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JOINT COMMITTEE ON TREATIES

Friday, 25 June 1999

Members: Mr Andrew Thomson *(Chair)*, Senators Bourne, Brownhill, Coonan, Cooney, O'Chee, Reynolds and Schacht and Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Laurie Ferguson, Mr Hardgrave and Mrs De-Anne Kelly

Senators and members in attendance: Senators Brownhill, Coonan and Cooney and Mr Adams, Mr Bartlett, Mr Hardgrave and Mr Andrew Thomson

Seminar on the parliamentary scrutiny of treaties

PARTICIPANTS

Ms Stephanie Pribil, ACT Chief Minister's Department

Ms Larissa Kettle, Agriculture, Fisheries and Forestry, Australia

Mr Bill Campbell, Attorney-General's Department

Mr Michael Lennard, Australian Taxation Office

Mr Neil Motteram, Australian Taxation Office

Mr Michael Nugent, Australian Taxation Office

Mr David Driscoll, Constitutional Affairs Committee (WA)

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Mr Mark Duckworth, Department of Premier and Cabinet (NSW)

Mr Chris Goodreid, Department of Premier and Cabinet (Qld)

Mr Donald Speagle, Department of Premier and Cabinet (Vic)

Mr Richard Fairbrother, Department of the Prime Minister and Cabinet

Mr Andrew Chalden, Environment Australia

Ms Pamela Harris, Environment Australia

Mr Norman Kalagayan, Environment Australia

Mr Alex Adrianopoulos MP, Federal-State Relations Committee (Vic)

Hon. Gerald Ashman MLC, Federal-State Relations Committee (Vic)

Ms Leonie Burke MP, Federal-State Relations Committee (Vic)

Mr Ken Jasper MP, Federal-State Relations Committee (Vic)

Hon. Michael John MP, Federal-State Relations Committee (Vic)

Ms Lyn Kosky MP, Federal-State Relations Committee (Vic)

Hon. Wendy Smith MLC, Federal-State Relations Committee (Vic)

Ms Lilian Topic, Federal-State Relations Committee (Vic)

Mr Allan Bracegirdle, Foreign Affairs, Defence and Trade Committee (NZ)

Hon. Derek Quigley MP, Foreign Affairs, Defence and Trade Committee (NZ)

Mr David Sanders, Legislative Counsel (NZ)

Ms Judy Barratt, IP Australia

Mr Roger Braid, IP Australia

Ms Helen Dawson, IP Australia

Ms Joanne Rush, IP Australia

Ms Jessica Wyers, IP Australia

Ms Shirley Harris, IP Australia

Mr Stephen Boyd, Joint Committee of Public Accounts and Audit

Hon. Dick Adams MP, Joint Standing Committee on Treaties

Mr Kerry Bartlett MP, Joint Standing Committee on Treaties

Senator Vicki Bourne, Joint Standing Committee on Treaties

Senator the Hon. David Brownhill, Joint Standing Committee on Treaties

Senator Helen Coonan, Joint Standing Committee on Treaties

Senator Barney Cooney, Joint Standing Committee on Treaties

Mrs Kay Elson MP, Joint Standing Committee on Treaties

Ms Tiana Gray, Joint Standing Committee on Treaties

Mr Gary Hardgrave MP, Joint Standing Committee on Treaties

Mr Grant Harrison, Joint Standing Committee on Treaties

Mrs De-Anne Kelly MP, Joint Standing Committee on Treaties

Mr Robert Morris, Joint Standing Committee on Treaties

Mr Patrick Regan, Joint Standing Committee on Treaties

Senator the Hon. Margaret Reynolds, Joint Standing Committee on Treaties

Ms Cheryl Scarlett, Joint Standing Committee on Treaties

Hon. Andrew Thomson MP, Joint Standing Committee on Treaties

Ms Kerry Tucker MLA, Legislative Assembly (ACT)

Hon. Ray Bailey MLC, Legislative Council (Tas)

Hon. Paul Harris MLC, Legislative Council (Tas)

Hon. Doug Parkinson MLC, Legislative Council (Tas)

Hon. Jim Wilkinson MLC, Legislative Council (Tas)

Hon. Stephen Wilson MLC, Legislative Council (Tas)

Mr. Steven Churches, Legislative Council Committee Office (WA)

Hon. Ray Halligan MLC, Legislative Council Standing Committee on Constitutional Affairs (WA)

Hon. Tom Helm MLC, Legislative Council Standing Committee on Constitutional Affairs (WA)

Hon. Angus Redford MLC, Legislative Review Committee (SA)

Hon. Alexander Downer MP, Minister for Foreign Affairs

Ms Ann Harrap, Office of the Minister for Foreign Affairs

Mr Roger Brake, Office of the Assistant Treasurer

Mrs Gillian Gould, Parliamentary Relations Office

Ms Melissa McEwen, Screen Producers' Association of Australia

Mrs Linda Lavarch MLA, Scrutiny of Legislation Committee (Qld)

Mr John Carter, Senate Employment Committee

Mr Ted Quinlan MLA, Standing Committee for the Chief Minister's Portfolio (ACT)

Hon. Murray Nixon JP MLC, Standing Committee on Constitutional Affairs (WA)

Hon. Ronald Dyer MLC, Standing Committee on Law and Justice (NSW)

Hon. Kevin Minson MP, Standing Committee on Uniform Legislation and Intergovernmental Relations (WA)

Ms Melina Newman, Standing Committee on Uniform Legislation and Intergovernmental Relations (WA)

Mr Graeme Evans, Policy Resource Coordinator, ACOSS

Professor John Halligan, University of Canberra

Mr Robin Miller, University of Canberra

Professor Gillian Triggs, University of Melbourne

Associate Professor Donald Rothwell, University of Sydney

Professor Ivan Shearer, University of Sydney

Professor Richard Herr, University of Tasmania

Seminar met at 8.56 a.m.

WELCOME

Associate Professor Richard Herr, Professor of Politics, University of Tasmania, and Past President of the Australasian Study of Parliament Group

Mr HERR—It is my great pleasure on behalf of both of the sponsoring bodies—the Australasian Study of Parliament Group and the Joint Standing Committee on Treaties—to welcome you all to the seminar this morning on the role of parliaments in treaty making. The ASPG will celebrate its 20th anniversary later this year in Sydney. Over that period of two decades, it is seminars such as this which have helped to vindicate the establishment of the ASPG in promoting the relevance of parliament as a robust contributor to contemporary public life. Indeed, it was precisely this idea of ensuring that parliament did have a central role in Australian democracy and Australasian democracy that led to its formulation and to the reason for promoting this seminar in cooperation with JSCT at our annual meeting last year.

Critics of the Westminster system have long claimed that parliament as an institution is in decline. That is to say that governments, bureaucracies and political parties have been setting the public agenda for so long that parliament is largely an irrelevancy. The defenders—and most of you in the room who are members of the ASPG, I hope, are amongst that group—argue that in fact parliament may have lost some areas, such as the initiation of legislation, but this decline has been offset by the acquisition of new responsibilities, such as the oversight of the burgeoning influence of international relations in our affairs.

Whether this image of parliament in transformation rather than in decline is valid really depends on whether parliaments are grappling with these new roles, whether they are taking on having an impact on the new areas of their responsibility. It is this general theme of how well these new areas are being managed that we are going to explore today by examining specifically the treaty making area. At the end of the day, it is the hope of the seminar organisers that we will identify and assess the options for enhancing and, where appropriate, invigorating the role of parliaments, national and state, in treaty making.

Why treaty making? JSCT has no doubt that, and I think the rest of us should not as well, it should be a rhetorical question. For me, at least, there are two key reasons for this focus. One is the exponential growth in the making of treaties. It is about 10 times that of earlier rates. Indeed, I saw one reference recently that said we had created as many treaties in the last 50 years as in the preceding 500, and this rate is increasing. More importantly, equally importantly perhaps, is that treaties are overwhelmingly the preferred mechanism internationally now for creating new international law. Therefore, in some ways, there is an analogy between the global conferences which create new comprehensive treaties and the workings of parliaments anyway but the fact is, by creating a more rule regulated international order, this comes home and impacts on our domestic laws. To that extent, we have to make sure that the two levels of law making are indeed compatible.

The need for this compatibility is important at all levels but, with the indulgence of my friends from New Zealand, I will put on my Tasmanian hat—now that the Tasmanian delegation has arrived as well—and say that one of the areas of importance for me at least is that there be a compatibility between the making of international law and the maintenance of the federal balance in law making responsibilities within Australia. I believe that the protection of the federal balance imposes on the state parliaments both the right and the responsibility to be fully engaged in the national treaty making process. This is not to deny the formal responsibility of Canberra for the making of international treaties—David would correct me very correctly if I tried to say anything otherwise—but clearly the Commonwealth must have the primary role in terms of the Constitution and in general prudence as far as international relations are concerned.

However, with treaties increasingly impacting on state areas of responsibility, it is desirable that the states assist appropriately in representing the interests of their own voters, of their own residents. The states have both the knowledge and the responsibility for their state interest and, to this extent, there is no real substitute for the knowledge they can bring to the treaty making process. The trick is to protect and project their state interests appropriately—that is, effectively, without damaging the national interest.

Here I need to note that the treaty making process has many stages. It is not merely a single element. It has a lot of stages and this sometimes gets lost in the debate over the federal balance in terms of treaty making. There is the identification of problems that will be resolved by an international approach. There is the decision to pursue the treaty option as the appropriate mechanism for resolving these identified problems. There is the negotiation of an instrument, the signature and then either the implementing of legislation and ratification or, in some areas, the other way around—ratifying and then implementing legislation—and then of course there is the whole process of applying the international law internally.

Sometimes it seems to me state parliaments give the impression that they are anxious only to intervene at the ratification stage, where they attempt to exercise some sort of veto function by saying they are against it. This is clearly far too late and, if it were successful, it would damage Australia's international standing over the long term. So clearly it is desirable that the states and the state interests be incorporated sooner in the process where they can be constructively applied.

To avoid being cast in the negative, state parliaments need to be aware that there are earlier opportunities to become involved constructively and to be prepared to use those opportunities. Regrettably, state parliaments have been far more anxious to claim the rights than the responsibilities that go with this kind of involvement.

State parliaments have accepted to some degree that they must devote some resources, but not much, to involvement in this area. As we will hear later on in the day, the practice amongst the states—the statutory units of the Australian Federation—is to accept this challenge to a greater or lesser degree and, in most cases, it has been to a lesser degree. Certainly state governments, that is to say the executive branches, have dealt with it more effectively than the parliaments themselves. The state parliaments have lagged well behind in committing resources to becoming responsibly involved.

In my view, however, they need to monitor events well enough to be on top of the issues as they arise. They cannot simply wait for their state governments or the federal government to refer matters to them and start learning then what the issues are. I would also argue that they have to be well enough in command of the information to demand information from either the state government or the federal government for matters that are not referred to them. Again, sometimes there is a political agenda in not referring issues to parliaments that the parliaments may well wish to know.

State parliaments need also to have sufficient resources committed to the international arena to be able to contribute constructively to emerging debates. They have to understand their own responsibilities and obligations well enough so that, when it comes to complementary or even possibly original implementing legislation, they can give effect to these obligations when the treaties finally do emerge and require implementing legislation.

It is not my role to debate these issues, but rather set the scene and explain why both the Australasian Study of Parliament Group and the Joint Standing Committee on Treaties felt it was desirable to hold a seminar such as this on this topic. In the course of pursuing our deliberations during the course of the day, we will certainly achieve one of our objectives. I was very pleased to find out last night that all of the parliaments eligible, with the exception of one territorial parliament, are here today. That is a sign that there is already a great deal of consciousness that this is an important area. Hopefully, also we will come to some conclusions about ways of improving the involvement of the various parliaments—not just state, but state and national parliaments—in the treaty making process.

With that I am delighted to welcome everyone to the opening of this conference and wish it all the success that was intended in putting it together. My next role is to put on another hat and introduce my following speaker. It is my pleasure now to introduce to you the Chairman of the Joint Standing Committee on Treaties, Mr Andrew Thomson.

