



MINISTER FOR AGRICULTURE AND FORESTRY;
THE MIDWEST AND WHEATBELT
LEADER OF THE GOVERNMENT IN THE LEGISLATIVE COUNCIL



recd 27/11/07

PUBLIC

CLERK OF THE LEGISLATIVE COUNCIL

Pursuant to Standing Order 377 please find below the Government response to the Standing Committee on Uniform Legislation and Statutes Review Report No.1 9: *Administrative Practices and Procedures and Parliamentary Processes Involving Treaties Entered into, or proposed to be entered into, by the Commonwealth.*

I request that the Government response be tabled as soon as practicable.

Hon Kim Chance

LEADER OF THE GOVERNMENT IN THE LEGISLATIVE COUNCIL

27/11/07

GOVERNMENT RESPONSE TO REPORT NO. 19: ADMINISTRATIVE PRACTICES AND PROCEDURES AND PARLIAMENTARY PROCESSES INVOLVING TREATIES ENTERED INTO, OR PROPOSED TO BE ENTERED INTO, BY THE COMMONWEALTH

Recommendation 1: The Committee recommends that the Responsible Minister table in the Legislative Council notice of all treaties tabled in the Commonwealth Parliament, and any subsequent reports on treaties received by the State Government from the Chair of the Commonwealth Parliament Joint Standing Committee on Treaties together with other relevant information (which may include the treaties themselves). The Committee observes that presently the Responsible Minister is the Minister for Federal-State Relations.

The Government understands that the intent underlying Recommendation 1 is to provide for enhanced Parliament scrutiny of treaties, and to that extent, the general intent is supported. It is acknowledged that the State Parliament may have an interest in being kept informed of certain proposed treaties, in particular if legislation is required at a State level to implement the Treaty obligations.

There are already a number of mechanisms in place that enable State Parliament to be kept informed of such matters:

- It is understood that the Joint Standing Committee on Treaties (JSCOT) provides written advice to the President of the Legislative Council, inviting submissions on whether Australia should take binding treaty actions, at the same time as writing to the Premier.
- As the Committee already indicated in Finding 5, there is already a wide range of publicly available information (including online) related to treaties to which the Commonwealth Government has acceded, or proposes to accede.
- Resources available at the JSCOT site (<http://www.aph.gov.au/house/committee/jsct/index.htm>) include a list of Treaties as they are tabled in Federal Parliament, submissions received to JSCOT inquiries, JSCOT's report on Treaties, and the Federal Government's response to the JSCOT report itself (if required).
- Resources available at the Australian Treaties Library site (<http://www.austlii.edu.au/au/other/dfat/>) include a list of multilateral treaties under consideration, together with details of the relevant Commonwealth contact officers. This list is tabled by the Department of Foreign Affairs and Trade in both houses of Federal Parliament approximately twice a year.

Furthermore, if the State Parliament considers it appropriate to conduct an inquiry into a treaty, or a proposed treaty, it can initiate such an inquiry.

While the Government will continue to seek improvements in the way Treaties are scrutinised, it emphasises that the Treaties process is ultimately a Commonwealth responsibility and the Government is subject to the timeframes and processes set by

the Commonwealth. In particular, the different sitting times of Federal Parliament and the Legislative Council means that any requirement to table notice of Treaties in the Legislative Council after they have been tabled in Federal Parliament could have very little practical benefit for Legislative Council members.

However, as set out in the response to Recommendation 2, the Government will seek to enhance Parliament scrutiny of Treaties through ensuring that Ministers, when introducing a Bill that is intended to give effect to a particular Treaty obligation, provide appropriate information to Parliament on particular treaty matters where the need arises.

Recommendation 2: The Committee recommends that, when introducing a Bill to the Legislative Council which gives legislative effect to a treaty obligation acceded to by the Government of the Commonwealth of Australia, the Government of the State do provide details of any National Interest Analysis and any Regulation Impact Statement relating to the Treaty together with any report on the treaty published by the Commonwealth Parliament Joint Standing Committee on Treaties as part of the Explanatory Memorandum to the Bill.

The Government acknowledges the necessity of providing appropriate information in addition to the Explanatory Memorandum when introducing a Bill into State Parliament. However, it is not practicable for the State Government to carry out the activities proposed in Recommendation Two.

Attached is an outline of the prescribed series of steps that are involved in the development of treaties. This is taken from the treaty-making handbook released by the Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered – Treaties and Treaty Making: An Officials' Handbook*.

