

## **Joint Standing Committee on Treaties: an actual restraint on executive power?**

### **Introduction**

The Joint Standing Committee on Treaties (JSCOT) was established in May 1996 as part of a series of reforms of the treaty-making process. Although the executive retains the treaty-making power given to it by the Australian Constitution, the reforms introduced a role for the Parliament in treaty oversight for the first time.<sup>1</sup>

Under the reformed process, treaties are tabled in the Parliament after signature, but prior to ratification and implementation. JSCOT conducts a public inquiry into the treaty action and reports back to the Parliament. The Government considers and responds to JSCOT's recommendations.

### **Purpose of this paper**

The 1996 reforms were to rectify a perceived 'democratic deficit' in treaty-making in Australia. This deficit has been defined in different ways. Concerns about the process included a lack of accountability, a lack of transparency, and a lack of consultation.<sup>2</sup> There was also apprehension about loss of domestic sovereignty, where the Australian people were subject to laws that had been made outside of the Parliamentary system.<sup>3</sup> Treaties were seen as a result of unrestrained and unaccountable executive action.

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<sup>1</sup> Votes and Proceedings, House of Representatives, 21 May 1996, pp. 134-5.

<sup>2</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Canberra, 1995.

<sup>3</sup> H. Charlesworth, M. Chiam, D. Hovell and G. Williams, 'Deep Anxieties: Australia and the International Legal Order', *The Sydney Law Review*, vol. 25, no. 4, 2003, p. 433.

This paper looks at the degree of actual restraint of executive action by JSCOT since 1996. It does this by examining two groups of treaties; those that have been signed and are not in force, and those where JSCOT recommended that the Government either not ratify the treaty or only ratify the treaty after certain specific actions were taken.

If JSCOT is an actual restraint of executive action then we would expect to see JSCOT's influence in the reasons why many of the treaties not in force have not been implemented. We would also expect to see that the treaties where JSCOT has recommended against taking binding treaty action are not in force, or that the specific precondition recommendations have been implemented.

## **Determining relevant treaties**

### **Accuracy of available information**

There are two sources of information about Australian treaties; the Australian Treaties Library managed by AustLii<sup>4</sup>, and the Australian Treaties Database on the website of the Department of Foreign Affairs and Trade (DFAT).<sup>5</sup> The Treaties Library contains the text of agreements, and associated documents such as National Interest Analyses and JSCOT reports. The Treaties Database contains the data about a treaty; such as status, dates of entry into force and termination, and amendments.

The information on the Treaties Library about a treaty is out of date and unreliable. For example, it has over 600 treaties with a status of "not in force", where the true figure is less than 100. This paper uses the information on the Treaties Database to determine the status of a treaty, and refers back to the Treaties Library for the actual texts.

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<sup>4</sup> <http://www.austlii.edu.au/au/other/dfat/> [accessed 15 December 2017]

<sup>5</sup> <http://dfat.gov.au/international-relations/treaties/Pages/treaties.aspx> [accessed 15 December 2017]

## **Treaties considered by this paper**

According to the Treaties Database, at 1 November 2017, there are 127 treaties signed after May 1996 which are not yet in force.

Of those treaties, 5 appear to be on the database in error, as Australia has either not signed the treaty, or the amendments do not apply to Australia by the operation of a specific reservation.

Of the remaining 122 treaties, 22 have not been tabled in the Parliament and considered by JSCOT. A further four have been tabled in November and December 2017 but JSCOT has not yet reported. A further 27 treaties marked as “not in force” on the DFAT database are, on closer examination, actually in force. These 53 treaties are not examined further in this paper.

This leaves 69 treaties that have been considered by JSCOT but are not yet in force.

This paper also examines seven treaties where JSCOT has recommended against taking binding treaty action, and five treaties where JSCOT has recommended that binding treaty action only be taken subject to the fulfilment of a series of specific recommendations.

## **Treaties not in force for Australia**

### **Multilateral treaties ratified by Australia but not in force**

There are ten multilateral treaties that have been ratified by Australia but are not yet in force generally. In every case, JSCOT recommended that binding treaty action be taken.

Australia deposited its notification of acceptance to two sets of amendments

relating to the World Intellectual Property Organization<sup>6</sup> on 16 December 2008. These amendments required 129 member states to ratify before entering into force. Currently only 52 have ratified.<sup>7</sup>

Three measures relating to the Antarctic<sup>8</sup> were approved by Australia on 15 May 2015. These amendments will enter into force once approved by all Consultative Parties. This has not yet occurred.<sup>9</sup>

In its examination of the *Comprehensive Nuclear Test Ban Treaty*, JSCOT made an additional recommendation to the Presiding Officers of both Houses of Parliament that:

... the Presiding Officers write jointly to the President of the United States' Senate to acquaint that Chamber with the views of the Australian Parliament, as expressed in the Act, and urge them to take all steps to facilitate and expedite ratification....<sup>10</sup>

According to the Government response this letter was sent.<sup>11</sup> Australia ratified this treaty on 9 July 1998.<sup>12</sup> The *Comprehensive Nuclear Test Ban Treaty* requires all of the 44 states listed in Annex 2 to ratify before entry into force. Thirty-six states have signed and eight have not, including the United States of America.