Andrew is the federal member for Wentworth, which is an inner metropolitan electorate covering the eastern suburbs of Sydney. He was first elected to parliament in April 1995 after a career as a solicitor, investment banker and something which is probably extremely important in international affairs, a golf course designer and builder. More than a few treaties and other problems have been resolved on golf courses, and of course some of them have been created as well. Since being elected Andrew has served terms as the Parliamentary Secretary to the Minister for Foreign Affairs, Minister for Sport and Tourism and Minister Assisting the Prime Minister for the Sydney 2000 Games. He has been the chairman of the Treaties Committee since December of last year and it is my pleasure to welcome him to the dais.

[9.09 a.m.]

FIRST SESSION: THE ROLE OF AUSTRALIAN PARLIAMENTS IN TREATY MAKING

A Commonwealth perspective

Hon. Andrew Thomson MP, Chairman, Joint Standing Committee on Treaties

Mr ANDREW THOMSON—Thank you, Professor Herr. On behalf of Senator Barney Cooney, the deputy chair of our committee and all my federal colleagues who are members of the committee, I will offer you some remarks about the treaty making process from a Commonwealth perspective. In doing so I would like to formally welcome as many people as I can. There are visitors and attendees of the seminar representing state and territory legislators. From the Parliament of New Zealand we have Mr Derek Quigley, the chairman of the foreign affairs committee of that parliament. We have distinguished academic participants and officials from Commonwealth, state and territory governments. We have participants from the news media and I hope, too, we have some interested citizens among us. I welcome you all.

I would like to start by asking ourselves collectively why we are gathered here. We are gathered here to discuss the role of parliaments in the treaty making process. I hope the outcome of that discussion will be that we have among us some new ideas, suggestions for some new methods and, hopefully, the final outcome in the future that we have some better treaties to which Australia is a party.

As a parliamentarian, what occurs to me first about the whole treaty making process is that there are a lot of suspicious people out there. Anybody who represents an electorate, either in the lower or upper house of a parliament, and receives inquiries from constituents will tell you from time to time that you are told by some of your constituents about some of the most extraordinary conspiracies that you did not know existed but which are out there.

There are the obvious well-tried ones about one-world government and so forth. This week I had a telephone call from a lady who told me that the introduction of the GST was a conspiracy between the Coca-Cola company, the IOC and John Fahey, because John Fahey had won the Olympics for Sydney and, Coca-Cola being a major sponsor, he had had to agree to cut the tax on Coca-Cola. I said, 'Well, you might care to know that John drinks Pepsi.' She said, 'That's just cover.' That aside, next time you see Brother Fahey and Brother Costello with a can of coke in their hands you will know what it is all about.

Really what is behind that conspiracy type of theory is that there are more dealings between national governments and national bureaucracies and, worst of all in the minds of suspicious folk, supernational agencies and quasi-governments. There is no doubt that that increased pace of dealing requires a more thorough explanation of the efficacy and the convenience of merging sovereignty as nations really do when making a treaty. I think of it as merging sovereignty, not as giving it away or ceding it.

The truth is, though, in many of those supernational agencies they do ipso facto pursue supernational objectives and they are peopled by officials who really cannot possibly take realistic account of local interests. They simply do not have the capacity or the time to do that in making the decisions that they do. Yet, if ordinary people see themselves as being ignored by such distant folk, those people get very cranky and make it clear to their elected representatives very quickly.

That is the sort of thing that causes difficulty for governments in trying to administer relations between countries via treaties, because it does tend to bubble up in the party room, and sometimes in a very hostile way. Certainly, from time to time trade agreements throw up these kinds of difficulties, whether they are bilateral or larger groups of rules such as the WT0. Quite plainly, some human rights agreements purport to render illegitimate certain very deeply held moral or religious values and that can cause immense resentment among people who feel that those values are time honoured and perfectly legitimate. Likewise, environmental protection treaties might frustrate a much needed project that could rejuvenate the economy of a very distant part of Australia or any other similar country.

The question arises for members of parliaments: how do we better explain the need for such treaties with the impossibility of just tearing them up or throwing them away to protect a particular local interest, no matter how vital that might be? The only tried and proven method to explain that is by having debate, by having a thorough public discussion about such instruments and the background to them. Hence the Commonwealth's reformed treaty making process seeks to achieve that end in its five elements.

Those five elements are firstly, the tabling in parliament of all proposed treaties 15 sitting days before any binding treaty action is taken—that is, making them public. Secondly, the preparation of a national interest analysis—you will hear the acronym NIA quite often today—to accompany each such treaty and hopefully explain some of the background. Thirdly, the creation of a Treaties Council which is an adjunct to the Council of Australian Governments, or the Premiers Conference as we often call it. That is to facilitate Commonwealth-state consultation in the treaty making process. The fourth element is the development of an Internet based library of treaties and treaties information. The fifth and final element is the establishment of the Parliamentary Joint Committee on Treaties to consider and report on all tabled treaties and matters related to treaties by the parliament or a minister.

The resolution of appointment of that committee provides that the committee shall and can inquire into matters arising from treaties and proposed treaties actions and any question relating to a treaty or other international instrument, whether or not negotiated to completion—that is, treaties that are in a draft form such as the MAI was—or any matters that are referred to the committee by the Minister for Foreign Affairs.

Broadly speaking, this resolution of appointment allows this committee to undertake four sorts of reviews. We have reviewed proposed treaties that have been tabled in the ordinary course of events. That is really the vast bulk of our work. Many people have the impression that huge treaties come in every week and are tabled and, somehow or other in the space of a week, we have an inquiry into a huge treaty. The reality is that most of them are very brief, small, somewhat esoteric types of agreements—everything from bilateral aviation

agreements to agreements that recognise standards in different countries. For instance, last week we dealt with the recognition of mutual standards with Iceland and Liechtenstein. We have also reviewed treaties which were tabled in parliament before this reform process was introduced, such as the United Nations Convention on the Rights of the Child. We have reviewed a draft text of a treaty, the MAI, and we have reviewed legislation that seeks to give effect to international obligations under treaties, such as a draft bill to implement the OECD Convention on Combating Bribery.

The issue of public involvement is really at the heart of all of this. On a number of occasions via our public hearings, and indeed via our activities simply as a local MP or senator, we have brought to bear on these inquiries the sorts of things we have heard among our constituents. On some occasions we have expressed concern about the extent of consultations that officials or departments of the federal government have not properly undertaken.

For example, in a series of medical treatment agreements between Australia, New Zealand and the United Kingdom wherein you get reciprocal access to public hospitals in these countries, we were concerned about the impact of these agreements on the state health budgets because, of course, Australian states fund the hospitals. We thought the Commonwealth health officials had taken a rather dismissive attitude to that possible financial impact on states. In relation to a double tax agreement with Vietnam, we were very surprised to discover that the Taxation Office had not really bothered to consult with any of the professional accounting associations in Australia, which seems a very strange thing to do if you are going to organise a double taxation regime with a country in which we hope a lot of Australian companies will be doing business in the future.

But our most pointed criticisms were contained in the report on the draft Multilateral Agreement on Investment, the MAI, where we noted that the federal Treasury had been somewhat selective in its consultation both with the community and in its advocacy of the need for such an agreement. I suppose you could characterise the advocacy of the need as a complete failure in the sense that transparency of investment processes and the protection of Australians' investment in other countries, which was really what most of the policy behind the MAI was supposed to achieve, was not made clear in the slightest fashion. Hence great fears grew about what the MAI might do to the sovereignty or jurisdictional powers of state and local governments—and the federal government for that matter—here in Australia. So with no consultation process, it created a vacuum which was fuelled by an immense amount of hostility, not simply in Australia but everywhere. It was killed off very quickly.

Where to from here? In the report of the Victorian parliament's Committee on Federal-State Relations, there is a very interesting proposal for an interparliamentary working group on treaties. The flesh that might appear on the bones of that idea I hope will perhaps find some consensus today: the sorts of officials and parliamentarians who might participate in such a working group; the frequency of its meetings; and the scope of its deliberations. It is a very attractive idea. It is something that could supplement the existing Treaties Council, which I believe has met formally only once since its establishment.

But, more than that, if we take this parliamentary process of scrutiny beyond the federal legislature and make it clear that the state and territory legislatures are involved, then that is

certainly a move in the direction of public consultation and public awareness. There is nothing healthier one can do in the treaty making process than introduce a little more consultation, which will hopefully lead to a bit more public ease about the whole process.

That concludes my remarks. I am going to ask the deputy chair, Senator Barney Cooney, to chair the next session. We will get under way a little earlier than on the program, but all the better for consultation and awareness. Thanks very much.

[9.24 a.m.]

State parliamentary perspectives on treaty making

Session chairman: Senator Cooney, Deputy Chairman, Joint Standing Committee on Treaties

Session panelists:

Hon. Michael John MP, Chair, Federal-State Relations Committee

Mr Ted Quinlan MLA, Chair, Standing Committee for the Chief Minister's Portfolio, Australian Capital Territory

Hon. Angus Redford MLC, Presiding Officer, Legislative Review Committee, South Australia

Mrs Linda Lavarch MLA, Chair, Scrutiny of Legislation Committee, Queensland

Hon. Ronald Dyer MLC, Chair, Standing Committee on Law and Justice, New South Wales

Hon. Ray Bailey MLC, President, Legislative Council, Tasmania

Hon. Kevin Minson MP, Chair, Standing Committee on Uniform Legislation and Intergovernmental Relations, Western Australia

Senator COONEY—This session is one where we hear from the various parliaments around Australia. There is only an hour to do that, so I will go about the business of the introductions and stick to the set speech.

This session will explore the perspectives that state and territory parliaments and parliamentarians have on the treaty making process. The aim is to discuss the experiences that state parliaments have had in reviewing the impact of international treaties on state laws and practices, and to consider whether there is scope to enhance the role of state and territory parliaments in treaty making.

Since the 1980s there have been a number of problems between the Commonwealth and the states and territories in relation to the role of treaties in domestic law, particularly in relation to the external affairs power. The Franklin Dam case is the classic example. Over time, a greater appreciation has developed of the need for states and territories to be adequately consulted about the treaty negotiation implementation and the potential impact at the local level. The Treaties Committee strongly believes that the states and territories must have proper, detailed and timely consultation. Inadequate awareness of some treaties may lead to less than optimal implementation of those treaties which are entered into on the basis that they will bring net benefits to Australia.

It is my pleasure to introduce the panel of representatives from the state and territory parliaments to comment on their perspectives of the treaty making process. The interesting thing about the people I am about to call—and I will go straight down the list before I sit down so that everybody will know what order they are coming in—is that they are the only people in Australia who are directly elected by the people. I always like to make that point about parliamentarians in any process of government. The executive itself is not directly elected, but the people you are going to hear from now are. They are the only ones that are so elected. I have here some short remarks about each of them. But I would like to say a lot more because I know most of them and they are worthy of the high offices they hold.

They are the Hon. Michael John, Chair of the Victorian Federal-State Relations Committee; Mr Ted Quinlan, a member of the ACT Legislative Assembly and Chair of the Standing Committee for the Chief Minister's Portfolio; Hon. Angus Redford, a member of the South Australian Legislative Council and Presiding Officer of the Legislative Review Committee; Mrs Linda Lavarch, member of the Queensland Legislative Assembly and Chair of the Scrutiny of Legislation Committee; the Hon. Ronald Dyer, member of New South Wales Legislative Council and Chair of the Standing Committee on Law and Justice; the Hon. Ray Bailey, President of the Tasmanian Legislative Council; and the Hon. Kevin Minson, Chair of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Relations. The members of the panel will provide a short comment on their perspectives and then we will follow with questions.

Mr JOHN—Thank you, Barney and Mr Chairman, ladies and gentlemen. I am very pleased to be invited to be part of the state members panel this morning at this very important seminar. My short paper today is entitled 'Why international treaty making matters to state parliamentarians'.

The Victorian Federal-State Relations Committee, which I chair, was established in May 1996. It is an all-party committee, with four government MPs, four opposition MPs and one National Party member. Our committee's role is to report to the Victorian parliament with recommendations to the Victorian government according to the terms of reference established by our Premier, the Hon. Jeff Kennett.

The committee has been given a very broad reference to consider matters relating to overlap and duplication, improvement of federal institutions and an enhanced role for the states in the federation. I am very pleased that seven of the nine members of my committee have been able to attend the seminar with me in Canberra. I welcome them and I am hopeful that they will have an enjoyable stay with you all.

