995 Report 299.
[80] Government Response 19.

The government conducted a review of the treaty reforms to consider, among other things, whether there should be a procedure for the parliamentary approval of treaties. The review considered other reviews on the treaty process held since the reforms were put in place.[81] The report, published in August 1999, concluded that the reforms were operating well and no further changes were needed.[82]

(b) Constitutional Validity

This part considers only one aspect of the debate: can the Parliament enact legislation requiring its approval prior to the Executive entering into a treaty?

The Senate Committee considered the question of whether the Parliament could legislate to regulate the executive's power to enter into treaties.[83] The concern was that it could be unconstitutional for the Parliament to interfere with the exercise of the Executive power vested under section 61 of the Constitution.[84] Those who believed that the Parliament could place limits on the executive's treaty-making power relied on this rationale: the treaty making power, although found in section 61 of the Constitution, is a prerogative power, and prerogative powers are subject to control by statute.[85]

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[81] For example, the Victorian Federal-State Relations Committee and South Australian Constitutional Advisory Council: see International Treaty Making and the Role of the States (1997, Government Printer, Melbourne) and The Distribution of Power between the Three Levels of Government in Australia and the Importance of Education and Consultation in Constitutional Reform (1996, South Australian Constitutional Advisory Council, Adelaide) respectively. Also, the Queensland Legal, Constitutional and Administrative Review Committee: The Role of the Queensland Parliament in Treaty Making, Report No 22 (2000, Government Printer, Brisbane).

[82] Department of Foreign Affairs and Trade, Review of the Treaty making Process (1999, Department of Foreign Affairs and Trade, Canberra). The Review rejected extending the 15 sitting day period and observed that this time limit "proved [to be] a good balance between the need for adequate parliamentary and public scrutiny and the need for timely treaty action". It added that the 15 sitting days "proved a manageable timeframe for [the Joint Standing Committee] to scrutinise treaties": ibid para 2.3.

[83] 1995 Report 275-278.

[84] Winterton, "Limits to the use of the 'treaty power'" in Alston P and anor (editors), Treaty Making and Australia: Globalisation versus Sovereignty (1995, Federation Press, Sydney) 29, 45-46.

[85] Spry M, The Executive Power of the Commonwealth: its Scope and Limits,

Henry Burmester submitted to the Senate Committee that the Parliament could "enact legislation to regulate the exercise of the prerogative powers of the Crown, of which the power to conduct Australia's treaty relations forms part".[86] The relevant legislative powers in the Constitution would be the external affairs power in section 51(xxix) and the incidental power in section 51(xxxix).

The High Court supports the above view. In *Barton v Commonwealth,* Mason J, who later became Chief Justice of Australia, held:[87]

> It is well accepted that a statute will not be held to abrogate a prerogative of the Crown unless it does so by express words or by implication, that is, a necessary implication.

The other members of the Court made similar statements.[88] As Henry Burmester noted, "[t]he corollary of those statements is that prerogative powers may be affected by statute".[89]

In *Victoria v Commonwealth and Hayden,* Jacobs J held:[90]

> The power to legislate in respect of matters falling within the prerogative arises under s 51(xxxix) in so far as it does not arise under any other particular head of power. Alternatively the course of power is the inherent sovereignty of the Australian Parliament in all subject matters which lie within the province of the Government of the Commonwealth of Australia. The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under s 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament.

Parliamentary Research Service Research Paper 28 (1996, Department of the Parliamentary Library, Canberra) 19-20.

[86] Burmester, "The power of the Parliament to enact legislation regulating the treaty process: Opinion" in Senate Committee Submissions, Volume 9 at 2149, 2152.

[87] (1974) 131 Commonwealth Law Reports 477, 501.

[88] Ibid per Barwick CJ at 488; McTiernan and Menzies JJ at 491; Jacobs J at 508.

[89] Burmester, "The power of the Parliament to enact legislation regulating the treaty process: Opinion" in Senate Committee Submissions, Volume 9 at 2149, 2152.

[90] (1975) 134 Commonwealth Law Reports 338, 406.

