
6 Treaties

Departments and agencies prepared Regulation Impact Statements for less than half of the treaties which affected business or restricted competition in 1997–98. In the latter half of the year, the Office of Regulation Review, with the assistance of some departments, developed an early warning system which should result in increased compliance in 1998–99.

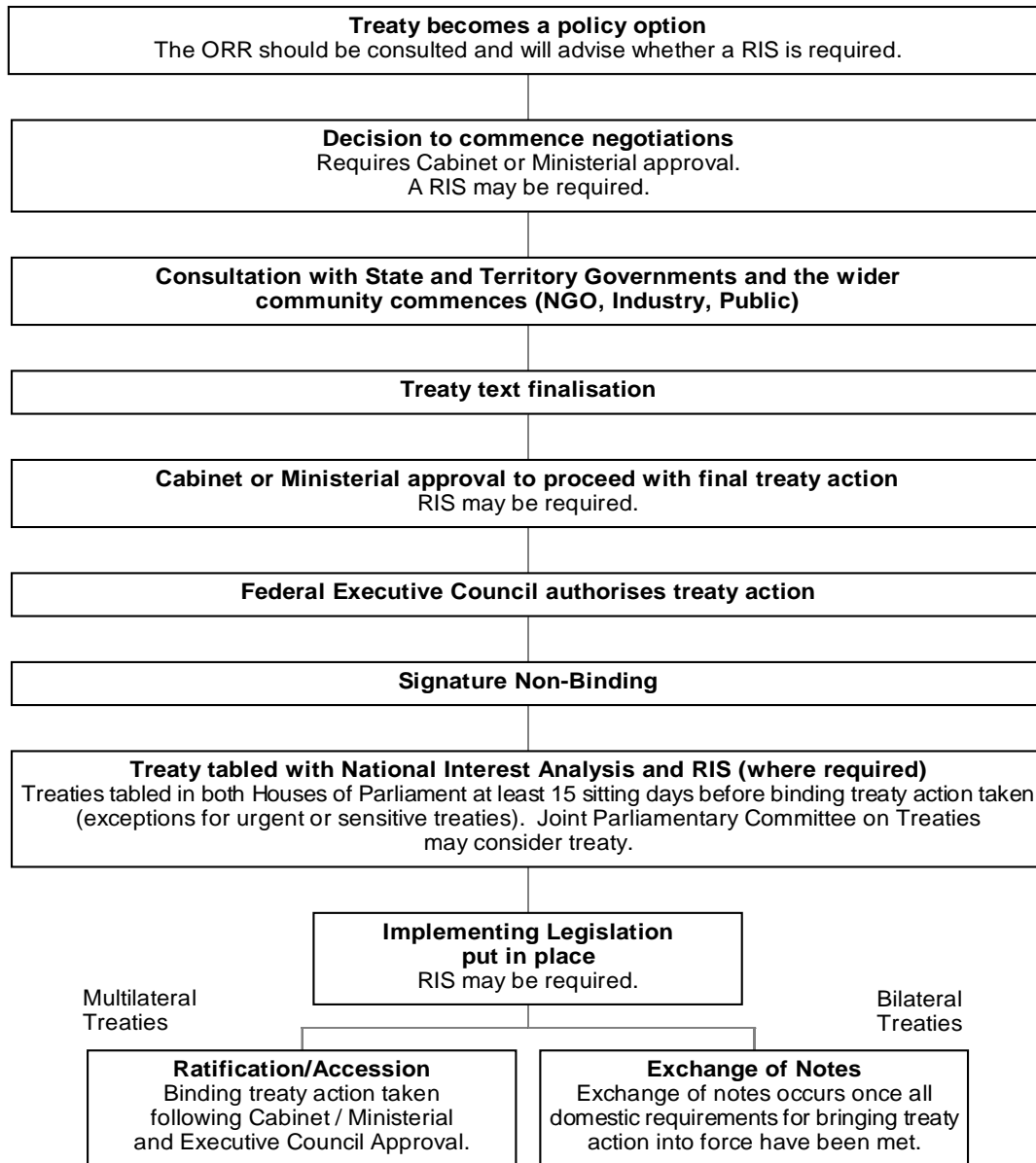
6.1 What are treaties and how are they made?