We tabled our first report in October 1997 on the subject we are discussing today—that is, *International treaty making and the role of the states*. If any member later on today would like a copy of that report, we did send a lot out but we can provide further copies should anybody not have received one.

The issue of treaty making is not explicitly mentioned in the committee's terms of reference. However, it is something that has been of importance to Commonwealth-state relations ever since legal cases such as Koowarta v. Bjelke-Petersen in 1982 and the Tasmanian Dam decision in 1983. These decisions established that the Commonwealth

parliament, acting under the external affairs power, section 51(xxix), can legislate to make Australia's treaty obligations part of Australian law. The Commonwealth can do this even if they do not traditionally have jurisdiction in this area.

Many state MPs, not only in Victoria but elsewhere, are concerned that the traditional constitutional power of the states can be overridden by the Commonwealth in that the Commonwealth can make treaties and then use the foreign affairs power in the Constitution to, in effect, extend Commonwealth powers in a manner not envisaged by the original Constitution.

Three events occurred around the time we commenced our investigations. First, the High Court's 1996 decision in the case of Victoria v. the Commonwealth confirmed, and arguably extended, the principles of the Tasmanian Dam case. The High Court made the following situation clear: that is, that the Commonwealth legislation implementing a treaty obligation will be legislation 'with respect to an external affair'—and hence constitutional—provided that it is reasonably capable of being considered appropriate to give effect to the treaty. This use of the external affairs power further extends Commonwealth powers. It allows the Commonwealth parliament a great deal of latitude in determining the manner and scope of any legislative implementation of treaty obligations.

Perhaps of greatest significance for the states, the Commonwealth can override state legislation even when that legislation is consistent with Australia's treaty obligations. If the Commonwealth legislates to give effect to treaty obligations, in a way which is inconsistent with existing state legislation, section 109 of the Constitution guarantees that the Commonwealth law will prevail. This is so even if the state legislation satisfies the obligations generated by the treaty.

In 1997 the second significant event occurred. Tasmania's anti-sodomy law was subjected to a High Court challenge. It was challenged as being inconsistent with the Commonwealth legislation implementing article 17 of the International Covenant on Civil and Political Rights. The Tasmanian parliament repealed the legislation before the challenge was heard; had the challenge proceeded, I believe there is little doubt that the Tasmanian legislation would have been struck down by the High Court on constitutional grounds. I make no judgment whatsoever on the moral issues in this legislation. Rather I am looking at it simply as a lawyer and as someone interested in constitutional and parliamentary affairs.

Where treaties create international obligations in areas of traditional state activity, I believe it should be the states that have the primary responsibility for implementing those obligations. Furthermore, if the subject matter of a proposed treaty is traditionally an area of state activity, then it is the states who will have a crucial role in implementing the treaty. It makes sense, therefore, that we should also have a role in making the process of treaty making work.

The third event which prompted the committee's decision to investigate Commonwealth-state aspects of treaty making was the creation in 1996 of the Commonwealth Joint Standing Committee on Treaties, JSCOT, now chaired by Andrew Thomson. This committee was established as part of a broader package of Commonwealth reforms to the treaty making

process. It was set up to enhance both Commonwealth-state cooperation and the Commonwealth parliamentary scrutiny process.

From its establishment, JSCOT made clear its readiness to listen to state input. We appreciated that in Victoria. However, JSCOT also expressed its disappointment to us at the lack of response from the states to its inquiries into Australian treaty making. My committee's investigations suggest that the states were primarily focused on bureaucratic consultation with the Commonwealth and had not fully appreciated the opportunity created by JSCOT for a broader community consideration of treaty issues and their implications for the states. Not enough of the state parliamentarians across Australia were involved in the process.

In Victoria, before the establishment of our Federal-State Relations Committee, treaty material would go to a middle ranking legal officer in our Premier's department. Much of the information would therefore be buried. The public, parliamentarians and media in our state would have very little access to the information. The Commonwealth had done its bit, but the states have not always taken up the cudgel adequately, in my view. Therefore, our report recommended the tabling of proposed treaties in state parliaments, thus allowing scrutiny by state members of parliament and the broader community.

We also recommended that a state parliamentary committee be given resources and responsibility for identifying treaties of particular relevance to the states and preparing state interest analyses and that this committee liaise with JSCOT. In particular, state interest analyses could form the basis of submissions to JSCOT inquiries into treaties of particular importance to the states.

In its response to our report, the Victorian government supported the committee's recommendation that certain information relevant to treaties be tabled in the Victorian parliament. I am pleased to say that the first tabling took place in the 1998 spring session of the Victorian parliament. The second tabling occurred in this year's autumn session. We have had terrific feedback on this from parliamentarians, academics and senior members of the community interested in this area. Many of my colleagues have expressed their satisfaction at knowing which treaties are being negotiated by the Commonwealth.

The government also supported ongoing liaison between the Federal-State Relations Committee—our committee—and JSCOT. Our two committees have met on numerous occasions and we have enjoyed an extremely fruitful set of exchanges. JSCOT's founding chairman, Bill Taylor, gave us a great deal of supported in our earlier efforts. That support has been continued by the current chairman, Andrew Thomson—and we thank you, Andrew. Also, your current chairman presented a very interesting address at our seminar on Australian federalism in February in Melbourne.

Unfortunately, our own state government did not endorse our recommendation that a committee be given the resources to undertake scrutiny of treaty matters affecting Victoria. We have attempted to keep this under consideration ourselves, while also continuing our broader inquiry into Australian federalism. Nevertheless, the Victorian state government's acceptance of the need for tabling is a really positive step forward in the information and consultative process, and we are grateful to the Victorian government for that. In April 1998,

we tabled in the Victorian parliament a document headed 'Comments to the Commonwealth Joint Standing Committee on Treaties on the subject of their inquiries into the Multilateral Agreement on Investment'. These comments were sent to JSCOT and form part of the evidence for their inquiry into the MAI.

My committee has plans to undertake further work in the treaties area. We have since tabled three other reports in the Victorian parliament, and all three deal with broader questions of Australian federalism. These reports partly focused on our ongoing concern for greater parliamentary cooperation in Australia. Now that these major pieces of work have been completed, our committee may have an opportunity to return to the issue of treaties and to consider options for the further development of state scrutiny of treaty making and of cooperation between Commonwealth and state parliaments on these issues.

Today's seminar is certainly an important step in this process. JSCOT is to be commended for having organised this event and I thank them for inviting me and members of my committee to participate. Last night we had a conference dinner, as most of you would know, and I was happily surprised at the large number of people attending the dinner, which I think shows the interest in the very important topic which we are discussing. I also congratulate Mr Alexander Downer on his important keynote address at last night's dinner. I wish the seminar every success.

Senator COONEY—Thank you, Michael. I now ask Mr Ted Quinlan to address us.

Mr QUINLAN—I will be relatively brief. The ACT is a fairly new parliament and, given the frequency of treaties, fairly new to this process. The assembly handles issues from both state and local government levels as we are the city state, so it is often a heady leap from matters of kerb and guttering to matters of global human rights. However, we are maturing and we like to think that we take the wider perspective as we represent the residents of the Territory—who, I must advise you, still believe that they are part of the federation.

The ACT is a small jurisdiction, so even though the prospect of whale watching on Lake Burley Griffin is fairly remote, we believe that our citizens still have an interest in what is done at the international level in terms of conservation and the global issues in which we have as much a personal as an administrative interest. In the 1998 review, the ACT did not make a formal submission but did express some concerns about some of the continuing difficulties that arose out of the process—the late notification and the limited time available for consultation and evaluation at the state level. As I said, we are a small jurisdiction and we have very limited resources, let me tell you.

I have been pleased to be able to access the material that has been produced by the Victorian committee and which has some very sensible recommendations. We hope and trust that the process that they have pushed for is carried through and continued in terms of the notification of the states, with sufficient time for tabling in state parliaments. We would make a plea, because of our limited resources, for the simplification of the advice process. Please work on the executive summary to the nth degree. Please continue to do those national and state interest analyses.

I hope and trust that out of this seminar there is a refinement of the process that allows the states time to analyse and evaluate, and gives them assistance in understanding the full ramifications of the treaty, its genesis, the reasons behind it, what consequences are envisaged as a function of that particular treaty and what impacts may flow through the states that we might even miss along the way. I congratulate the parliamentary committee for putting on this seminar and, as I said, I hope and trust that what comes out of it is a slightly easier life for a busy little assembly.

Senator COONEY—Thank you, Ted. I now call the Hon. Angus Redford.

Mr REDFORD—I must say at the outset that I admire the courage of the Joint Standing Committee on Treaties in calling this meeting, for two reasons. The first is that you have got seven politicians listed to speak in 60 minutes. I think that is a very courageous decision. The second is that you are giving a forum for various state people to have a comment about this aspect of federalism. South Australia is a very important regional economy and it is a very parochial area, as I am sure other areas of Australia are. There is a great deal of suspicion on the part of people in small regional economies about treaties, treaty making processes and the like. Indeed, it would be fair to say from South Australians' perspective that we are very suspicious of Canberra, let alone New York, Bonn or Geneva!

I think the issue from the South Australian perspective probably highlights two great tensions. First is the tension between the states and the Commonwealth. I think Michael covered that very well in his contribution. The second is the tension between the executive arm of government and the parliament. I think they overlap. When I was first invited to this seminar, I looked at the title and for the first minute I thought there might have been a spelling error when it said the role of 'parliaments' as opposed to 'parliament' in treaty making, because I have to say that, from a South Australian perspective, parliament has had absolutely no role whatsoever.

In the excellent speech last night by the South Australian minister for foreign affairs, he talked about openness and transparency and went on to say that state and territory governments are effectively involved in the treaty making process. He then outlined the review of that process. With the greatest of respect to the minister, I say that that process of involvement and the review process have been conducted entirely at an executive level, from the South Australian perspective. Indeed, if you did a word search on the word 'treaty' on the South Australian *Hansard*, it would bring up very few references. The only issue that our parliament has dealt with in relation to treaties is that we did respond legislatively to the High Court's decision in Teoh's case where we attempted—this has not yet been tested—to make the effect of that decision nugatory.

In closing, I would like to do two things. Firstly, I congratulate the Victorians in taking a very strong lead in the parliamentary process. I have raised the issue on a number of occasions that all parliaments should table treaties to enable better public consultation. I note that the Victorian committee has recommended that that be pursued at the leaders' conference. If you have to have a proponent for a particular point of view, I suppose the Hon. Jeff Kennett might be that person. In that respect, confined only to this issue, I wish him every success in the world.

Finally, I congratulate you, Andrew and Barney, for establishing today something that is important, and hopefully something will come out of it. I know that when we go back to the states and start raising these issues, the eyes of the respective attorneys-general will glaze over and they will hope that we will go away. I am sure this will not go away. There has been sufficient community interest in this for it not to.

Mrs LAVARCH—The last time I spoke to Barney Cooney, I was sitting on the side of the highway at Gympie on the mobile phone and we were doing a round-Australia telephone conference in relation to my role as chair of the Scrutiny of Legislation Committee. It was quite interesting having the big timber trucks rolling past and trying to have input into a very meaningful interstate discussion. I thank you for inviting me here today. I was not too sure whether I should change my surname before I came—yes, I am Michael Lavarch's wife—or whether I should plead innocent.

Senator COONEY—I thought he was your husband.

Mrs LAVARCH—He certainly is. We are equal partners. Stating the obvious—it does not always hurt to state the obvious—the starting position for Queensland is that we accept and understand that the responsibility for treaty making is the sole power of the Commonwealth executive by virtue of our Constitution. However, in saying that, it is appropriate that, where a treaty affects a state, we are involved in the formation of the treaty, through consultation or even through being part of the Australian delegations and having input into those international negotiations. In fact, at a state level it has been said that it is a fundamental imperative. I am going to go out on a limb here amongst my state colleagues, but I think it is also appropriate that in the formation stage of the treaty these roles in relation to delegations and international negotiations are undertaken at an executive and policy level. I believe that is where we have the coordination amongst all our departments in the state for the impacts of those treaties.