As is evident from the attached table, the Government is unable to table the National Interest Analysis (NIA) when introducing State legislation to give effect to a treaty obligation, as, at that time, the NIA may have not yet been prepared by the Commonwealth department or agency with primary carriage of a treaty. Legislation giving effect to treaty obligations (including at a State level) needs to be introduced and passed in Parliament *before* the Minister of Foreign Affairs recommends to the Executive Council that Australia become party to a treaty:

Any legislation (Federal/State/Territory) required for Australia to meet its treaty 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 the relevant Parliament/s will necessarily pass implementing legislation after consent is given¹.

¹ Department of Foreign Affairs and Trade, 2005, *Signed, Sealed and Delivered – Treaties and Treaty Making: An Officials' Handbook*, p 27 http://www.dfat.gov.au/treaties/treaties_handbook.pdf

While this Recommendation is not supported, the Government will seek to ensure that Ministers, when introducing a Bill that is intended to give effect to Australia's treaty obligations, provide appropriate information to Parliament on particular treaty matters where the need arises. Further, the Government will continue to seek the comments of relevant stakeholders, including Members of Parliament, which may be included in the consultation processes between the State and Commonwealth Government.

Recommendation 3: The Committee recommends that the House do amend the Committee's terms of reference at clause 8.3 by deleting sub-clause (c) which reads:

"To examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia";

and re-number the sub-clauses accordingly.

The Government notes that the Committee is seeking to remove from its terms of reference its responsibilities on treaty matters and considers that this is a matter for the Legislative Council to address.

PART V: STAGES IN THE DEVELOPMENT OF TREATIES

PROCESS	BILATERAL	MULTILATERAL
Initiative	Either side can initiate. In Australia the initiative is coordinated by the Federal department/agency with portfolio responsibility for the subject matter, acting within approved Ministerial/Cabinet guidelines.	Usually taken by a country or group of countries within an international organisation. Participation is subject to Ministerial/Cabinet approval.
Regulation Impact Statement (RIS)	If the treaty could affect business regulation or restrict competition, the responsible department/agency may be required to submit a RIS. The Productivity Commission's Office of Regulation Review should be consulted from the outset.	
Public information	Information on treaties under consideration, whether new or existing treaties or amendments thereto, is provided by responsible departments/agencies quarterly to International Division, PM&C, which notifies States/Territories through SCOT. A list of multilateral treaties derived from this information, together with details of contact officers, is tabled by DFAT in both Houses of Federal Parliament approximately twice a year and is published on the Internet.	
Composition of delegation	Delegations to negotiations are composed of representatives of responsible departments/agencies. Participation by Members of Parliament; State/Territory and NGO representatives, is arranged according to subject matter.	
Consultation	Line departments/agencies consult with other interested departments/agencies, the States/Territories, NGOs and the general public at this stage, or at several stages in the process. Briefings for interested parties should be arranged as appropriate.	
Negotiations and final text	<p>The text is often based on a standard model previously approved by Cabinet. The draft is cleared with Legal Branch, DFAT, at appropriate stages. Once drafted/negotiated, the treaty may be initialled to signify the intention of the negotiators to submit it to their respective governments for approval.</p> <p><i>Notes:</i> 1. Unless urgent (when the treaty may provide for entry into force on signature), the treaty provides for entry into force after signature, and the satisfaction of legal or other requirements, by an exchange of diplomatic notes. In some cases, one side will have already satisfied all requirements at signature and the treaty will allow for the other side, alone, to provide a diplomatic note. Some countries require the formal exchange of instruments of ratification as the second step.</p>	<p>The treaty is usually negotiated at one or more international conferences and concluded by the text being annexed to the Final Act of the plenipotentiary conference at which it is adopted. The draft text is cleared with Legal Branch, DFAT, at appropriate stages. Signature of the Final Act implies no commitment to the text beyond submission of it to governments for consideration. (In the case of the International Telecommunication Union and the Universal Postal Union, signature of the Final Acts of plenipotentiary conferences does have a binding effect and requires Ex Co approval.)</p> <p><i>Note:</i> The text may provide one step, eg definitive signature, accession or acceptance, or two steps, eg, signature followed by ratification, for a country to become bound.</p>