In this case the JSCOT recommendation was not about the subject matter of the treaty but the implementation, and was intended to prevent a known problem

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<sup>6</sup> Amendments to the Convention Establishing the World Intellectual Property Organization and Amendments to the Convention Establishing the World Intellectual Property Organization

<sup>7</sup> [www.wipo.int/treaties/en/wipo\\_article\\_9-3.html](http://www.wipo.int/treaties/en/wipo_article_9-3.html)

<sup>8</sup> Measure 4 (2004) Insurance and contingency planning for tourism and non governmental activities in the Antarctic Treaty area

Measure 1 (2005) Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability arising from environmental emergencies

Measure 15 (2009) Landing of persons from passenger vessels in the Antarctic Treaty area

<sup>9</sup> [www.ats.aq](http://www.ats.aq)

<sup>10</sup> Joint Standing Committee on Treaties, *Fifteenth Report*, Canberra, 1998, para. 4.59.

<sup>11</sup> <https://www.un.org/disarmament/wmd/nuclear/ctbt/>

<sup>12</sup> <https://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> [accessed 15 November 2017]

with the treaty coming into force - lack of ratification by other countries. Although the recommendation was implemented, it has not achieved the desired result.

Australia accepted amendments to the *Convention on the International Mobile Satellite Organization* on 6 October 2011; however the amendments need 62 acceptances, of which only 14 have been received.<sup>13</sup>

Australia ratified the *Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education Convention* in 2014 - one of only three members to ratify. This agreement will come into force after five members ratify.

The *Agreement Establishing the Pacific Islands Forum* was signed by all 16 Forum members on 27 October 2005. This Agreement is intended to replace the 2000 agreement. The 2005 Agreement is not in force<sup>14</sup>, and the 2012 Forum meeting communique encouraged the “remaining members” to ratify.<sup>15</sup> Australia ratified on 19 October 2006.<sup>16</sup>

*Amendments to the Agreement Establishing the European Bank for Reconstruction and Development* were adopted on 30 September 2011 but are not yet in force.<sup>17</sup> Australia accepted this Agreement on 16 August 2012.

Australia ratified the *Doha Amendment to the Kyoto Protocol* on 9 November 2016. The Doha Amendment needs three-quarters of the parties to ratify before

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<sup>13</sup> [www.imsso.org](http://www.imsso.org). [accessed 13 December 2017]

<sup>14</sup> <http://www.forumsec.org/pages.cfm/about-us/our-history/agreement-establishing-forum-secretariat.html> [accessed 15 December 2017]

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<http://www.forumsec.org/resources/uploads/attachments/documents/2012%20Forum%20Communique,%20Rarotonga,%20Cook%20Islands%2028-30%20Aug1.pdf> [accessed 15 December 2017]

<sup>16</sup>

<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/0833922492939070CA2570C400042085> [accessed 15 December 2017]

<sup>17</sup> <http://www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html> [accessed 15 December 2017]

entry into force (that is, 144 acceptances). At 8 December 2017 there are 95 acceptances.<sup>18</sup>

In each of these ten cases JSCOT had no influence on why these treaties were not in force. JSCOT supported taking binding treaty action, and the Government has done so to the best of its ability. In one case, a JSCOT recommendation sought to encourage other ratifications to enable entry into force, although this does not appear to have had any effect.

### **Multilateral not ratified by Australia and not in force**

Another two multilateral treaties not yet in force have not been ratified by Australia. In both of these cases JSCOT supported entering into the treaty without reservation and without making additional recommendations.

*The Amendments to the Convention on Conservation of Nature in the South Pacific* was signed by Australia on 9 October 2000. However at the Eighth Meeting of the Parties in 2006 the parties agreed to suspend operations of the head agreement, which had entered into force in 1990, until further notice.<sup>19</sup>

*The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* was only signed by Australia on 7 June 2017. As at 25 October 2017 Australia had not yet ratified, and the Convention had not yet entered into general force.

### *Trans-Pacific Partnership*

Eighteen not in force treaties relate to the *Trans-Pacific Partnership* (TPP); the TPP itself and 17 bilateral treaty-level side agreements. JSCOT made six recommendations in relation to the TPP, three about the process of negotiating future trade agreements, two on specific matters relating to the TPP, and one final recommendation supporting the TPP and recommending that the

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<sup>18</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-c&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&clang=_en) [accessed 29 November 2017]

<sup>19</sup> <http://www.sprep.org/legal/meetings-apia-convention> [accessed 15 December 2017]

Government take binding treaty action.<sup>20</sup>

To enter into force, the TPP requires ratification by six original parties that together account for at least 85 per cent of the combined gross domestic product of the original signatories.<sup>21</sup> In practice, this requires both the USA and Japan to ratify the agreement before it comes into force.

On 23 January 2017, President Trump signed a presidential memorandum withdrawing the USA as a signatory to the TPP<sup>22</sup>, effectively rendering the TPP unable to enter into force under its own terms. Two countries have ratified the TPP - Japan on 20 January 2017 and New Zealand on 22 May 2017.<sup>23</sup>

JSCOT's inquiry and recommendations had no influence on the reasons why these twenty treaties are not in force. In each case, entry into force is dependent on the actions of other countries, and Australia's lack of ratification is unlikely to have influenced the status of these treaties.