I was pleased to hear from previous speakers, from Andrew Thomson and from the thrust of discussion so far, that the state perspective is in relation to a role in public consultation and public awareness and putting the public at ease. I believe that is the greatest role that the parliament has in the dissemination of information about treaties. Before I go on to the Queensland parliament, at an executive or government level Queensland has set up in the Department of Premier and Cabinet an intergovernmental relations directorate. Chris Goodreid, who is here today, is the director of that body. Its function is to promote and maintain Queensland's interests in international treaty submissions. The work it has done so far in its very short time has been to make submissions to JSCOT, and it has also coordinated attendance by Queensland representatives at several international negotiations. It also initiated and held a conference in Brisbane called International Treaties 2000 and Beyond, which I believe was the genesis for the holding of this conference here today.

To Andrew Thomson, as a member of the Queensland parliament where we have, I think, five One Nation members and previously six One Nation members, can I say that your constituent's conspiracy theory is quite sane. We have had some quite barking mad theories come across and be raised in parliament. It is always an entertainment each morning to get the *Notice Paper* and read the questions on notice from the day before. For my colleague from South Australia, if we did a word search in *Hansard* of the Queensland parliament for

the last year, I am sure 'international treaties' would have one of the highest hit rates. Other than the legitimate role of the parliament where a treaty is being implemented into our domestic law in scrutinising that and debating it in parliament, Queensland does not have any overt or direct processes for the scrutiny of treaties.

I chair the Scrutiny of Legislation Committee. The committee system in Queensland parliament is in its infancy, I believe. Before the Fitzgerald inquiry we did not have a proper or strong parliamentary committee system even though we have only one house. The parliamentary committees were put in place prior to the Fitzgerald report but as a result, I believe, of the Fitzgerald inquiry. The Scrutiny of Legislation Committee in its role of scrutinising legislation has been in existence only since 1995. It is all new ground. I believe we will go from strength to strength through the resourcing and acceptance of a proper parliamentary committee system.

The Scrutiny of Legislation Committee, as I am sure most of you would be aware, scrutinises legislation by looking at the extent to which bills introduced in the House are consistent with or offend fundamental legislative principles. Considering those fundamental legislative principles, of which one is the rights and liberties of our individuals, may well require a deliberation of international standards. We certainly have experience and a recent example of questioning a minister about whether our international obligations were observed and considered when formulating that legislation. A bill was debated and passed in the House at the end of last year, which was also our adoption of the Hague Convention in relation to intercountry adoptions, and that was a direct implementation of a treaty. In an indirect way we shape our legislation through those international standards and those fundamental legislative principles. They all feed in and are debated in parliament.

That, in short, is the experience of the Queensland parliament. I am delighted to be here today to hear other points of view and to take back to my parliamentary colleagues ideas about how we can improve public awareness and improve the debate and the giving of informed consideration and views about our international treaty making and our obligations under those treaties. I thank you for the opportunity.

Senator COONEY—Thank you very much, Linda. Our next speaker is the Hon. Ronald Dyer.

Mr DYER—The Hon. Andrew Thomson, Senator Cooney, parliamentary colleagues, ladies and gentlemen, I would like to adhere to and support others who have congratulated the organisers of this conference, and the Commonwealth parliament's committee in particular. I will start by conveying some views that partly arise out of my own experience with regard to the most recent portfolio I held in New South Wales of Public Works and Services. I will return in a little more detail to that in a moment.

The first point I would like to make regards the actual principles and procedures for Commonwealth-state consultation on treaties. We do feel that there is some need for adjustment to be made in that regard. The Director-General of our Cabinet Office wrote to the Secretary of the Department of the Prime Minister and Cabinet in February this year regarding the matter to which I am about to refer. Clause 2(1) of those principles and procedures refers to treaties—and I emphasise that word—of sensitivity and importance to

the states, while clause 3(1) refers to the Commonwealth taking account of the views of the states where a treaty or other international instrument—and I emphasise that—is one of sensitivity and importance.

Some Commonwealth agencies are reading clause 2(1) as meaning that they need only consult on actual treaties. If I may say so, I take the view that they might be happier as strict constructionists on the High Court. The New South Wales view is that clause 2(1) should be amended to refer to other international instruments to remove the confusion and to make it consistent with clause 3(1). That is not a mere legal quibble, as I will illustrate in a moment.

The New South Wales experience is that the level of commitment by the Commonwealth to the consultation process varies considerably depending on which agency is conducting the negotiations. Some Commonwealth agencies consider that simply listing a treaty in the schedule of current Commonwealth negotiations is sufficient consultation. That is not a view with which New South Wales agrees. The consultation period is frequently too short. Our view is that, especially where treaties have a technical content—and many of them do—opportunities should be provided for them to be reviewed by the relevant ministerial council. We suggest that a period of eight weeks for states to respond should be regarded as the appropriate minimum except in urgent cases, and we concede that there are sometimes cases of urgency.

By way of illustration of what I was saying earlier about the guidelines and the necessity to have some consultation regarding instruments and not only treaties, the Commonwealth considered that the APEC guidelines on non-discrimination in government purchasing were not covered by the principles and procedures to which I have referred. However, so-called non-binding guidelines frequently can create the framework for future negotiations and can end up in the form of a treaty.

My own experience as Minister for Public Works and Services in New South Wales at two successive ministerial council meetings last year—one held here in Canberra and the other on the Gold Coast—was that I needed to express concern regarding the impact of the proposed guidelines on government procurement policy. If the APEC guidelines matured into a treaty and were put into effect, there was the potential—to say the very least—for a severe effect on employment levels in the states and territories, especially in country and regional areas. I am not expressing just my own views; my ministerial colleagues, no matter what their political colour, from the states and territories would agree with what I am saying.

To New South Wales the matter was crucial because the procurement function in New South Wales, which is handled by the Department of Public Works and Services, is second only in size to the Commonwealth Department of Defence throughout Australia. The states often have procurement policies that might be discriminatory in terms of APEC guidelines in that, for example, they might contain preferences for country or regional industry. I just give that as a case study to illustrate why I regard it as so important that the guidelines should be amended to refer to ‘or other international instrument’ as well as treaties.

What role should state parliaments play with regard to treaty making? With regard to New South Wales, I would first of all like to convey the Cabinet Office view, which I suppose I can take as being the view of the New South Wales government. I will then add

some personal glosses as chair of the Standing Committee on Law and Justice in my own parliament. State parliaments, it is said, have a role when state legislation is needed to implement Australia's treaty obligations. However, as the states have no constitutional power in treaty making, it is difficult for state parliaments to have a more formal role. It would be unworkable to put the onus on the state executive, by which they mean the state bureaucracy, to provide more information to our state parliament on treaties when almost all of that information is itself sourced from the Commonwealth.

They add that there is nothing to prevent the Commonwealth parliamentary standing committee on treaties circulating the material to state parliaments that it sends to others for consultation. Finally, they express the view that there is nothing to prevent a state parliamentary committee carrying out an inquiry into the effects of particular treaty negotiations if matters are referred to it.

As to the second view they express—that is, as states have no constitutional power in treaty making, it is therefore difficult for state parliaments to have a more formal role—my comment is that parliament could well have a more formal role via a parliamentary committee on the suggested Victorian model. In my view, the cabinet office position is somewhat formal and restricted and the fact that there is no actual role at the moment does not mean that there ought not to be or that there cannot be.

As to the second last point that they made—that is, that there is nothing to prevent the Commonwealth parliamentary standing committee on treaties circulating the material to state parliaments that it sends to others for consultations—that really is of little use if there is no established mechanism to consider the circulated material, and I would suggest that a parliamentary committee dedicated to the purpose would serve to overcome that problem.

The final point they made was that there is nothing to prevent a state parliamentary committee carrying out an inquiry into the effects of a particular treaty negotiation or aspects of it if matters are referred to it; that is, a parliamentary committee. The problem there is that no such reference has ever been made to the Standing Committee on Law and Justice, which I now chair. This is the only parliamentary committee in New South Wales that would be appropriate to receive such a reference. So I wait with interest to see whether such a reference might be made. We are ready, willing and waiting.

I would like to congratulate the Victorian committee, in particular, on its initiatives. I have obtained their material from the Internet, and I really think that the work that they have done is most impressive. I am very interested, if I may say so, in the suggestion I understood to be made a little earlier of an interparliamentary working group. That is a very positive and constructive suggestion which has my personal support.

I will just summarise the New South Wales position. First of all, we do feel strongly that all Commonwealth agencies should take a more positive role in consulting the states and the territories on international negotiations containing potential federal issues, and that the states and territories should be given a minimum of eight weeks for comments on treaty negotiations or texts except in cases of demonstrated urgency. The principles and procedures should make it clear that they relate to all international instruments of significance to the states and territories. I would also comment that the NIAs—although I do not attack them;

they are useful—often tend to be too late. They should be undertaken when negotiations commence for key international negotiations and, in our view, be updated as negotiations progress.

The final point I would like to make is that the Commonwealth should confirm its commitment to the future of the Treaties Council, which, as has been said already this morning, has in fact met only once. The mechanism at a bureaucratic level appears to be working well. The officials are meeting regularly, and that is excellent. However, we do ask that the Commonwealth reaffirm its commitment to the Treaties Council and encourage it to actually meet.

Senator COONEY—Thank you very much. I now call the Hon. Ray Bailey.

Mr BAILEY—I would first of all like, along with others, to thank those responsible for the organisation of today's seminar. I am here as an Independent member of the Legislative Council, so I do not speak on behalf of the whole of the Tasmanian parliament. Four of my Legislative Council colleagues are also here today. We are here today basically to obtain the educative value that will hopefully come out of the seminar. As an Independent member, the views that I express are my personal views and not the views of either houses of the parliament of Tasmania.

The treaty process has treated Tasmania very badly over the last 16 or so years. Mr Thomson, you said that many states were suspicious of the powers that the Commonwealth had and, indeed, even of the path it is now going down. Whilst many of those suspicions, I think, have now been allayed as a consequence of the Senate standing committee, nevertheless, Tasmania has had its traditional sovereign state rights violated, particularly in relation to two matters. That has been done, of course, by the executive power that the Commonwealth has to make treaties, by the Commonwealth parliamentary power to validate those treaties and as a consequence of the High Court decisions which have taken place which have disallowed our state laws.

Others have referred to the Franklin Dam case, and that of course did affect Tasmania. The Tasmanian parliament back in, I think, 1981 passed laws for the construction of a dam in Tasmania. The amount of water that could have been harnessed within that dam would have produced around 300 megalitres of energy at a very low cost. The dam was considered necessary to stimulate economic growth and to create employment in Tasmania. Those laws were invalidated by the High Court in 1983. Now, in 1999, economic growth is still required in Tasmania and unemployment needs to be decreased.

But we have a problem. We have a huge magnesite deposit which has been discovered in Tasmania which we would like to have the benefit of downstream processing, but at the end of the day we do not have enough energy to provide energy for that development unless we can negotiate with Victoria for a gas pipeline to be put across Bass Strait to give us sufficient energy in Tasmania. That is a serious consequence of federal intervention in the early 1980s. I might say, that the power that we would get from the gas pipeline would be at a much higher rate than Tasmania would have been able to produce had the dam been built.

The second case has also been referred to, and that was the case of Toonen in relation to homosexual law reform in Tasmania. Again—not judging the merits or otherwise of the final determination of that issue—the same process was used for sections of Tasmania's criminal code to be invalidated. Whilst that case did not invalidate those laws, it was quite obvious that, if there were to be a challenge, they would be invalidated.

So we have a situation where, on an environmental issue, a dam has been stopped and, in relation to a criminal matter—or what was a criminal matter in the criminal code—our ability to have valid legislation continue in place with respect to what were considered to be criminal matters has been overturned. I think the motive at that time should be taken into account. I think the government of the day in each of those cases saw political advantage in relation to environmental issues and in relation to human rights issues to influence votes outside of Tasmania because of its stand on those particular issues. Whilst I appreciate that steps have been taken since 1996, the potential for exploitation still remains as a matter that could rear its head again in the future. But I do congratulate the federal government for having introduced the measures it introduced in 1996.

So far as the Tasmanian parliament is concerned, there was nothing in place which would equate to the Victorian position, but we do have on our *Notice Paper* a notice of motion moved by Stephen Wilson, who is here today, which, if accepted, would establish a committee and one of its functions would be to look at the treaty process. The responsibility for the scrutiny of treaties in Tasmania simply rests with the Department of Premier and Cabinet and, again, that is the executive of the parliament. Unless we can provide some opportunity for scrutiny, as Victoria has done, it would remain that way.