A treaty is a written agreement between two or more parties which is governed by international law and is intended to create legal relations. The parties must have ‘international personality’, which means that they must be recognised by the international community as having the capacity to enter into international relations. Such parties include countries, principalities, emirates and kingdoms. However, in some cases international organisations, such as the United Nations, may also be parties to treaties.

A treaty may take the form of a charter, convention, covenant, protocol, agreement, pact or exchange of letters. They can be bilateral or multilateral.

In May 1996, the Government announced changes to the treaty-making process. The reforms, which include the introduction of National Impact Analyses (NIAs), provide for more effective consultation and increased public and Parliamentary scrutiny. Figure 6.1 illustrates how the Regulation Impact Statement (RIS) requirements fit into the treaty making process.

Figure 6.1 The treaty making process



A treaty usually sets out the procedures which must be fulfilled to bring it into force. Signature may be sufficient in some cases, but if the State party must take legislative action to fulfil its obligations under the treaty, ratification is usually required.

If the further step of ratification is required, signature alone is insufficient to bind a country to implement the treaty under international law. Signature, however, indicates a commitment by the signing party that it supports the principles of the treaty and will refrain from action which would defeat its object and purpose.

Where a treaty is signed but not yet ratified, there is an obligation on the part of the signatory country to proceed to ratification in good faith. It is Australia's policy to adhere to this duty of good faith: Australia will not sign a treaty which it does not intend to ratify.

Ratification is the final step which binds a country under international law to implement the terms of the treaty. Ratification is separate from the putting in place of domestic legislation. It usually occurs after the necessary changes to domestic law have been made. Accession describes the situation where a country was not originally a signatory to the treaty but subsequently accepts its provisions.

6.2 How do the Regulation Impact Statement requirements apply to treaties?

The preparation of a Regulation Impact Statement (RIS) is mandatory for all treaties involving regulation which will directly affect business, which will have a significant indirect effect on business, or which will restrict competition. Regulation is defined very broadly to include any law or other government 'rules' which influence the way people behave. The RIS requirement is not necessarily limited to treaties which require changes or additions to domestic legislation. It may also include treaties which otherwise involve regulation (see box 6.1).

Both the RIS and the NIA are made public. The RIS aids the decision-making process by analysing all feasible options and their potential impacts. The NIA was introduced as part of a package of treaty-making reforms to ensure that State and Territory governments and the Parliament are involved effectively in and informed of the treaty-making process.¹ Hence, there are significant differences in their roles. In addition, the process of preparing a NIA would normally commence much later than the preparation of a RIS. If required, a RIS should be prepared at the very beginning of the process — that is, at the time of the decision to commence negotiations — and as such is an integral part of the policy development process.

There are three points in the development of a treaty at which RISs are required. At each stage, the RIS should be revised to reflect analysis relevant to that stage in the process. The stages are:

1. **decision to commence negotiations:** a draft RIS, focussing on the problems being addressed and the objectives of the potential negotiations, should

¹ The NIA was also introduced to address the "democratic deficit" in the way treaty-making was carried out in the past (Minister for Foreign Affairs 1996).

accompany the Cabinet Submission or the letter to Prime Minister when approval is sought to enter treaty negotiations;

2. **endorsement of the treaty:** a RIS, giving greater emphasis to the impacts on different groups within Australia, should accompany the Cabinet Submission or letter to the Prime Minister when approval is sought to sign the final text of the treaty;
3. **Parliamentary scrutiny:** a RIS should accompany the NIA when the treaty is tabled in Parliament.

A RIS is also required for domestic legislative changes resulting from a treaty, except where the domestic legislation repeats or adopts the terms of all or part of an instrument for which the treaty provides.