In *Koowarta v Bjelke-Petersen,* Murphy J discussed the nature of the Commonwealth executive power with respect to external affairs and noted that the Executive power over foreign affairs could be found in section 61 of the Constitution.[91] However, he held that the power was not unlimited and is subject to both express and implied constitutional limitations, adding: "Otherwise the Executive power in relation to external affairs, unless confined by Parliament, is unconfined."[92]

In *Re Residential Tenancies Tribunal of New South Wales; ex parte Defence Housing Authority,* Brennan CJ noted that "[t]he executive power of the Commonwealth may be modified by valid laws of the Commonwealth".[93] Dawson, Toohey and Gaudron JJ held that the prerogatives of the Crown "are not immutable but, being derived from the common law, are susceptible to statutory alteration or abolition where the necessary legislative power exists".[94] Further, McHugh J stated that "where a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament".[95] Anyway, as Richardson remarked:[96]

> The subordination of prerogative powers to legislative power was clearly established in the House of Lords case, *Attorney-General v De Keyser's Royal Hotel*: [1920] AC 508.

The issue of constraining the prerogatives and other powers imported by section 61 of the Constitution was considered by the Constitutional Commission in 1988. It reached the following conclusion:[97]

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[91] (1982) 153 Commonwealth Law Reports 168, 238.
[92] Ibid.
[93] (1997) 146 Australian Law Reports 495, 497 citing Brown v West (1990) 169 Commonwealth Law Reports 195, 205; see also Attorney General v De Keyser's Royal Hotel [1920] Appeal Cases 508.
[94] Ibid.
[95] Ibid 524.
[96] Richardson, "The executive power of the Commonwealth" in Zines L (editor), Commentaries on the Australian Constitution (1977, Butterworths, Sydney) 50, 67. See also Zines, "Commentary" in Evatt HV, The Royal Prerogative (1987, Law Book Company, Sydney) C1, C17.
[97] Constitutional Commission, Final Report, Volume 1 (1988, Australian Government Publishing Service, Canberra) 354.

> The prerogatives and any other power imported by section 61 can be regulated by federal legislation or even replaced by statutory powers. Such legislation may be enacted in exercise of the Federal Parliament's power to make laws with respect to particular subjects, or in exercise of the power conferred by section 51(xxxix) to make laws with respect to matters 'incidental to the execution of any power vested by this Constitution in...the Government of the Commonwealth...or in any department or officer of the Commonwealth'.

There have been suggestions to the contrary regarding this conclusion. Sir Maurice Byers[98] argued that although the Executive power to enter into treaties could not be taken away from the Executive, it could be regulated by the Parliament. He said:[99]

> No law of the Parliament could take away directly or indirectly the power that the Executive possessed. However, the law under s 51(xxxix) can say how that power is to be exercised and so it could lay down conditions relating to the manner in which treaties should be ratified by the Executive or it could require things like reports to the Parliament beforehand.

Sir Maurice pointed out also that the Executive's power could not be taken away indirectly by saying: "You can't ratify unless I say so".[100]

In addition, in its submission to the Senate Committee a group of Adelaide legal academics suggested that:[101]

> the Commonwealth Parliament's law-making participation in the process may be held to be constitutionally limited to the implementation of treaties in accordance with present practice.

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[98] Former Solicitor-General of Australia.

[99] Commonwealth, Hansard, Senate Legal and Constitutional References Committee, 16 May 1995 at 383-384.

[100] Ibid 384.

[101] Charlesworth and ors, "Submission to the Senate Standing Committee on Legal and Constitutional Affairs on its reference on the External Affairs Power" in Senate Committee Submissions, Volume 5 at 1017, 1021-1022.

It is unlikely the High Court would regard an Act that required prior parliamentary approval for ratification of a treaty as beyond power. As Professor George Winterton observed, and Professor Geoffrey Sawer agreeing,[102] the treaty making power was not expressly conferred by the Constitution. While implicit in section 61 of the Constitution as an exercise of executive power, it derived from the common law and was thus inherently subject to statutory control.[103]

Nevertheless, by contrast, there is a distinct possibility that the High Court would hold invalid any legislation that sought to transfer the prerogative power to enter into treaties from the Executive to the legislature. To permit such a transfer would be to invest the legislative arm of government with executive powers. Although Professor Enid Campbell formed part of the Constitutional Commission, she had previously suggested that there could be a limit to legislative control in treaty making.[104] In her submission to the Senate Committee, Professor Campbell opined that given the separation of powers it was possible that the High Court would hold that the federal Parliament could not enact legislation to invest itself or either of its Houses with power of an executive character.[105] As a result, the Parliament could not:[106]

> pursuant to its external affairs power, enact a statute which removes the treaty making power from the Executive branch and transfers it to the Parliament or one (or both) of its Houses.

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[102] See Sawer, "Australian constitutional law in relation to international relations and international law" in Ryan K (editor), International Law in Australia (1984, 2nd edition, Law Book Company, Sydney) 35, 37.