I endorse the manner in which the Victorians have approached this matter. Their report of 1997 in relation to treaties is an excellent report and I congratulate Michael on that report on the work he has done in that area.

My view is that the state parliaments must be involved in the treaty making process, as well as the executive government. I would float the idea that this could perhaps be achieved if the Joint Standing Committee on Treaties were to provide copies of all treaties and the associated material to each state house of parliament, in addition to the executive government of each state. At least that would give notice in the state houses of parliament of the fact that those treaties were about to be ratified. Then it would be of advantage, I would have thought, for the joint standing committee to have any input that the parliaments of the states might make in addition to executive government.

Senator COONEY—Thank you very much, Ray. I now call the Hon. Kevin Minson.

Mr MINSON—Good morning. Thank you for the opportunity to give a few words on treaties and what we are doing in Western Australia and where we believe we should perhaps go. I made the comment to one of our speakers that it seems this session will actually finish early. To have six members of parliament speak and finish early is an achievement in itself.

There are three issues in Western Australia that are important when it comes to treaties and I suspect that they are reflected around Australia. The first of those issues relates to the

impacts on the state itself. Of course, there are not that many treaties, given that some thousands have been signed in the last decade, and not many of them really impact on us at all. As Mr Downer said last night, many of them relate to things that really do not impact on the state at all. They have to do with international aviation and so on.

However, where they do act in such a way as to impact upon the duties of a state, then they very much concern us. Of course, those things that impact upon matters that are traditionally and constitutionally the province of the state—like the environment and industries associated with it or which impact upon the environment itself—very much make state parliaments and state governments sit up and take notice if there is a flow-on impact.

The second area where there is an impact is the lack of understanding by our national government on what those flow-on effects are likely to be before they sign it. I would suspect that, if many people had realised the way our Constitution has been, in my opinion, misused over the years as a result of world heritage treaties and so on, perhaps there would have been a second think before many of the signings took place.

There is often a lack of understanding by our federal government that we can only have a good environment and good employment figures and so on if we have an economy that is in good shape. If you want to see environmental disasters around the world, you should go to the areas with poor economies. The lack of understanding by our central government often about what the flow-on effects are going to be is a problem and needs to be addressed. I suspect it will be addressed as time goes by. The third time there is an impact from the states' point of view is when our conspiracists have a convention and that usually coincides, Linda, with UFO landings in the north of Queensland.

I propose the following action. I suggest that what we need to do is remove the mystery. It was good to hear Alexander Downer talk last night about removing some of the shroud of mystery. Of course, the shroud of mystery is not really intentional, but rather, because of the volume of treaties and their very often ho-hum boring nature, most people do not take any notice of them. It is only every few years that one comes along, goes through the normal process and suddenly there is an outcry. A large number of people then say that there must have been a conspiracy, because we never hear about this huge number of treaties.

Next, and most importantly, I beg any central government to treat the federation with care and respect, because we must not forget that we are a federation of states and have a completely different view of life, for example, from a country like New Zealand where there is only one government. I suspect that the New Zealand government thinks very carefully before it signs a treaty because it has to live with the ramifications. However, in a federation of states that is not always the case.

I would suggest that in any mechanism that is evolved over the years to deal with treaty making, we have to remember that section 61 of our Constitution gives the power to the Commonwealth to sign a treaty or make a treaty, section 51(xxix) relates to the external affairs power, and is the one that has been well and truly used and misused over the years, and section 109 states that where there is a conflict the Commonwealth has the ultimate say. Where those powers are used, either individually or in concert, there is a potential problem for upsetting that delicate thing called the federation. I suggest to you that we need to

proceed with care and treat that federation with respect, because if we do, it will repay us handsomely.

I suggest on a practical note that we do need to involve the parliaments. To that end, we need to formalise a process and to an extent that is the fault of the state. I say 'state' individually because we individually as states have to understand that we have to put a mechanism in place. There is nothing to stop currently the tabling of these documents. It is just that we have not done it. We need to formalise a process within our own states.

To that end, I would like to see committees with a common function and name established in each state to deal with these matters. For example, we have here the committee that I chair and also our upper house Constitutional Affairs Committee. We actually have two committees here, and I suspect that there is a third one that could also have claimed to be here as well had they been able to get pairs. To have a formalisation and rationalisation of the process would be positive, and the committee could meet once or twice a year to give comment to the Commonwealth prior to ratification where there is going to be a conflict or an implication for the state.

Finally, I suggest that in that process there needs to be an annual reporting mechanism to all parliaments. In Western Australia I would like to see in the annual report a report on those that are ratified, those that are in the process of being ratified and what is on the horizon with respect to what the Commonwealth is considering signing. If we did that, I suggest that no citizen or parliament could say that there was a shroud of mystery or that there was a conspiracy. Indeed, I think that sort of a mechanism would be very much welcomed.

After we have finished with the current report we are doing on the effects of competition policy, my committee hopes—over the next few months to a year—to table in the Western Australian parliament a report on treaties. Mr Chairman, thank you for the opportunity. I thank you very much for drawing this together because it has been very important over the years. I think there is the opportunity to enhance federation and the terrific thing that is the Federation of Australia if we can sort out some of these difficult issues.

Senator COONEY—Thank you very much, Kevin. It is now question time.

Ms KOSKY—There was a lot of discussion about the mystery of treaty making—and this is probably a question and comment to you, Andrew. I think that part of the reason for why the mystery or the lack of consultation actually exists is because it is largely the departmental people, the bureaucrats, who are actually dealing with the treaties and not either ministers or parliamentarians. So the tendency is for them to deal with the technicalities of that piece of work and relate their expertise to that piece of work, rather than actually put it out for broad consultation—not just the provision of information but actually seeking genuine views and encouraging debate around that treaty. I would be interested in your comments on my suggestion.

Mr ANDREW THOMSON—We have the executive as the power to make treaties at a federal level and it does so in that very sense. You are right: it is really the property of officialdom and the executive until it comes to our committee. But, in trying to get discussion

going about it, my impression is that our Achilles heel is the lack of interest in the press gallery. It is very hard to get a press release printed—or, I should say, the story in a paper—about a treaty that has been tabled, because the controversy has not erupted yet.

If the committee went out to the front of parliament and had a demonstration, there would be a story in the paper about that. But, in the normal processes of scrutiny and reporting and so forth—unless you publish horrible pictures with your press release about the possible consequence of what might happen, if there is some warning involved—then it is very hard to stir up interest. Hence you do not ignite public debate easily. We will persevere and eventually, if something is sufficiently and genuinely controversial, we will get it—as you know—in the electorate office through the mail, phone calls and the whole thing. But to try and ignite it in the parliamentary sense is difficult.

Ms TUCKER—This is an information question. Someone has mentioned the Treaties Council a couple of times, and one of the speakers encouraged its members to meet more often. Can someone tell me who is on that and what its function is?

Mr ANDREW THOMSON—It comprises the head of each state and territory government.

Mr MASON—The Treaties Council is one of the five pillars of the reforms that were instituted in 1996. It is the pillar that focuses particularly on the need for consultation at the highest levels with the states on any given treaty or on a treaty that is of particular sensitivity or concern. Hence it is established that this council will be chaired by the Prime Minister and will include all state premiers and chief ministers, and that they will normally meet in association with meetings of COAG. They will look at treaties that have been identified as being of particular interest or concern to the states or territories. As some speakers have already remarked, regrettably they have met only once since it was set up—in November 1997—but there is always the opportunity for that council to meet as often as the Prime Minister, the premiers and the states wish it to meet.

Ms SMITH—My question is also to Andrew. I am not sure whether a matter that is taken under treaty has to be inflammatory. I will give an example, which was a classic in the reading that I have done on this issue with the committee. When a treaty that was done on rice growing was signed a couple of years ago, the rice growing association of Australia was never involved in any discussion or consultation at all. The treaty was signed at an international level but nobody who was involved in the industry in Australia got to look at it or make a representation. So I think our concerns also come from people in the community who have direct interests in, and for whom there are direct implications from, a treaty not being involved. As I said, it does not have to be an inflammatory issue.

Mr ANDREW THOMSON—In one sense, where there is a specific industry or a clearly identifiable group, this federal committee asks the officials that appear to explain the national interest analysis—'who have you talked to?'—or we should do so. If we do not, that is our failure. But in some sense too the rural newspapers have correspondents here, so I would not let the press gallery off the hook so easily. It is a dual process. You have to have the department of foreign affairs, the department of trade or whoever get out and really make

sure they do their job—and we as a committee do our bit—but the fourth estate is very powerful. I take your point about the specific interest groups.

Ms SMITH—Can I follow that through by asking the question: who takes ultimate responsibility for a treaty? If one is going to look, as the Commonwealth is—it is an excellent idea—at the whole arrangement, obviously the person, the people or the group that take ultimate responsibility have to have a list of all those parameters before they resolve the issue.

Mr ANDREW THOMSON—The buck stops with us to half the extent in the sense that we are accountable to our electors as MPs and as members of this committee. The minister responsible for treaties—either the Minister for Foreign Affairs or the Attorney-General—in a formal sense is likewise responsible to parliament through question time. It would be an interesting exercise if an opposition party attacked a minister for not consulting sufficiently about a treaty where some of the opposition members were also members of the committee that was supposed to scrutinise it. There are those two facets of responsibility there.

Mr JOHN—I think the buck stops with the executive—not with the parliament and not with the cabinet—because for centuries we have had the tradition under British law where the sovereign is involved, the Prime Minister, the foreign minister and a very senior bureaucrat perhaps, and that is it. Mr Downer said last night that he does not even have to have anything pass through cabinet. So the treaty can be entered into and signed without it having passed the cabinet.

Mr REDFORD—You would be very courageous to do it.

Mr JOHN—Yes, it would be courageous to do it.

Mr MASON—You are quite right that in formal terms the executive has the responsibility, but it is not quite the case that it can just go through on the say of one minister. It cannot. The federal Executive Council has to formally endorse all treaty actions. The normal practice is that, when a treaty is concluded, the ministers that have the main carriage of the subject matter of the treaty will all have to be consulted and will have to formally in writing let the Prime Minister know that they have agreed. Then formally the Executive Council has to be advised that has happened, and only after Executive Council approval can a treaty be ratified.

Mr JOHN—I just wanted to make the point that JSCOT was not the final carrier—

Mr MASON—I agree with your broad point. I think the parliament's role is to do an enormous amount of consulting, promoting, advertising and letting the people know about what is happening with treaties. But in formal approval terms the buck does rest with the executive.

Mr HELM—Is it safe to assume, since the Treaties Council has not met since 1997, that there has been no treaty signed which is of concern to the states? My question leads on from the previous question: are they ducking the buck or does it say that these treaties that have been signed since 1997 have not been important? I do not know who the question is to.

Senator COONEY—I suppose Andrew would have to cop that one.

Mr ANDREW THOMSON—My impression is that the Treaties Council is there to enable a premier or a chief minister to make a particular fuss about a treaty and in a very formal sense say, 'We don't want a bar of this,' or 'We demand an amendment to it,' and so forth. I am not sure what was on the agenda of the one meeting they had. Any amendments that the various states and territories might have thought of asking for have probably been done at official level—just as David Mason explained. If a premier or a chief minister wanted to really have a stoush about a treaty, he or she would take it to that council. I suppose that is what it is there for.

Mr MASON—Mr Helm raised the question: if the Treaties Council has not met since November 1997, how have all the treaties gone through? The short answer to that is that they would go through in the normal way, as they have historically. That is to say, they are approved and ultimately endorsed by the Executive Council and they go through. The Treaties Council does not have—and nor was it intended to have—a veto power or a final approval power over treaties. Rather, as Andrew Thomson has said, the Treaties Council was intended to provide an opportunity for state premiers who are concerned about particular treaties to question the Commonwealth, to get it all out, but they do not have veto power over it. So treaties keep going.

Mr ADAMS—I think the committee members have been surprised that the states have not responded as much as we would have anticipated.

Mr HARDGRAVE—Exactly right.