PROCESS	BILATERAL	MULTILATERAL
	Treaties can take the form of an exchange of letters or third person notes, particularly amendments to existing treaties. For entry into force of such treaties, see Note 1 - however, ratification is not applicable.	
Declarations	Generally not applicable.	Declarations are unilateral statements, made at signature/ratification/accession, often taking the form of an interpretation or explanation. Declarations are formulated in consultation between the responsible department/agency, AG's and DFAT, with particular care concerning legal effects. Declarations of acceptance of additional obligations under existing treaties which modify Australia's international legal obligations require Ex Co approval.
Reservations	Not applicable	Reservations, where permitted, modify the legal effect of specified provisions of a treaty. Formulated in consultation between the responsible department or agency, AG's and DFAT, they are subject to Ex Co approval. Reservations can be made on signature (by inscription on the treaty) and/or ratification/accession (by inclusion in the instrument). They are subject to objection or rejection by the depositary or parties to the treaty.
Implement- ation	It is a requirement that any treaty entering into force for Australia be able to be implemented in Australia. Thus, legislation (Federal/State/Territory) will need to be in place when the treaty enters into force for Australia, as will any changes to the practices of Departments/agencies necessary to conform to the treaty. AG's can advise on whether existing Federal, State or Territory law conforms with the provisions of the treaty or whether new or amending legislation is needed.	
Language verification	Where a treaty is concluded in a language additional to English, the other side provides a translation in that language. Responsible departments arrange for verification before signature. This can take up to six weeks.	Verification is supervised by the international organisation responsible for the treaty.
Government approval	The responsible department/agency submits the treaty for the approval of all relevant Ministers or Cabinet. Cabinet approval is required if the matter falls outside existing policy guidelines, or in special circumstances concerning which PM&C can advise. When Cabinet approval is not required, the approval of the Minister for Foreign Affairs and the Attorney-General, is necessary, with advice to the Prime Minister. Once approval has been obtained, the Minister for Foreign Affairs submits the matter to Ex Co. Any treaty submitted to Ex Co for a second or further step is again subject to these procedures.	

PROCESS	BILATERAL	MULTILATERAL
Executive Council - First Submission (ExCo)	Ex Co authorisation for signature is required for all treaties. Treaties providing for formal ratification as a second step are again required to be submitted to ExCo. Documents submitted to Ex Co are prepared by Legal Branch, DFAT, drawing on information provided by responsible departments/agencies, particularly for the Explanatory Memorandum, which accompanies each treaty.	As for BILATERAL. Multilateral treaties may require one or two steps before becoming binding on Australia and each step is subject to ExCo approval. (See <i>Note</i> under Negotiations and final text - Multilateral above.) Legal Branch, DFAT, should be consulted regarding treaty-status amendments to, or elaborations of, existing treaties where they provide for entry into force unless an objection is deposited for Australia.
Preparing signature texts	Responsible departments/agencies provide the final text in hard copy and electronic form to the TSC, DFAT, which prepares a signature text (printed, bound and sealed, as appropriate). Where a treaty is to be signed in a language additional to English and the text is not available in electronic form, DFAT will coordinate preparation.	The preparation of the signature text is the responsibility of the depositary. The depositary provides a certified true copy of the text to DFAT which copies it to Departments/agencies as required. (If the certified text is sent direct to the Department/agency, it should be forwarded to the TSC.)
Signatory	Selection of the signatory is arranged by the responsible department in consultation with relevant ministers and their offices. The Minister for Foreign Affairs signs the instrument of full powers authorising the nominee to sign the treaty. The instrument is handed to the other side prior to signature of the treaty. No instrument is required if the Governor-General, Prime Minister or Minister for Foreign Affairs is the signatory but ExCo approval for signature is still required.	Same as BILATERAL, except that the instrument of full powers is deposited with the depositary for the treaty before signature takes place.
Signing ceremony	The time and venue of the signing ceremony are determined by the responsible department/agency. TSC, DFAT, presides over the actual ceremony if it is held in Canberra and assists with arrangements, or attends, ceremonies held elsewhere in Australia. Where signature is in another country, DFAT coordinates arrangements.	The depositary arranges the ceremonial signing. Where a treaty is to be signed for Australia subsequent to the ceremonial signing, DFAT makes separate arrangements with the depositary. The depositary may arrange for a <i>procès-verbal</i> of the signature to be signed or alternatively issues a formal notification recording the fact.
Rectifying errors	Errors found prior to signature can be rectified by amending the signature text; the amendments are initialled by the signatories. Thereafter, the text cannot be amended - errors are rectified by an exchange of note.	Errors are rectified by the depositary in consultation with relevant governments.