### **Multilateral treaties not ratified by Australia but in force**

A further five multilateral treaties have entered into general force, but Australia has not yet ratified or accepted the treaty. These are an interesting group of treaties as although they have been generally accepted by the international community, Australia, despite initially signing the treaty, has chosen not to be bound by their terms.

*The Optional Protocol to the Convention against Torture and other Cruel, Inhuman*

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<sup>20</sup> Joint Standing Committee on Treaties, *Report 165*, Canberra, 2016.

<sup>21</sup> National Interest Analysis [2016] ATNIA 4, Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam and associated side letters [2016] ANTNI 2.

<sup>22</sup> <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific> [accessed 26 November 2017]

<sup>23</sup> <https://mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/> [accessed 26 November 2017]

*or Degrading Treatment or Punishment* was signed by Australia on 19 May 2009. It entered into force generally on 28 June 2006. JSCOT has reported on this treaty twice, in 2004 and again in 2012. The first inquiry was the result of a Senate referral on 26 November 2003. JSCOT's report, tabled on 23 March 2004, had a single recommendation; recommending against the Government taking binding treaty action "at this time".<sup>24</sup>

The second report on OPCAT was completed in 2012, after the Government had signed the agreement in 2009. That report recommended that binding treaty action be taken. JSCOT specifically rejected the earlier Committee report, finding that there were gaps in monitoring of places of detention which could be addressed by implementing OPCAT.<sup>25</sup> As with the previous report, JSCOT's conclusion reflected the position of the Government at the time.

Further information on multilateral treaties can be found in the list of all multilateral treaties currently under negotiation or review prepared by the Government approximately twice a year. This list is on the Australian Treaties Library website and tabled in Parliament. According to the schedule of treaties as at 13 June 2017, the Australian Government intends to ratify OPCAT by December 2017, subject to consultation with Australian States and territories.<sup>26</sup>

The *Convention on the Choice of Court Agreements* entered into force generally on 1 October 2015. In its report of November 2016, JSCOT recommended that binding treaty action be taken. According to the schedule of treaties, ratification is awaiting domestic legislation to allow Australia to accede to the Convention. As at 5 October 2017 the Convention has 30 contracting states.<sup>27</sup>

In contrast, the *United Nations Convention on the Use of Electronic*

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<sup>24</sup> Joint Standing Committee on Treaties, *Report 58*, Canberra, 2004, p 34.

<sup>25</sup> Joint Standing Committee on Treaties, *Report 125*, Canberra, 2012, p 51.

<sup>26</sup> <http://www.austlii.edu.au/au/other/dfat/mta/> [accessed 15 December 2017]

<sup>27</sup> [www.hcch.net/en/instruments/conventions/status-table/?cid=98](http://www.hcch.net/en/instruments/conventions/status-table/?cid=98).



*Communications in international Contracts* only has 9 contracting parties. It entered into force on 1 March 2013, after being adopted on 23 November 2005. Australia does not appear as a signatory, and the Convention does not appear on the schedule of treaties. JSCOT considered the treaty and recommended that binding treaty action be taken.<sup>28</sup> It appears that the Convention was tabled in Parliament at a point where it was thought that Australia might accede to this Convention, but this is no longer being considered.

The *Optional Protocol to the Convention On the Safety of United Nations and Associated Personnel* was signed by Australia on 19 September 2006. JSCOT supported ratification, including a recommendation about encouraging others to also ratify.<sup>29</sup> According to the schedule of treaties, officials are developing legislation to implement the obligations in the protocols domestically. It is clearly not considered to be a priority for legislative scheduling.

JSCOT also recommended that binding treaty action be taken for the *Amendment of Article XII(c)(iii) of the Agreement relating to the International Telecommunications Satellite Organization*.<sup>30</sup> The schedule of treaties advises that it is proposed that Australia not ratify the amendment until 99 other countries ratify, when the Amendment will enter into force. According to ITSO, the amendment entered into force on 16 January 2017, so presumably Australia will shortly ratify. Australia is not currently listed as a party to the amendment.<sup>31</sup>

For this group of treaties, entry into force for Australia is within the Government's power. Two of the treaties are waiting on domestic legislation, and one on further consultation. It is not clear why the ITSO amendments have not been ratified, or why the Electronic Communications convention is no longer being considered for ratification.

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<sup>28</sup> Joint Standing Committee on Treaties, *Report 116*, Canberra, 2011, p 23.

<sup>29</sup> Joint Standing Committee on Treaties, *Report 105*, Canberra, 2009, p 7.

<sup>30</sup> Joint Standing Committee on Treaties, *Report 115*, Canberra, 2011, p 50.

<sup>31</sup> [www.itso.int](http://www.itso.int) [accessed 30 November 2017]

It appears that the JSCOT inquiry and subsequent recommendations had no influence on the reasons why these treaties are not in force.

### **Bilateral treaties**

It is comparatively straightforward to determine the status of multilateral treaties. Much of the negotiation occurs in the public arena, and the ratification stages occur via a third party depositary that generally makes this information public. In contrast, bilateral treaties usually come into effect through an exchange of diplomatic notes that are not made public, and any decision to not ratify is generally made behind closed doors.