Mr ADAMS—As Ray Bailey from our state upper house commented this morning, Tasmania has been affected by the treaty process greatly as people have had some of their powers taken away from them. But neither political persuasion in Tasmania has sent very much information to this committee through other treaties that we have been involved in.

This committee grew out of a Senate report in the 1993 parliament and, after the change of government in 1996, that report was acted on in the setting up of JSCOT. The Victorian parliament has a committee that is basically enhancing the federation, and I have met with that committee on a couple of occasions. It has always been a pleasure to discuss views from a state and national perspective. But I think all committee members have been a bit surprised that the states have not put information before us nor have sought to come before us as a committee to put an argument in relation to some treaties.

Mr BAILEY—If I can respond to that: state parliaments do need to be involved in that process. That is the reason I made that comment earlier that it is left to the Commonwealth executive government and the state executive government, and there needs to be a process where the parliament is aware of what the treaties are directly from the Commonwealth.

Mr ADAMS—Information should go to the parliaments and not to the executives—

Mr BAILEY—They can go to both.

Prof. ROTHWELL—I have been interested this morning to listen to the state representatives make the general comment that they believe there is a greater need for information sharing and a greater role for the states to play in this process. That is consistent with many of the debates that have taken place throughout the 1990s. My observation would be: what is the capacity of the states, in terms of the state executives and the state bureaucracies, to play this type of role that is being suggested? There is a large amount of expertise in international law in Canberra—in the Attorney-General's Department and in the Department of Foreign Affairs and Trade and, dare I say it, there is quite a bit of expertise in some of the universities. But is there expertise in international law in the states when it is not traditionally a state area of responsibility? To that end, I would suggest that, if the states are going to take a greater role, the states would need to look at establishing—within the attorneys-general departments and crown solicitors departments—offices and bureaus which are specialised in this particular area.

Mr REDFORD—I want to comment on the last speaker. It is irrelevant whether we have expertise on international law or not, and I can assure the speaker that we probably do. We have lots of expertise at the state level, but it is the impact on the community that we are concerned about.

Mr HARDGRAVE—Hear, hear.

Mr REDFORD—It is the political impact; it is the impact on individuals. We do not care about the international niceties; we care about our constituents, the people who vote for us. To come back to what you were saying earlier, the tension is as much between the executive and the parliament as it is between the states and the Commonwealth. If the Commonwealth gets it absolutely right, then the states probably do not need to be involved. But what we have seen is that the Commonwealth has not got it exactly right because it is, in some respects, more remote from the people and from the state governments.

It is hardly surprising that you have not had any representations to your committee from the states because it is dealt with at an executive to executive level, and executives are always very comfortable with each other. More work now gets done at ministerial councils than on the floor of parliament in some cases, and it is never the subject of any public discussion. There is never any *Hansard* record produced of ministerial councils. Indeed, no-one even knows what is on the ministerial councils' agendas.

I think the issue is not so much a debate between the states and the Commonwealth or between the state parliaments and the Commonwealth parliament. It is more an issue between us as elected representatives and legislators dealing with the bureaucracy and the executive arm of government who traditionally have liked to keep things to themselves—even at their own cost.

Mr MINSON—In the same vein as Angus's comments, could I make the observation that the council is made up of the wrong people. Frankly, prime ministers and premiers have so much on their plates they are unlikely to focus on what is in a particular treaty. If we had standardised committees dealing with these matters, I would suggest that the chairs and deputy chairs would be more appropriate members of the council who could request economic impact statements, community impact statements, and so on, and then bring it to

the attention of their various parliaments by way of annual report. People who have to operate in the sort of environment that ministers, and particularly prime ministers and premiers, operate in are simply not going to focus on this matter.

Mr DUCKWORTH—I want to make a comment in response to one of the things said by a member of JSCOT. Whether or not states have made submissions to the committee does not justify why one of the five pillars has not met. To say that because the fifth pillar is not there we should make more use of the fourth pillar is not a justification for not actually having the fifth pillar in place and operating.

Senator COONEY—We will now adjourn for morning tea.

Proceedings suspended from 10.48 a.m. to 11.13 a.m.

[11.13 a.m.]

Reviewing the reformed treaty making process

Session chairman: Mr Gary Hardgrave MP, Member, Joint Standing Committee on Treaties

Session presenters: Mr Richard Rowe and Mr David Mason, Commonwealth Department of Foreign Affairs and Trade

Mr HARDGRAVE—Good morning. I am the federal member for Moreton, Queensland, and I am a member of the Joint Standing Committee on Treaties in the 39th Parliament, as I was in the 38th Parliament. I am very pleased to see so much interest in today's forum from so many of the states. As somebody has just remarked to me, it is not often that we get politicians, bureaucrats, departmental officials and others from all the states together in one room basically looking for a constructive outcome at the end of the day. As a member of the Joint Standing Committee on Treaties, I am optimistic that this will be looked back upon as a very significant day in the history of what I believe has become a very significant committee—without wanting to overgild our own lily.

This session is on the reformed treaty making process. Therefore, I hope you find it instructive and I also invite you to make a contribution. With your indulgence, as one of the original members of the Joint Standing Committee on Treaties, I will just make a couple of comments. I confess that, in the 38th Parliament, we as a committee spent a lot of time finding our way and very early on showing a lot of the various departmental officials that this committee—and, through it, the people of Australia—was something they should now account to. To their credit, DFAT and A-G's responded very strongly to that coercion, that stimulation, we gave them in early reports. As we have gone along the track, I think we have found that each department has started to realise that the Treaties Committee is an important part of accounting to the people of Australia.

To address members of state parliaments especially, without ever wanting to do as some might suggest—and being from Queensland, we often suggest it—and that is have Canberra trying to tell you how to run your parliament, it certainly would be a good thing also if you were to invite your executive to look upon what has been done here at the federal level, as the Victorians have done. In a federation of states that want to take the very best idea and try to apply it in other states, the challenge always is to iron out the parochial differences state by state and come up with a mechanism providing the same sort of accountability back to the people you represent—and generally they are the same people we all represent in the federal parliament. It is also to listen to their concerns and to explain and account to them why executives have come up with a decision to sign a particular treaty, and to encourage their participation in the discovery process that the Joint Standing Committee on Treaties attempts to unfold here.

I am not a lawyer. I count that as being perhaps my single greatest qualification to be a member of the Joint Standing Committee on Treaties. I am not an expert on international law. I would certainly invite all state members to resist any possibility of having to extend

the bureaucracy into a great duplication of international law experts. I offer you my only and simple premise that I use in my discussions with officials wanting us to agree to a treaty—and that is: what is in it for Australia? That is a very simple proposition to understand. So, 'What's in it for each of your states?' I think therefore must be a very simple proposition for you to offer.

I now introduce Mr Richard Rowe and Mr David Mason from the Department of Foreign Affairs and Trade. The department and the Attorney-General's Department have recently completed a review of the reformed treaty making process. Richard Rowe is Legal Adviser and Assistant Secretary of the Legal Branch, International Organisations and Legal Division of DFAT. He has represented Australia at numerous international conferences. He was deputy permanent representative of Australia to the United Nations in New York from 1992 to 1997; Consul General in New Caledonia from 1990 to 1992; and he has also served overseas in Geneva as deputy head of the Australian delegation to the conference on disarmament.

Mr Mason is Deputy Legal Adviser and Executive Director of the Treaties Secretariat in the Department of Foreign Affairs and Trade. He has law and arts degrees—so there are plenty of lawyers involved in the process—from the University of Melbourne, and a masters in international law from the Australian National University. He has 25 years service as a career diplomat, most recently in Kuala Lumpur as Australia's Deputy High Commissioner to Malaysia. He has had extensive experience and practice in most areas of public international law, culminating in his recent appointment as Executive Director of DFAT's Treaties Secretariat.

These gentlemen today will speak to us about the results of this recent review and the reforms to the treaty making process. I firstly invite Mr David Mason to address us all.

Mr MASON—Thank you very much, Mr Hardgrave. My colleague Richard Rowe and I have been invited to speak in this seminar on the topic 'Reviewing the reform treaty making process'. We are delighted to do so, not least because of the timeliness of reporting on that subject. As the Minister for Foreign Affairs, Mr Downer, noted in his address to us all last night, the release of the government's report on this very issue is very near. Mr Downer was pleased last night to set out the broad findings of the government's review.

This morning though, Richard Rowe and I intend building on those broad conclusions by looking in more detail at the major outcomes and findings of the review so far. In so doing, it must be remembered that these detailed findings that we are going to go into have not yet been endorsed by ministers and, therefore, represent only the preliminary views of the relevant Commonwealth government officials. That is the particular context in which our remarks should be taken. The further broad context I want to sketch out has two aspects. Firstly, I just want to recapitulate what was involved in the 1996 treaty reforms; and, secondly, I want to set out how we went about conducting the review of those reforms.

It will be recalled that the landmark reforms of 1996 were built on the following five pillars: first, the tabling of treaties in parliament for at least 15 days before binding action; second, the preparation of national interest analyses for each treaty; third, the establishment of the parliamentary Joint Standing Committee on Treaties—that is JSCOT—to scrutinise

those treaties; fourth, the establishment of a Treaties Council comprising the Prime Minister, premiers and chief ministers; and fifth, the establishment of an Internet treaties library, based in the Department of Foreign Affairs and Trade.

In introducing the reforms in the parliament on 2 May 1996, the Minister for Foreign Affairs, Mr Downer, foreshadowed that the Commonwealth government would review the initiatives taken to reform the treaty making process after two years. That review duly got under way in July of last year when the Prime Minister wrote to the premiers and chief ministers to invite them to provide comments about the reforms and to make suggestions for improvements to those reforms. The Minister for Foreign Affairs and the Attorney-General wrote in similar terms to the Joint Standing Committee on Treaties. The Department of Foreign Affairs and Trade and the Attorney-General's Department also wrote advising of the review and seeking comments from persons and organisations who had made submissions to the 1995 Senate report and from others who had made submissions to JSCOT inquiries.

In other words, we ranged out as widely as we could to catch all those who were perhaps interested in commenting on this subject by first going to the particular people and bodies and then going out more widely so that we went with advertisements in national, state and territory newspapers. In July 1998 they sought views on the question of the operation of the new treaties procedure and that review was also advertised on the Internet sites of the Department of Foreign Affairs and Trade and the Attorney-General's Department.

What was the result? The review received 69 submissions, which included submissions from all state and territory governments and 13 submissions from Commonwealth departments and agencies. The Joint Standing Committee on Treaties also provided comments to us. The review submissions covered a vast range of dimensions and perspectives on the treaties reform process. In making sense of them all, we have identified the key issues that they have addressed. Those key issues cover six broad areas which Richard Rowe and I have divided into two main categories of three areas each.

The first of these categories covers three areas: the role of states and territories in the treaty process; the efficacy and quality of the general consultation on treaties issues; and the question of public awareness of and access to treaty information and related material. That group of issues I will address in just a second. The second group will be addressed by Richard Rowe immediately following my presentation. The second group of issues that Richard Rowe will address are these: the tabling in parliament of all treaties; the overall role of the federal parliament in the treaty process, particularly the part played by JSCOT and the use that JSCOT makes of national interest analysis; and the associated issues of whether the reformed treaty process should be subject to parliamentary approval of treaties. I have tried to outline the main themes raised in the review and how we are going to cover them.

Moving first to state and territory issues, the 1996 reforms included a number of measures designed to improve the quality of state and territory participation in the treaty making process. Most of these measures are set out in the 1996 *Principles and procedures for Commonwealth-state consultation on treaties*, which has already been alluded to by at least one of the state parliamentarians earlier today. Those 1996 principles and procedures were adopted at the Council of Australian Governments meeting, COAG, on 14 June 1996. They include these two key measures. The first is the establishment of the Treaties Council,

consisting of the Prime Minister, the premiers and the chief ministers, as a high level advisory body to consider treaties of particular importance and sensitivity to the states and territories.

The second is an enhanced role for the Commonwealth-state Standing Committee on Treaties—not to be confused with the Joint Standing Committee on Treaties, the parliamentary body. Rather, this is the Standing Committee on Treaties, which we call SCOT, which comprises senior Commonwealth government and state and territory officials who are involved in, or take the responsibility for, identifying treaties of particular sensitivity or importance to the states and territories which might be considered by the Treaties Council. So that body of the Prime Minister, chief ministers and premiers that we referred to earlier, the Treaties Council, is advised by a high level group of state and Commonwealth bureaucrats who recommend and set out the sorts of treaties of sensitivity that they think appropriate that their premiers raise at the Treaties Council.