However, in those cases where the RIS for the treaty addresses the same problems and issues as would the RIS for the domestic legislation, but the domestic legislation does not repeat or adopt the terms of the treaty verbatim, then only one RIS need be prepared. That is, the RIS prepared for the treaty can be referred to in the Explanatory Memorandum for the domestic legislation.²

Box 6.1 Treaties which do not require changes or additions to domestic legislation

A RIS should be prepared if a treaty involving regulation is likely to have a direct or substantially indirect impact on business, or restrict competition. The RIS requirements are not limited to treaties which require changes to domestic legislation. They may include treaties that otherwise ‘involve’ regulation.

Two examples demonstrate the point. Bilateral Film Co-Production Treaties do not alter any existing legislation. Existing domestic legislation defines an official film “co-production” as a joint film production between Australia and a country that has ratified a Bilateral Film Co-Production Treaty with Australia. Once Australia and another country ratify an agreement, “official co-productions” become eligible to apply for funding from the Australian Film Finance Corporation and the Australian Film Commission, and tax concessions on private investment. Hence, the treaty ‘involves’ regulation and has a direct impact on business. Such treaties require the preparation of a RIS.

Alternatively, there are many co-operative treaties which are generally statements of principle about improving relations between two countries. For example, Trade and Economic Relations Agreements are often statements of principle about improving relations and an agreement to meet occasionally to further mutual understanding and cooperation. They do not create, change or otherwise involve regulation. Such co-operative agreements do not normally require a RIS.

² Where the tabling of the enabling domestic legislation precedes the tabling of the treaty text, then reference to the RIS prepared for the legislation may be made in the NIA.

6.3 Regulatory activities in treaties

During 1997–98, 47 treaties were tabled in the Commonwealth Parliament. Of these, 33 (or 70 per cent) did not require a RIS since they did not affect business or were subject to the limited exceptions from the requirement to prepare a RIS. The remaining 14 treaties — 30 per cent of the total — affected business, and therefore required the preparation of a RIS.

Of the 14 treaties that required a RIS, 12 had a *direct* impact on business, and two had a significant *indirect* impact on business. These figures are summarised in figure 6.2 below.

Table 6.1 provides a list of examples of treaties that have an effect on business.

In five cases the RIS was prepared for tabling. In only one case was it prepared for the decision maker. However, this was understandable given that decisions to enter into treaties, were often made a number of years earlier when RIS requirements were not as extensive. Uncertainty also existed about the stages in the treaty-making process at which RISs are now required. All of the RISs prepared were cleared by the Office of Regulation Review (ORR) as containing an adequate level of analysis.