Seventeen of the treaties not in force that have been the subject of JSCOT inquiry are bilateral treaties (not including the 17 bilateral TPP side agreements that are discussed above).

#### *No longer needed*

For two agreements, events have overtaken the need for the treaty. For the *Australia-Indonesia Maritime Delimitation Treaty*, an obvious change to the international environment made the treaty unable to be ratified.

This agreement sought to finalise the maritime boundaries between Australia and Indonesia, including the area around what is now East Timor. JSCOT made a number of recommendations to improve either implementation or to minimise the risks associated with the treaty, however JSCOT approved of the treaty action.<sup>32</sup> In May 1998 President Suharto's regime fell, and in 1999 East Timor separated from the Republic of Indonesia and was under the transitional Administration of the United Nations until 2002. Further negotiations on the subject matter of the treaty have been with the new state of Timor Leste.

It appears that events have also overtaken the *Agreement with the Republic of*

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<sup>32</sup> Joint Standing Committee on Treaties, *Report 12*, Canberra, 1997.

*Korea on Cooperation in the Fields of Energy and Mineral Resources*, which was signed on 30 August 2004. JSCOT recommended that binding treaty action be taken.<sup>33</sup>

This treaty has been superseded by the *Korea-Australia Free Trade Agreement* (KAFTA) which came into effect on 12 December 2014.<sup>34</sup> The KAFTA establishes a Committee on Energy and Mineral Resources Cooperation,<sup>35</sup> and the Korea-Australia Joint Committee on Energy and Mineral Resources Cooperation and Consultation has been meeting since October 2005.<sup>36</sup>

*More than ten years old*

The following three bilateral agreements have very little publically available information, and it seems unlikely now that they would enter into effect, given the time since signature. JSCOT recommended that binding treaty action be taken in all cases.

<b>Date signed</b>	<b>Treaty</b>	<b>JSCOT report</b>
27-Jun-2005	Agreement between Namibia (of the one part) and Australia, Canada, India, New Zealand, South Africa and the United Kingdom of Great Britain and Northern Ireland (of the other part) concerning the treatment of war graves of Members of the Armed Forces of the Commonwealth in the Territory of the Republic of Namibia.	76
11-Jul-2005	Agreement with the Government of the Republic of Indonesia for Cooperation in Scientific Research and Technological Development	76
26-May-2006	Amendments to the Annex of the China-Australia Migratory Bird Agreement (CAMBA) of 20 October 1986	79

<sup>33</sup> Joint Standing Committee on Treaties, *Report 66*, Canberra, 2005, p 35.

<sup>34</sup>

<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8430726FF168944ACA257CBB0020F5AC> [accessed 15 December 2017]

<sup>35</sup> *Korea-Australia Free Trade Agreement* (Seoul, 8 April 2014) [2014] ATS 43

<sup>36</sup> <https://industry.gov.au/resource/Enhancing/bmec/Pages/bmecRepublicOfKorea.aspx> [accessed 15 December 2017]

*Less than two years old*

At the other end of the time scale, it is likely that the six bi-lateral treaties not yet in force that were signed after November 2014 are still intended to enter into force in the future.

<b>Date signed</b>	<b>Treaty</b>	<b>JSCOT report</b>
15-Nov-2014	Treaty between Australia and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters	156
14-Sep-2015	Agreement between Australia and the Republic of Estonia on Social Security	158
09-May-2016	Amendment to the Agreement on Consular Relations between Australia and the People's Republic of China	173
29-Dec-2016	Agreement relating to Scientific and Technical Cooperation between the Government of Australia and the Government of the United States of America	174
17-Feb-2017	Agreement relating to Science, Research and Innovation Cooperation between the Government of Australia and the Government of New Zealand	174
23-Feb-2017	Agreement between the Government of Australia and the Government of the State of Israel on Bilateral Cooperation in Technological Innovation and Research and Development	174

*Air Services Agreements*

Fourteen of the bilateral treaties not in force are Air Services Agreements, or amendments to Air Services Agreements. The treaties were signed between 1997 and 2013.

Air services arrangements are made through a combination of treaty-level agreements, and less than treaty level arrangements, including memoranda of

understanding and exchanges of letters.<sup>37</sup> Four of the treaties are in “interim effect”, six are “operational effect” and three are “supplemented by MOU”.<sup>38</sup>

For these treaties, where the practical implementation of the treaty relies on instruments of less than treaty status, it appears that the ratification of the treaty is of minimal importance to its effect. Although JSCOT did not make any additional recommendations, or raise any concerns about ratification in these cases, it is unlikely that it would have had any impact on the implementation of the subject matter contained in these types of agreements.

#### *Tax treaties*

Three of the bilateral treaties not in force are part of Australia’s network of bilateral tax treaties. Up-to-date information on these treaty actions is kept on the Treasury’s website to assist in tax planning. The agreements exist in the definitions of the *International Tax Agreements Act 1953*, to enable the Agreement to enter into the tax law at the point at which the Agreements enter into force. In all three cases JSCOT supported taking binding treaty action without any additional recommendations.