In addition to these specific mechanisms, there are opportunities for the states and territories to contribute their views to the treaty making process in a vast range of mechanisms, which I will get onto in a moment. Among those mechanisms is the Joint Standing Committee on Treaties itself. As has been said earlier, there is no barrier—quite the contrary, there is encouragement—against any state parliament or executive making submissions directly to the Joint Standing Committee on Treaties as it sits to scrutinise treaties that will be signed after 15 sitting days of being looked at in parliament.

In reading our findings from the review it is quite clear, particularly in the ones from the states and territories, that the thrust of their submissions was to say that the 1996 reforms—the five pillars of which I have already outlined—have resulted in a significant improvement in the nature and quality of state and territory involvement in the treaty making process, particularly in the nature and quality of consultations. However, to varying degrees different states identified where potential improvements were possible and advocated some. I want to examine in turn each of the major improvements that the states and territories put forward to this review and indicate in general terms the thinking of Commonwealth officials about those ideas.

First, the primary concern raised by the state and territory government submissions related to the adequacy of consultation on the proposed treaty actions. In particular there were concerns that the states and territories were provided with either too little or too much information and that the time allocated for providing comments was sometimes inadequate, particularly in relation to providing comments on national interest assessments.

In response to that, let me say that the Commonwealth officials would readily acknowledge that effective involvement in the treaty process by states and territories largely turns on them having enough information at a sufficiently early stage to enable them to make a substantive and timely contribution. Having acknowledged that, one problem to be pointed to is that the Commonwealth itself often only receives documents for international meetings—when an international treaty is being negotiated—at a very late stage.

But it is not sufficient to say only that, because it is also the case that those documents on a treaty being negotiated are there in the public domain, in that many international

negotiations are already on the Internet sites of the various international organisations. So scrutiny by state parliamentarians or executive would be quite possible if they were only made aware that there are Internet sites of international organisations out there that give them immediate free access to the full text of the treaties that are being negotiated—whether that be the first strike or whatever. Indeed, in Treaty Secretariat we are working towards establishing links from our Internet sites with those international sites to be able to access those treaties.

We have earlier said that the fifth pillar of the reforms was to try to establish the treaties library on the Internet to give free and immediate access to everyone with an Internet access in Australia—and not only in Australia but in the world. We have done that in very large measure, and I will come to that later. Let me at this point say that they are also available out there on the international sites, and we can guide you to where they are, if that is not immediately obvious to you. We can easily do that through the Treaty Secretariat.

Commonwealth officials recognise this problem that some states and territories have identified, and they will do all they can to ensure that better access is gained. But they would note that states themselves are able to get most of that information very quickly and easily by down-load from the Internet, if only they know and are given encouragement about where to look.

Further on the question of how the states and territories might be able to get access, I should note that in the 1996 Principles and Procedures provision is made for two things that I will highlight. Provision is made for, firstly, using existing ministerial councils and consultation bodies for detailed discussions between the Commonwealth and the states and territories about treaties. On any given matter of major importance that is subject to multinational treaties—such as the environment or human rights matters and so on—there are Commonwealth-state mechanisms and bodies, many of them at ministerial council level, which our anecdotal evidence is showing are being used very little by the states.

I do not think it appropriate to point the blame at the Commonwealth or the states: all of us need to ensure that we each know that the stuff is there and available and that the mechanisms are there to consult. We need, as we become aware, to make more use of those mechanisms. As I say, one of them is enshrined in Principles and Procedures, and it is these ministerial councils and consultative bodies on matters that are the subject of treaties between states. This is all quite separate, of course, from the Treaties Council and the other bodies.

The second provision I want to mention is that it is enshrined in government practice that we are obliged to provide states and territories with a report on the outcome of negotiating sessions of sensitivity and importance to the states, wherever that is practicable. Within the bureaucracy at least, there is a mandate for all federal government negotiators to let the states know what happened in negotiations. That is caveated by saying ‘whenever practicable’, and the practicable aspect relates to such issues as sensitivity on secrecy; but in most cases I am sure it would be fully practicable. Looking at the concerns raised by some of the state and territory governments, a number of the submissions suggested that state and territory parliaments should have a formal role—in particular, I think Victoria suggested

this—at least in approving treaties of particular interest and concern to the states and territories.

As has already been stated many times, including today, the federal government's approach is that it is inappropriate for the state and territory partners to have a formal role in the treaty making process, for all the reasons we have heard about earlier: what the Constitution allows, and so on. The reason that view is reinforced in the minds of Commonwealth officials is that the reformed treaty making process, if used properly and if full advantage is taken of it, does in our view provide a great deal of opportunity for states and territories to have their views taken into account in treaty negotiations.

In particular, for instance, NIAs or national interest assessments are required to address issues including precisely what consultation has occurred, the reasons it would be in Australia's interests to become a party to the treaty, how the treaty will be implemented domestically, and so on. A formal approval role for state and territory parliaments would, in the view of many, impose lengthy delays on the treaty making process, and it is rather difficult to identify any positive improvement to that process that is not already being obtained or is capable of being obtained via the treaty reforms.

I move on to a third issue raised by the states' and territories' submissions, and that is the issue of whether Australia should require federal clauses to be inserted into relevant international conventions. This issue has been around for some time. Federal clauses limit the application of a treaty to areas of a federal government's constitutional authority. The 1995 Senate committee report looked at this very question and determined that it would present considerable practicable and political difficulties for us to do that in Australia. That report actually also suggested possible constitutional difficulties. The upshot of all this is that there are no plans to seek federal clauses in future treaties—although the Commonwealth government will undoubtedly continue to make a federal statement, on signature, when that is appropriate.

The fourth issue that has been raised is that some submissions have suggested the 1996 Principles and Procedures should be contained in an intergovernmental agreement, that those procedures themselves should be upgraded to an intergovernmental agreement. Again, Commonwealth officials feel it is difficult to identify any clear advantage in changing the status of the current arrangements. Of course, it should be noted that this issue could be considered by the Treaties Council and addressed positively, if that were the view of the members of the Treaties Council.

A fifth issue raised by the submissions was the level of representation of state and territory interest on Australian delegations at treaty negotiations. This has been raised a number of times this morning. Certainly it is the view of Commonwealth officials that there is no doubt that such representation can assist both in informing the delegation of state and territory views and in providing expert technical assistance.

Consistent with what is set out in the 1996 Principles and Procedures, the Commonwealth supports representation of state and territory interests on delegations to international conferences that are dealing with issues that affect the states and territories. It supports that fully—provided, of course, that the representation is funded by the states and

territories themselves. I notice my minister last night made particular mention of that point of self-funding state and territory representatives. That concludes my remarks on states and territories.

I want to say something very briefly about consultation. Consultation was a key theme of the 1996 reforms and the government's endeavour to provide the wider community with real opportunities to contribute to the government's assessment of the national interest. The standard means of participation included writing to ministers and parliamentarians, discussions in the media and involvement of organisations, NGOs and so on, active in the relevant fields.

But then there is a special channel for public input on treaties which includes the twice-yearly tabling and publication of lists of multilateral treaties under negotiation or consideration. Again, that list, published twice yearly and updated constantly, is available on the Internet web site in the DFAT treaties library. It provides a brief precis of the treaty, but also provides the name of the department, the officer and his or her telephone number, with an invitation encouraging people to telephone them and seek views on what is happening to the treaty. I do not think it is widely appreciated that there is this degree of transparency available if you know where to look.

Two recent examples are perhaps worth noting in terms of consultation generally, one being the antipersonnel landmines convention signed by the foreign minister on December 1997 and ratified in January 1999. The government faced a difficult task there of balancing competing interests. Landmines provide a significant tactical capability that, on the one hand, had a well-established place in the Australian Defence Force plans. Against this the widespread misuse of landmines had been leading to tragic humanitarian and economic results and contributed to an assessment of the need for a global ban of them.

This is a typical consultation process that the Department of Foreign Affairs and Trade and other departments go through. We targeted the existing broad networks, including DFAT's national consultative committee on peace and disarmament whose membership covers parliamentarians, academics, returned service associations and representatives of community peace groups. We put all those groups in front of the officials to give feedback on what the thinking was behind the negotiation of that treaty. The feedback from these networks contributed a great deal to the government's assessment of the depth of community interest on this issue and highlighted issues of community concern about the handling of the landmines issue.

That is a previous consultative process. A current consultative process is the initiative by the Minister for Trade and Deputy Prime Minister, Mr Fischer, to seek public comment on the agenda for further World Trade Organisation negotiations. Many would argue that probably the biggest global issue out there right now is the World Trade Organisation and what effect it will have on Australia's economic growth.

The objective of these consultations is to assist the government in determining the national interest. These open and public consultations complement ongoing consultations we have with the states and territories. As I say, the minister announced this on 10 February in the National Press Club. The consultations were also advertised in national newspapers.

In addition to increasing the level of public awareness of this particular treaty negotiation, the significant feature of these broad public consultations has been that they have begun at the very early stage of the consultation process. I will conclude on that very point and emphasise consultations at the early stage. I will conclude by simply saying that it seems to me that it is absolutely critical with consultations and input, be it by the states and territories—or most importantly by the states and territories—or by other stakeholders and public interest groups, that it comes at the earliest possible point in the development of a treaty. To wait for the NIA is simply not appropriate.

NIAs by definition are national interest assessments done on the completed final text of a treaty. By the time you have got to an NIA there is not a great deal of change you can make. Of course, the NIA was so attacked in the hearings that JSCOT did on the treaty that there was a political groundswell in Australia that we should not sign that treaty. Of course, it could kill a treaty to attack the NIA, but the reality is that by the time you reach the NIA, if you are hoping to influence a treaty, it is far too late. The pity of it is that it can be influenced at a much earlier stage, in particular by the states. Via the six-monthly updates that go out to the executive branches of all the states and territories, the states have the knowledge available to them at a much earlier stage, and the invitation to contribute.

Finally, I just say that three of the great hallmarks of the treaty reform process were: consultation, and I have covered that detail; transparency, and I have tried to cover that in as much detail as I can; and accessibility to information about treaties which we attempt to achieve in the ways I have outlined and we attempt to achieve it in the treaties database. As you heard earlier, we have now got the database to the point where we have 26,000 pages of treaty texts on the treaty database. There is free access to it by anyone in Australia or outside. It includes not only all the treaties that Australia has ever signed but also national interest assessments on all of the treaties signed since 1996. We are developing that treaties database so that its linkages will go out to other areas. For instance, legislation implementing the treaties will also be contained in the database with linked things that connect them.

I fear I have exceeded my time. My colleague Richard Rowe will do his best in the time remaining to cover the other three areas.

Mr ROWE—Since the introduction of the package of reforms in May 1996, the government has tabled more than 130 treaties. The preparation of NIAs has led to greater transparency and JSCOT has engaged in effective scrutiny of these treaties. These three reforms in particular have given an enhanced role to the Australian parliament in scrutinising all intended treaty actions. I would like to comment briefly in the time remaining in this session on each of these in the context of the review which is being conducted by the Minister for Foreign Affairs and the Attorney-General of the 1996 reforms.

Firstly, in relation to tabling, a number of submissions raised the issue of the adequacy of the period for tabling treaties in parliament before binding action is taken. The period established in the 1996 reforms was at least 15 sitting days, which is usually 30 to 100 calendar days of both houses of parliament. The period was recommended by the 1995 Senate report and is consistent with other analogous parliamentary tabling periods, for example, the period during which parliament may consider a new regulation.

I might comment that a number of the submissions referred to the tabling period and seemed to be confused about the difference between sitting days and calendar days. The concerns that they expressed in relation to the time period mainly went to the issue of adequate time for consultation. Those concerns have been addressed in the review in relation to other areas of strengthening the consultative process.

I should also mention that the issue of the adequacy of the tabling period was addressed by JSCOT in its first report in which it said:

On 18 June 1996, the Committee advised the Minister for Foreign Affairs of its concerns that, in some circumstances, the 15 sitting day period in which treaties remain tabled could be insufficient for an inquiry and report to Parliament before binding treaty action is taken.