PROCESS	BILATERAL	MULTILATERAL
Publication prior to entry into force	Texts remain confidential to the parties until signed. DFAT publishes on the Internet < http://www.austlii.edu.au/au/other/dfat/ > signed treaties which have not entered into force. For treaties which have entered into force see <i>Australian Treaty Series</i> below.	Final texts of treaties not yet in force for Australia are published in the Australian Treaties Library on the Internet.
Tabling	The texts of treaties are tabled in both Houses of Parliament prior to any binding treaty action. Treaties are tabled with National Impact Analysis (NIA, see below) and a RIS may also be required. Responsible departments/agencies deliver the required number of documents to TSC, which coordinates the tabling process.	
National Interest Assessment (NIA)	Responsible departments/agencies prepare NIAs, which are cleared through the Office of International Law, AG's, and TSC, DFAT. States/Territories are also consulted, and their views recorded in the NIA. The line department/agency is responsible for the final content of the NIA. See also RIS above. DFAT publishes all NIAs on the Internet when tabled.	
Joint Standing Committee on Treaties (JSCOT)	JSCOT examines and reports to Parliament on the treaty (usually within the 15 or 20 sitting day period), and can make recommendations to Government. JSCOT may hold public hearings. Its reports are tabled, printed and made available on the Internet. Final treaty action is not usually taken until the report is tabled.	
Government Response to JSCOT Reports	JSCOT reports may contain recommendations which require a formal Government response. Where only one department/agency is concerned, that department/agency prepares the Government response, obtains Prime Ministerial approval, and arranges its tabling in Parliament. Where a DFAT response is required, or where the recommendations concern more than one department/agency, the TSC coordinates the Government response and arranges its tabling.	
Executive Council - Second Submission	When a signed treaty is to be ratified it is again submitted to ExCo, in conformity with the steps set out above for its first submission to Ex Co.	
FINAL TREATY ACTION BY:		
- Exchange of notes;	Either side may initiate. If convenient, notes exchanged in the country where the treaty was not signed. DFAT issues the diplomatic note in accordance with instructions from the responsible Department/agency.	Not applicable.
Unilateral note	Similar to exchange of notes, except Not applicable. that only one side provides a note.	Not applicable.
Ratification	The instrument of ratification, to which the TSC, DFAT, binds and seals a copy of the signature text of the treaty, is signed by the Minister for Foreign Affairs. The instrument is then exchanged for a similar instrument, prepared by the other side, in a formal ceremony where a procès-verbal is	The Minister for Foreign Affairs signs the instrument of ratification which is deposited through the relevant overseas mission. The depositary may arrange for a procès-verbal of the deposit to be signed or, alternatively, will issue a formal notification recording the fact.

PROCESS	BILATERAL	MULTILATERAL
	usually signed by the participants as a record of the exchange. The exchange is usually arranged in the country where the treaty was not signed, and it can take place at officials level.	
Accession, acceptance	Not applicable.	Similar to ratification (above), except that the relevant instrument refers to accession or acceptance.
Entry into force	A treaty will enter into force on a date calculated in accordance with its provisions – usually when notes are exchanged or following a predetermined elapse of time after the exchange. On occasions the date is actually specified in the text.	Entry into force is governed by the provisions of the treaty and will usually occur a set time after a minimum number of ratifications/accessions has been deposited. For treaty-status amendments, it will usually require a minimum number of acceptances.
Records of treaty action	All Australian treaty action is recorded in monthly summaries, published on the Internet. Annual summaries are printed in issue No 1 of the <i>Australian Treaty Series</i> for each year). TSC, DFAT, maintains a telephone information service on treaties.	As for BILATERAL. The Australian Government is depositary for certain multilateral treaties: the status lists of parties to these treaties are published by DFAT on the Internet and are available on request in hard copy. DFAT maintains status lists for other multilateral treaties on the basis of information provided by depositaries -hard copies are available on request. Some of these lists are also published by their depositaries on the Internet.
Archiving	The signature texts of all bilateral treaties, and multilateral treaties for which Australia is depositary, are archived by TSC, DFAT, which can provide certified true copies thereof. Certified true copies of multilateral treaties provided to Australia by depositaries for other treaties are also archived.	
Australian Treaty Series	Any treaty entering into force for Australia is printed in the <i>Australian Treaty Series</i> which is available from Government Info Shops. The series is held in major public and university libraries and is also published on the Internet.	
Registration with United Nations	Treaties in force for Australia are registered by DFAT with the United Nations in accordance with Article 102 of the UN Charter. Air service agreements are registered with ICAO.	Any multilateral treaty for which the Australian Government is depositary is registered with the United Nations. Any subsequent action affecting the treaty is also registered.
Termination	A treaty is governed by its terms and will usually provide for formal termination or the withdrawal of parties From it. In Australia such action requires Ex Co approval and to be tabled with an NIA and considered by JSCOT in the same way as new treaties or treaty amendments. Similarly, the withdrawal or modification of a reservation (multilateral only) requires Ex Co approval.	