<b>Date signed</b>	<b>Treaty</b>	<b>JSCOT report</b>
16-Dec-2009	Agreement between the Government of Australia and the Government of Samoa for the Allocation of Taxing Rights with respect to Certain income of Individuals and to establish a Mutual Agreement Procedure in respect of Transfer Pricing Adjustments	114
12-May-2010	Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in respect of Transfer Pricing Adjustments.	120

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<sup>37</sup> <https://infrastructure.gov.au/aviation/international/agreements.aspx> [accessed 26 November 2017]

<sup>38</sup> <https://infrastructure.gov.au/aviation/international/agreements.aspx> [accessed 30 November 2017].

26-Sep-2013	Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information relating to Tax Matters	139
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*Other bilateral treaties*

The *Treaty on Economic Cooperation between the Government of Australia and the Government of the Independent State of Papua New Guinea* was considered to be sufficiently important at the time of signature to be signed by the then Prime Ministers of both countries on 21 March 2014. JSCOT recommended taking binding treaty action without any additional recommendations.<sup>39</sup> Although Australia and PNG continue to have a close economic relationship, the intentions of either party towards this Agreement, and whether ratification is likely, are not on the public record.

In contrast, there was a public statement of the Australian and New Zealand Governments that they were ceasing efforts to establish a joint therapeutic products regulator.<sup>40</sup> This meant that the *Agreement with the Government of New Zealand for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products*, signed on 10 December 2003, was no longer needed. The Agreement was supported by JSCOT.<sup>41</sup>

One bilateral treaty is not in force due to Parliamentary disapproval. However it was not JSCOT but the likelihood of a Senate block that prevented the entry into force of the *Treaty on Extradition between Australia and The People's Republic of China*. This Agreement was signed on 6 September 2007 but not tabled in the Parliament until 2 March 2016.

JSCOT inquired into the Agreement over the 44th and 45th Parliaments,

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<sup>39</sup> Joint Standing Committee on Treaties, *Report 143*, Canberra, 2014.

<sup>40</sup> <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2014-dutton100.htm> [accessed 10 December 2017]

<sup>41</sup> Joint Standing Committee on Treaties, *Report 62*, Canberra, 2004.

reporting back on 16 December 2016. As the transcripts of the public hearings show, many members of JSCOT had concerns about the proposed extradition arrangements.<sup>42</sup> The final report made four additional recommendations, aimed at safeguarding the human rights of extradited persons. However, on balance, JSCOT considered that the power of the Minister for Justice to refuse extradition was a sufficient backstop safeguard, and recommended that binding treaty action be taken.<sup>43</sup>

The Labor members dissented from this view, recommending instead that binding treaty action be delayed until after there had been an independent review of the *Extradition Act 1988* to ensure the extradition system continues to be consistent with community expectations and international legal obligations.

To implement this treaty, the Government introduced regulations in order for China to become an extradition country under the *Extradition Act 1988*. On 21 March 2017, Senator Bernadi moved a disallowance motion on the Extradition (People's Republic of China) Regulations 2017.<sup>44</sup> This motion lapsed after the Government then withdrew the regulations on 28 March 2017, citing the advice from the Leader of the Opposition that the Opposition would not support ratification.<sup>45</sup>

According to commentators at the time, the JSCOT hearing was an early sign that the Government may have difficulty in passing the regulations, with the decisive factor being the potential for dissent from among government backbenchers.<sup>46</sup> It is possible that the backbenchers would not have been aware of the contentious nature of this treaty without the JSCOT inquiry highlighting the relevant issues. It is also likely that the Opposition disagreement with the treaty was given form and strength from the public hearings and submissions collected during the

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<sup>42</sup> *Committee Hansard*, Joint Standing Committee on Treaties, Canberra, 24 November 2016.

<sup>43</sup> Joint Standing Committee on Treaties, *Report 167*, Canberra, 2016, para. 3.60.

<sup>44</sup> senate journals no. 32 21 march 2017 p 1094.]

<sup>45</sup> <https://foreignminister.gov.au/releases/Pages/2017> [accessed 1 December 2017]

<sup>46</sup> <http://www.smh.com.au/federal-politics/political-news/china-extradition-treaty-how-did-the-turnbull-government-get-it-so-wrong-20170328-gv80de.html> [accessed 1 December 2017]

JSCOT inquiry. The dissenting report draws from arguments made by witnesses before JSCOT.

In contrast to multilateral treaties, the Government has a great deal of control over the timing and implementation of bilateral treaties. However it is under no obligation to make the decisions relating to a bilateral treaty public. Negotiations about timing and implementation continue in private with the other party after signature and JSCOT inquiry.

Several of these treaties, which were supported by JSCOT as being in Australia's national interest, have not been implemented for unknown reasons. This undermines JSCOT's role, and limits the value of JSCOT's recommendations, by suggesting that other factors are in play in determining the national interest than those considered by JSCOT. It also shows the evolving nature of international relations and highlights the difficulties of relying on JSCOT approval over a long period of time.

The only one of these treaties where the JSCOT inquiry may have influenced the lack of implementation was the extradition agreement with China. In that case the actual restraint on executive action manifested through the traditional method of Parliamentary oversight - the refusal to pass implementing legislation. However it is reasonable to assume that the JSCOT inquiry process aired the issues, and drew attention to the potential problems of the agreement that may not have been otherwise apparent.