Figure 6.2 Regulatory activities in treaties

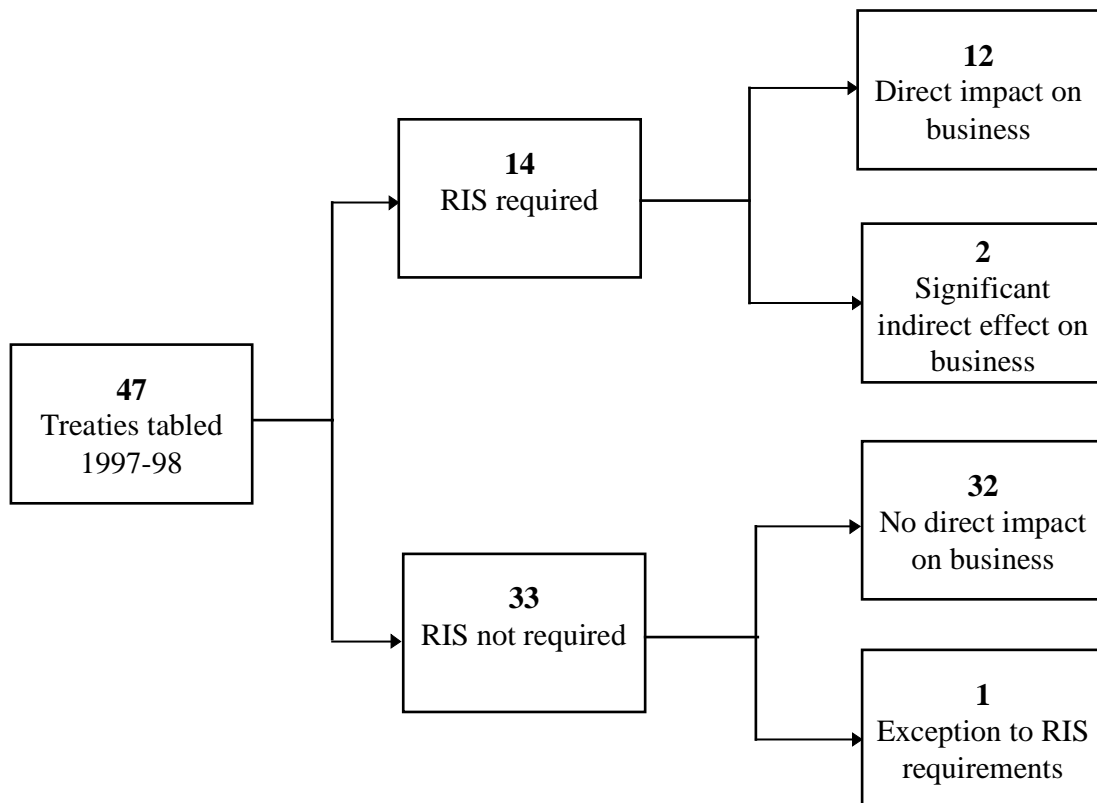


Table 6.1 Selected treaties having an effect on business, 1997–98

<i>Treaty</i>	<i>Features</i>	<i>Effect on business</i>
Agreement on Mutual Recognition in relation to Conformity Assessment, Certificates and Markings between Australia and the European Community	Enables testing, inspection and certification of products intended for sale in the other party's territory to be undertaken in the country of origin. Has the potential to reduce the costs associated with and the time required for certification of products for export	Direct
International Telecommunications Union Final Acts of the World Radio Communications Conference: Partial Revision of the Radio Regulations of 5 December 1979	Makes additional radio-frequency spectrum available for mobile satellite services and opens additional spectrum for high frequency broadcasting	Direct
Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter	Alters the existing regime regulating the dumping of wastes and other matter from one which states what may not be dumped in the marine environment to one which defines what is permitted to be dumped	Direct
Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries	Finalisation of the seabed boundaries will allow the release of additional areas for petroleum exploration	Significant Indirect

Table 6.2 Assessment of the processes used for 1997–98 treaties against compliance measures

<i>Compliance measures</i>	<i>Number of treaties</i>	<i>As a percentage of treaties that require a RIS</i>
For how many treaties was the first RIS prepared when policy approval was given for the negotiations to commence?	0	
For how many treaties was the first RIS prepared when policy approval was sought for the final text of the treaty?	1	7
For how many treaties was the first RIS prepared for tabling (either of treaty text or domestic legislation) in Parliament?	5	36
For how many treaties was the first RIS prepared after tabling had occurred?	0	
For how many treaties was a negative comment made?	0	
For how many treaties did the RIS prepared finally reach an adequate standard?	6	43
For how many treaties was a RIS included in the explanatory material tabled in Parliament?	2	14

6.4 Explaining compliance for treaties

Several factors, in addition to those outlined above, have contributed to the level of compliance with RIS requirements for treaties. Given that NIAs share some of the attributes of RISs, the ORR at first monitored the existing NIA processes in order to assess whether they met the RIS requirements. After a period of observation it was decided that they did not, primarily because the fundamental roles of NIAs and RISs differ. In early 1998, the ORR met with the Treaties Secretariat to clarify RIS processes for treaties and the first RISs were tabled with treaty action on 30 June 1998.

6.5 Improving compliance for treaties

The ORR currently liaises with both the Treaties Secretariat in the Department of Foreign Affairs and Trade (DFAT) and the Department of the Prime Minister and Cabinet (International Division) in order to identify upcoming treaty action. This early warning system in conjunction with increased awareness of RIS requirements, should result in increased compliance in 1998–99.

In addition, the Treaties Secretariat advises Departments on the need to consult with the ORR about RIS requirements for tabling. This information is to be included in the DFAT treaty document *Negotiation, Conclusion and Implementation of Treaties*.