[103] Commonwealth, Hansard, Senate Legal and Constitutional References Committee, 16 May 1995 at 406 per Professor G Winterton. See also Winterton G, Parliament, the Executive and the Governor-General (1983, Melbourne University Press, Melbourne) 95; Zines L, The High Court and the Constitution (1997, 4th edition, Butterworths, Sydney) 262-266; Finn and anor, "The accountability of statutory authorities" in Senate Standing Committee on Finance and Government Operations, Statutory Authorities of the Commonwealth, Fifth Report (1982, Australian Government Publishing Service, Canberra) 173.

[104] Campbell, "Parliament and the Executive" in Zines L (editor), Commentaries on the Australian Constitution (1977, Butterworths, Sydney) 88, 91-92

[105] Campbell, "The external affairs power of the Commonwealth" in Senate Committee Submissions, Volume 1 at 79, 93.

[106] Ibid.

However, Professor Campbell considered that Parliament could validly enact legislation that required the Executive to obtain parliamentary approval prior to entering into a treaty. More generally, Brennan J, who later became Chief Justice of Australia, said in *Jacobsen v Rogers* that a limitation could arise:[107]

> from s 61 of the Constitution, precluding the making of laws which impair the capacity of the Executive Government of the Commonwealth from functioning as such.

In its submission, the federal Attorney-General's Department stated:[108]

> This statement may have an application in relation to the capacity of the Executive to enter into treaties, particularly where the capacity has been so constrained that the ability of the government to conduct Australia's international relations is hampered to a significant degree.

Legislation that required parliamentary consideration prior to the Executive entering into a treaty would probably be valid and not regarded as an undue impairment. Thus, it would seem that although the Parliament could not assume the power to enter into a treaty itself, it could place limitations on the executive's power to do so.

VII. CONCLUSION

It is becoming increasingly obvious that the Australian community desires greater parliamentary involvement in treaty making. This is probably a consequence of the growing realisation of the impact that international agreements may have on Australians, combined with a desire by various interest groups wishing to influence matters in such a way as to further their own interests. The Parliament seems more accessible to this type of lobbying than the executive, particularly in light of its more public processes and the wider spectrum of interest groups that it represents.

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[107] (1995) 182 Commonwealth Law Reports 572, 598.

[108] Attorney-General's Department, "Submission to the Inquiry by the Senate Reference Committee on Legal and Constitutional Affairs into the External Affairs Power" in Senate Committee Submissions, Volume 4 at 681, 689.

The revised treaty making process, implemented by the coalition government in May 1996, was instigated to overcome the inability of the Parliament and the public to scrutinise the treaty making actions of the Executive arm of government. The depth and effectiveness of the consultative process appear to have improved by allowing interested organisations and individuals access to a process that was previously difficult to influence and perceived to be quite off-limits. In a debate in the House of Lords in 1999, Lord Lester of Herne Hill noted that Australia was well ahead of the United Kingdom in the scrutiny of the treaty making process because the "Australian Senate has a well developed treaty scrutiny committee".[109]

The full impact of these reforms on the development of public policy is still to be felt. The Joint Standing Committee has a most important role, but this is mainly at the point where the text of the treaty has already been settled. Further, for all its potentialities it is only an advisory body. Nonetheless, consultation and accountability will be issues the Committee will examine closely as an important facet of parliamentary scrutiny.

The revised treaty making process constitutes a significant advance in terms of a remedy for the democratic deficit. It addresses the major weaknesses identified in the system. However, it does not solve the problem completely nor provide for a parliamentary determination on whether action should, or should not, be taken to make the treaty binding on Australia. As Professor James Crawford has rightly stated:[110]

> The changes introduced in 1996 are no doubt useful, and they certainly entail a greater level of formal consultation and communication with the federal Parliament and state governments than previously obtained. On the other hand, they do not go very far... In particular, there is no proposal for parliamentary disallowance of treaty action, let alone for any requirement of parliamentary approval... It is difficult then to avoid the conclusion

[109] United Kingdom, Hansard, House of Lords, 12 January 1999 at column 131.
[110] Crawford, "International law and Australian federalism: past present and future" in Opeskin B and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 325, 336-337.

> that the 'democratic deficit', if it exists, results more from the conditions of treaty making than any procedures for parliamentary consultation or, at least, any such procedures short of a power to advise and consent or to disallow.

Since there is probably no constitutional prohibition on such parliamentary involvement, it seems only a matter of time before it occurs in some form or other.