### **JSCOT recommended against ratification**

In the past 20 years, JSCOT has recommended on seven occasions that a treaty not be ratified. This includes OPCAT, as discussed above.

The *Anti-Counterfeiting Trade Agreement (ACTA)* was agreed on 1 October 2011 and signed by 31 countries and the European Union. JSCOT inquired into the



Agreement and made 9 recommendations, including that the ACTA not be ratified until several actions had been taken, including an independent assessment of the benefits and costs.<sup>47</sup>

The ACTA was controversial in a number of countries, and only Japan has ratified the agreement to date.<sup>48</sup> In its response of 27 November 2012, the Government agreed with most of the JSCOT recommendations, commissioning an analysis of the costs and benefits, and stating, through the Government response, the Government's position on interpretation of controversial provisions in the treaty.<sup>49</sup>

No further action has been taken in relation to this treaty, and it does not appear on the DFAT database as a treaty current but not in force. The unpopularity of the treaty was highlighted by the JSCOT process and the bipartisan recommendation not to ratify. This is likely to have influenced the Government's decision to not ratify the Agreement.

In 2008 JSCOT inquired into the *Agreement between the Government of Australia and the Government of the Russian Federation on Cooperation in the Use of Nuclear Energy for Peaceful Purposes* and made three recommendations, including that the Government not enter into the treaty until it was satisfied of certain pre-conditions.<sup>50</sup> JSCOT was concerned that Russia was not meeting its international obligations in relation to nuclear material.

The Coalition members, then in Opposition, made a dissenting report, in which they considered that the safeguards were sufficient and Australia should take binding treaty action.

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<sup>47</sup> Joint Standing Committee on Treaties, *Report 126*, Canberra, 2012.

<sup>48</sup> [http://www.mofa.go.jp/policy/economy/i\\_property/acta\\_conclusion\\_1210.html](http://www.mofa.go.jp/policy/economy/i_property/acta_conclusion_1210.html) [accessed 3 December 2017]

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[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jscot/reports.htm](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscot/reports.htm) [accessed 18 December 2017]

<sup>50</sup> Joint Standing Committee on Treaties, *Report 94*, Canberra, 2008

In its response, the Government gave further, more detailed arguments rebutting the conclusions of JSCOT that formed the basis of the recommendations. This response forms a comprehensive public statement about nuclear safeguards in relation to Russia. In the end, the Government stated that “the question of taking binding treaty action remains under consideration”, and the Agreement entered into force on 11 November 2010. However on 3 September 2014, then Prime Minister Abbott announced the suspension of Australian uranium sales to Russia until further notice, as part of the sanctions following Russia’s purported annexation of Crimea.<sup>51</sup>

In 2002, JSCOT advised Parliament that “[a]t this stage, the Committee declines to support binding treaty action” on a double taxation agreement with the USA.<sup>52</sup> JSCOT was not convinced that the USA tax amendments had any benefit for Australia, and recommended that the Australian Tax Office develop an effective methodology to quantify the economic benefits of double tax agreements.<sup>53</sup>

On 25 June 2002 the Treasury provided additional information, including a summary of the benefits, an analysis of the comparative static net benefits and of the key submissions to an earlier review. This was the only government response provided to this Report. The amendments were ratified by exchange of instruments of ratification on 25 August 2002, and entered into force on 12 May 2003.<sup>54</sup>

In its Fifteenth Report, tabled in June 1998, JSCOT recommended that ratification of the *Agreement between Australia and the Islamic Republic of Pakistan on the*

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<sup>51</sup> <http://dfat.gov.au/geo/russia/pages/australia-russia-nuclear-cooperation-agreement-frequently-asked-questions-faq.aspx> [ accessed 10 December 2017]

<sup>52</sup> Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income

<sup>53</sup> Joint Standing Committee on Treaties, *Report 46*, Canberra, 2002.

<sup>54</sup> <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllIDocIDs/74D61378E48A41C7CA256B050012BBD5>

*Promotion and Protection of Investments* not take place until the Australian Government announces publicly the resumption of Ministerial and senior official contacts with Pakistan.<sup>55</sup> This recommendation arose from concerns about Australia's overall relationship with Pakistan, particularly Pakistan's recent nuclear tests and the subsequent cessation of high level contacts between both countries.

The Government advised, in its response of 29 June 2000, that it was unable to accept the recommendation of JSCOT in relation to this agreement, saying that the recommendation "ran counter to already agreed Australian Government policy on the measures adopted in response to nuclear testing". The Agreement entered into force on 14 October 1998.

In 1998, JSCOT also took the unusual step of recommending against entering into an agreement that had not yet been finalised. At the time, the *Multilateral Agreement on Investment* (MAI) was being negotiated under the umbrella of the OECD. Negotiations were discontinued in April 1998,<sup>56</sup> although it was not clear at the time that it would be a permanent cessation.

In an interim report, JSCOT recommended that Australia not sign the final text "unless and until a thorough assessment has been made of the national interest, and a decision is made that it is in Australia's interest to do so".<sup>57</sup>

In its final report, JSCOT acknowledged that the MAI was not going to be negotiated to finalisation, but considered that the issues and concerns raised were sufficiently important to conclude the inquiry. JSCOT recommended that, if there were negotiations for an across countries agreement for the regulation of international capital, that Australia continue to be involved in negotiations.

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<sup>55</sup> Joint Standing Committee on Treaties, *Fifteenth Report*, Canberra, 2008, para. 6.44.

<sup>56</sup>

<http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>

<sup>57</sup> Joint Standing Committee on Treaties, *Interim Report: 14<sup>th</sup> Report*, Canberra, 1998, para. 1.69.

JSCOT made specific recommendations for consultation; including that all Australians should have a chance to put their views as part of “an open and public process”.<sup>58</sup>

In its response of 7 December 1999, the Government stated that negotiations for the MAI are no longer taking place, and if such negotiations should re-start, the Government will consider whether it is in Australia’s national interest to be involved in such negotiations. The response also makes clear the Government would provide for interested parties to put their views, and will decide which department would have the lead role.

This response is an unvarnished statement of the Government’s assertion of the primary role in making decisions about the negotiation of treaties. However, despite this response, JSCOT’s recommendation on improving future consultation has been implemented. DFAT routinely consult at all points of the negotiation of free trade agreements, and have done so since the World Trade Organization conference in 1999.<sup>59</sup>

In 1997, JSCOT recommended against ratifying the *Economic and Commercial Agreement with Kazakhstan* “unless and until there are demonstrations by Kazakhstan of good faith in its trade and investment relations with Australia, in particular appropriate compensation for Telstra”.<sup>60</sup> This recommendation arose from a particular situation where Telstra lost control of its investment in a joint venture in Kazakhstan through regulatory changes. Of particular concern to JSCOT was that neither the NIA nor the government witnesses made any mention of Telstra’s difficulties, leading JSCOT to describe the NIA and the information as “seriously deficient”. JSCOT also recommended that if ratification were considered in the future, the Government prepare and table an additional NIA.

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<sup>58</sup> Joint Standing Committee on Treaties, *Multilateral Agreement on Investment: Final Report*, Canberra, 1999, para. 8.47.

<sup>59</sup> Joint Standing Committee on Treaties, *Report 162*, Canberra, 2016, Appendix C Seminar Transcript, pp. 76 -77.

<sup>60</sup> Joint Standing Committee on Treaties, *Eleventh Report*, Canberra, 1997, para. 2.60.

In its response of 9 August 2001, the Government noted the recommendation and advised that, at the time, the Government agreed that ratification be deferred. However the situation with Telstra had been resolved, and the Government now assessed that finalisation of this treaty would be in Australia's interest. A revised NIA was tabled on 8 October 2003. JSCOT conducted a further inquiry, and remained concerned about the tangible benefits to Australia from the Agreement. However, noting that the Agreement was one of encouragement rather than obligations, JSCOT recommended that binding treaty action be taken.<sup>61</sup> The treaty entered into force on 2 June 2004.<sup>62</sup>

Of the seven agreements where JSCOT recommended not ratifying, five went ahead regardless; noting that in two cases – OPCAT and the agreement with Kazakhstan - JSCOT conducted a further inquiry and supported ratification. In one case – the nuclear agreement with Russia – the agreement is no longer operational. It is possible that the concerns expressed by JSCOT about this agreement lent weight to the decision to cancel this agreement, even if the proximate cause was Russia's actions in the Crimea.

In two cases – the MAI and the ACTA – JSCOT served as a focus for serious public concerns about both agreements. Neither agreement was supported by the international community and they are no longer being actively considered for implementation.

### **JSCOT recommended ratifying, subject to conditions**

On five occasions JSCOT has recommended that binding treaty action only be taken subject to the fulfilment of a series of specific recommendations.

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<sup>61</sup> Joint Standing Committee on Treaties, *Report 56*, Canberra, 2003.

<sup>62</sup>

<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/4CF895113A50E00DCA256D730009281F>

In 1996, JSCOT expressed a number of concerns about two international agreements relating to tuna: the *Agreement Between the Government of Australia and the Government of Japan Concerning Long-line Tuna Fishing 1996* and the *Agreement for the Establishment of the Indian Ocean Tuna Commission*. JSCOT made 21 recommendations in relation to tuna fishing and surrounding matters to protect against some of the potential risks of the two agreements.<sup>63</sup>

In its response of 26 May 1998, the Government provided detailed further advice on how it was either implementing the recommendations, or how it considered that the reasons for each recommendation were already being adequately addressed in other ways. Although the Government response was measured and comprehensive, it was given at least eighteen months after the agreements entered into force. The agreement with Japan was an annual agreement, which entered into force on 4 June 1996.<sup>64</sup> The agreement on the Indian Ocean Tuna Commission entered into force for Australia on 13 November 1996.

JSCOT's inquiry into the *Statute of the International Criminal Court* generated a great deal of public interest, receiving 252 submissions. JSCOT recommended that Australia ratify the Statute, subject to the implementation of the other ten recommendations in the report.<sup>65</sup>

In its response of 12 February 2004, the Government accepted nine of the recommendations - including making the requested legislative changes - and noted another two, with reasons. Australia had ratified the Statute on 1 July 2002, with an entry into force for Australia on 1 September 2002.

Three agreements about Co-operation in the Peaceful Uses of Nuclear Energy - with the United Arab Emirates, India and the Ukraine - were also the subject of a

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<sup>63</sup> Joint Standing Committee on Treaties, *Report 3*, Canberra, 1996.

<sup>64</sup>

<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/FF0B5D6D8868931BCA256B42000D1D56>

<sup>65</sup> Joint Standing Committee on Treaties, *Report 45*, Canberra, 2002.

conditional approval by JSCOT. These Agreements are necessary pre-conditions for the sale of nuclear material from Australia to another country in order to safeguard the use of that material. In Report 137, JSCOT recommended that the Government ratify the agreement with the UAE, subject to another three recommendations to improve safety and monitoring. The Government response did not implement the recommendations, but provided further information on why it considered the additional safeguards to be unnecessary.<sup>66</sup> The Agreement came into force on 14 April 2014.

In relation to the agreement with India, JSCOT made an additional five recommendations, including setting out several specific conditions that should be met before any sale of uranium to India.<sup>67</sup> In its response of 11 November 2015, the Government noted JSCOT's concerns, but did not agree with deferring sale of uranium, and did not agree with the recommendation to disclose legal advice relating to the agreement. The Agreement entered into force on 13 November 2015.

JSCOT had similar concerns about safety and monitoring in relation to the Agreement with the Ukraine. JSCOT recommended that binding treaty action be taken "providing the Australian Government undertakes a proper assessment of risks, and develops and maintains a suitable contingency plan for the removal of Australian nuclear material if the material is at risk of a loss of regulatory control."<sup>68</sup> A government response was tabled on 1 June 2017, explaining further the steps that were being taken to address JSCOT's concerns. The Agreement entered into force on 15 June 2017.

For four of the five treaties in this group, the JSCOT recommendations were not implemented by the Government. Although the government responses provide

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[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Treaties\\_referred\\_on\\_15\\_January\\_2014/Government\\_Response](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaties_referred_on_15_January_2014/Government_Response)

<sup>67</sup> Joint Standing Committee on Treaties, *Report 151*, Canberra, 2015

<sup>68</sup> Joint Standing Committee on Treaties, *Report 167*, Canberra, 2017.

useful additional information and explanation in response to JSCOT's concerns, the JSCOT inquiry did not act as an actual restraint on the executive. These four treaties came into force without alteration. However the Government did implement most of JSCOT's recommendations in relation to the International Criminal Court.

## **Conclusions**

This paper does not address many of the benefits that have been attributed to JSCOT inquiry over the past twenty years. These include the increase in both the quantity and quality of information available about treaties, the increased readiness of negotiators to consult widely during the treaty process, and the extra care taken by public servants who know that they will be held publically accountable for the content and process of treaties. There is no doubt that treaty making in Australia is more open and consultative than it was 20 years ago. There are more opportunities for both the Parliament and the people to involve themselves in issues of international relations than there were prior to the 1996 reforms, and JSCOT is an important part of that change.

This paper has not addressed those benefits, but has only focussed on the actual restraint of executive action; has JSCOT stopped the executive from entering into a treaty that it had signed? The short answer is no. Of the 69 treaties not in force only the Extradition Agreement with China was not implemented because of parliamentary objection; and that occurred in the Senate, not JSCOT. It is possible that the Senate would not have been as aware of the issues without JSCOT inquiry, but JSCOT's recommendation was for the Government to take binding treaty action.

For the treaties not in force, it is worth noting that JSCOT recommended in almost every case that entering into this treaty was in Australia's national interest. This conclusion was based on the information available to JSCOT at the time, and included an assessment of the detriment to Australia that may occur if



the treaty was not entered into. The failure of the Government to implement these treaties may show that JSCOT not only fails to act as a restraint, but also fails to act as an encouragement to implementing treaties.

JSCOT is slightly more effective on the rare occasions when it recommends against ratification, or ratification subject to certain conditions. Twice treaties were not implemented after JSCOT did not support ratification, and on a further two occasions JSCOT conducted an additional inquiry with more information before supporting ratification. One treaty was ratified after the implementation of JSCOT's recommendations.

As a side benefit, the government responses to JSCOT recommendations are often useful documents to explain the reasons behind a treaty and expand on areas of concern. This has benefit even when the recommendation is not implemented, or not implemented in the way that JSCOT has suggested.

Structural changes to the treaty process would be needed to improve the degree of actual restraint on executive action from JSCOT inquiry. These could include a power of Parliamentary veto, where the executive does not enter into a treaty without express Parliamentary approval. Alternatively, Parliament could have a greater role during the negotiation process. Both suggestions would need to be developed within the existing constitutional framework, and would have to balance the need for Parliamentary oversight against the requirements for an efficient and confidential treaty negotiation process.

The most plausible conclusion from this analysis is that restraint of executive action is not a useful performance indicator to determine the effectiveness of JSCOT. Ratification and implementation of treaties are complex, and the balance of competing interests changes over time. JSCOT inquiry is only one factor in the decisions that are made, and re-made, about Australia's international obligations.

It may be that JSCOT effectiveness is better measured by qualitative indicators

relating to inquiries; such as thoroughness, the completeness of the information gathered, the quality of the analysis, and the openness to opposing views.

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