The committee went on to say:

. . . The Committee therefore intends to advise the Minister as early as practicable after each tabling that:

. . . .

. if it is not possible to report within the 15 sitting day period on a particular treaty or treaties in a group, that a report will be tabled as soon as practicable.

. . . It remains the Committee's expectation that binding action in the latter cases would be delayed until its report has been tabled.

The minister's reply to that recommendation in the report was to agree with it. In such cases where this might arise, the minister indicated that, if necessary, treaty action would be delayed. I think the record shows that, without exception, this commitment has been honoured. So a mechanism is available and the executive has agreed to extend the 15 sitting day period when absolutely necessary.

It is still considered, having looked at all the submissions, that the 15 sitting day time frame does provide a reasonable balance between the need to allow for sufficient parliamentary scrutiny of treaty actions and the need to implement a treaty as soon as possible. I note that JSCOT, in its submission to the review, also said that it did not believe it was necessary to formally extend the review period. Moreover, as Mr Downer commented last night in his statement, the review has found that this tabling initiative of 15 days has significantly strengthened parliamentary scrutiny—a keystone objective of the 1996 reform package—and, in addition, the review has revealed that the flexibility of this mechanism has provided a good balance and has worked well.

National interest analysis is another pillar of the reforms and of the reviews. As David Mason mentioned, the role played by NIAs is very important in recording the consultation that takes place on any given treaty with key stakeholders and interested parties—particularly the states and the territories. An NIA analyses a number of things. It analyses the foreseeable economic, environmental, social and cultural effects of a treaty action, the obligations such action will impose, the direct financial cost to Australia, domestic implementation and the nature of the consultation that has occurred.

NIAs are tabled in parliament and are then made available on the Internet, as David mentioned. In the view of those who have been examining the submissions, they are an important tool in the dissemination of information about treaty actions and a valuable aid to JSCOT in its considerations. The quality and content of NIAs is continuing to evolve. In this regard, the JSCOT submission—and the comment was made in other submissions—put forward some recommendations about the way in which those NIAs could be made better and improved in a user-friendly sense, including greater detail on the consultation process that has been carried out.

In its submission, JSCOT stated that the authors of NIAs must be conscious of striking a workable balance between providing sufficient information to reveal the full consequences and costs of the proposed treaty action, and ensuring that the NIA is understandable to lay readers. As an aside, I would like to assure you that, in the Department of Foreign Affairs and Trade, when preparing NIAs we do not follow the principles of legislative drafting which were stipulated in one authorised handbook. It recommended that we should never use one word where 10 will do, we should never use a simple statement where it appears that one of substantially greater complexity will achieve similar goals, we should qualify virtually everything and, if a lay person can read a document from beginning to end without falling asleep, it needs work.

The third pillar that I would like to comment on in relation to the review is the Joint Standing Committee on Treaties. Obviously, this is a fundamental aspect of the reform package and, as the Hon. Andrew Thomson mentioned this morning, JSCOT has interpreted its mandate broadly. The committee has, for instance, taken the view that all treaties entered into before its inception have been tabled for its consideration. It has, in fact, undertaken examination of such treaties. The second largest of the parliamentary committees, JSCOT's main role is to inquire into and report on treaties.

In fulfilling its role, the review recognises that the committee has played an important part in overcoming the perceived democratic deficit. In particular, it has developed as a key forum through which comprehensive community contribution is facilitated and it has increased confidence in the treaty process. One matter relating to JSCOT which has been considered in the review is the timing of JSCOT's involvement in the treaty process. JSCOT's practice, as has been mentioned, has been to inquire into and report on treaties as they are tabled, before the government takes binding action. There are, however, two other stages at which a treaty could be considered by JSCOT within the terms of its resolution of appointment. Both of these have been mentioned in the submissions. I would like to refer to them to make the point that the situation referred to in the submissions is already covered.

Firstly, it should be possible for JSCOT to inquire into a treaty during negotiations while the text and Australia's position are still to be finalised. This is provided for in JSCOT's resolution of appointment and has already occurred, for example, in relation to the draft Multilateral Agreement on Investment, which was referred to earlier. Secondly, it has also been suggested that it might be appropriate on occasion for the Minister for Foreign Affairs to refer a treaty to the committee during the negotiation stage to assist the government with making the decision whether to sign and subsequently ratify a treaty. Again, this is provided for in the committee's resolution of appointment.

Another aspect that came out of the review relating to the role of the committee is the level of scrutiny of treaties that it should undertake. Many treaties are based on cabinet approved templates, and these standard documents cover such bilateral issues as double taxation, extradition, law enforcement, mutual assistance, health and social security. Other treaties are subordinate to major international treaties, simply implementing the policy under the main treaty. Examples include individual international organisations' operational agreements or technical arrangements.

The characterisation of a treaty may be relevant in determining the intensity of the review process to be applied to it. JSCOT has recognised this aspect of the treaty process. In its first report, it noted:

The Committee will not examine all tabled treaties in detail. 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.

This practice of determining the level of scrutiny to be applied to a treaty functions well when the NIA clearly and succinctly summarises the issues. In relation to template treaties, government practice is to indicate in the NIA how the specific treaty varies from the template. This practice was developed in response to comments from JSCOT. The review is recommending that JSCOT's current resolution of appointment is appropriate for its key role in the treaty process and that the discretion of the committee to inquire into any treaty when tabled should remain unfettered.

I would like to comment briefly on one subject which has also arisen in relation to the review and which has also been adverted to this morning, and that is the subject of parliamentary sanction of treaties. The 1995 *Trick or Treaty?* Senate report considered the issue of whether to introduce a requirement for parliamentary approval prior to Australia's ratification of treaties. That report concluded that the issue be referred to JSCOT, noting that other reforms recommended by the review would assist in curing some of the problems that a parliamentary approval process would be designed to address.

The government's response to that report indicated the experience to be gained from the reforms should be assessed before determining this matter and that the government would consider this issue as part of this review.

A number of submissions to the review addressed the issue of parliamentary approval of treaties. The views ranged from saying that parliamentary approval was unnecessary to arguing that ratification of some treaties should be subject to approval by referendum. The main argument in favour of some form of parliamentary approval is, in essence, that it could result in improved accountability, consultation and community awareness of Australia's proposed ratification of treaties.

The view formed so far is that a requirement for parliamentary approval of treaties is not warranted, because the reformed treaty procedures have themselves sufficiently improved public consultation and parliamentary scrutiny. In particular, the procedures require that, prior to binding action being taken, a treaty must be tabled in parliament, as we have mentioned, together with the NIA. Moreover, those treaties that would directly affect the rights and duties of individuals in Australia already require parliament's consideration of the

implementing legislation. Further, all treaties are subject to inquiry by JSCOT, and the government has, in the opinion of those conducting the review at the officials' level, been careful to take JSCOT's recommendations into account. And the procedure of parliamentary approval, as opposed to the current system of parliamentary scrutiny, could result in significant delays in the treaty process, possibly without any significant benefits additional to those already achieved as a result of the reformed treaty procedures. So this is the trend in reviewing that particular aspect at the present time.

Finally, I would like to say that, as the Minister for Foreign Affairs, Mr Downer, noted last night, we have seen a significant enhancement in treaty scrutiny and consultations at all levels of Australian government and in the community. As he said, the effect of this revolution has been to make the treaty making process much more transparent and the government that much more accountable for its actions. Australians now have unparalleled access to the work of governments in making new international laws. This is, I might say, the overwhelming view that is also reflected in the submissions made to this review. However, as Mr Downer also noted last night, valuable suggestions for finetuning the existing system have been made during the review process.

He singled out just three areas, and I will mention them briefly. An important priority will be further improving consultation with states and territories. Another area is the importance of representation of state and territory views at treaty negotiations, and another is improving the quality and utility of NIAs. There is no doubt that the review will reflect the need to finetune, make adjustments and make the improvements that have very broad support in the submissions which have been put forward.

I conclude by suggesting that these further reforms—which, as I say, will be reflected in the review—will be aimed at ensuring even greater openness and transparency, which were the key elements of the 1996 package. Together with the consultation that is inherent in those reforms and the theme of the package, they should ensure that the democratic deficit which the reforms were meant to address is for ever eradicated.

Mr HARDGRAVE—Thank you very much, David and Richard, for your presentations. I am just taking a mental DIA—a delegate's interest analysis. In order to keep the program for the afternoon on time, I suggest that we move on to the next item on the agenda unless there is a burning question for either of our speakers.

Mr JOHN—I am particularly interested in the Internet information provided by the two speakers. But I just want to correct any misapprehension amongst delegates that the Victorian report did not question the Commonwealth's total right to be the government that is responsible for the entering of treaties. In our report we actually say that the Commonwealth government is the only Australian government with the power to make treaties. Our recommendation for tabling into state parliaments is for information to try to enhance the process and not in any way to usurp the authority of the Commonwealth.

Mr HARDGRAVE—Thank you very much for that, Michael.

Mr EVANS—I am the policy resource coordinator for ACOSS in relation to treaties. Unfortunately, I have to be in Melbourne this afternoon; so I shall not be here. I want to

make a brief suggestion, which is that there might be organised at some stage a counterpart seminar on national interest group, voluntary sector or non-government involvement in treaty making.

Mr JASPER—To follow on from what Michael John said, whilst not taking away from the final right of the federal government, recommendation 6 in our report indicated that the Commonwealth should extend the period from 15 sitting days and that that should be extended for the states to have a minimum of 15 sitting days. I would like either of the two speakers to comment on the suggestion that the states be involved to the extent of getting these treaties before the Victorian parliament, other parliaments and other jurisdictions in Australia.

Mr MASON—I want to respond in two parts. Firstly, I greatly welcome the prospect of having the states further involved in making input into treaties. In my address I tried to set out the various mechanisms available, some of which, in my view, are not being fully used by the states. That leads on to the second part of my answer. I think that the states, as long as they get the information on treaties being negotiated or that have been signed early enough, will be able to make considered views and have them submitted to us within the same 15 sitting days of parliament—reminding ourselves, as Richard Rowe did, that—because of the nature of the schedules of when the two houses sit and so on—in practice those 15 sitting days go anything from 30 to 100 calendar days.

It seems to me that 30 to 100 calendar days—if the states could get the information they need on treaties at a sufficiently early stage and indeed make input into negotiations at a sufficiently early stage, as I think is possible—would be sufficient time to enable the states to do it, remembering always that, when it is an emergency or when there is a special reason that the 15 days for the Commonwealth needs to be extended, that can always be done. It is allowed for by the resolution that set all this up and it has been used on a number of other occasions. In other words, if states had a particular interest about sensitivity they could present that concern to JSCOT and more generally, and the decision to extend the number of days for the states to have time to make their input could be made. For all those reasons, I am not persuaded that we would need to change and add another 15 working days.

Mr HARDGRAVE—Thank you very much. Ladies and gentlemen, I have two very quick announcements to make before we break for lunch. Firstly, you will notice that outside there are display copies of the 21 reports of this committee—although I think I noted that report 2 is missing completely. Some of them are quite rare—perhaps we should do a fully autographed set at some stage as a major fundraiser for the committee's work—but there are additional copies of some. So if you have an interest in obtaining copies, I suggest you talk to the secretariat staff of the Joint Standing Committee on Treaties. Secondly, the Australasian Study of Parliament Group, which is co-sponsoring this seminar, is running a bit of a membership drive. If you are interested, they are offering membership to participants in the seminar.

Proceedings suspended from 12.10 p.m. to 1.35 p.m.

[1.35 p.m.]

SECOND SESSION: INTERNATIONAL PERSPECTIVE

The treaty making role of parliaments in other countries

Session chairman: **Hon. Dick Adams MP, Member, Joint Standing Committee on Treaties**

Session presenter: **Associate Professor Donald Rothwell, Faculty of Law, University of Sydney**

Mr ADAMS—Welcome. I have been a member of the Joint Committee on Treaties since its beginning and I have the privilege of chairing this session. Most of you would not know that this room is actually the second chamber of the House of Representatives. We debate non-controversial legislation here. As you can see, it is set up just like a parliamentary chamber. It is non-controversial, so we do have an extended time for people to speak on the issues which they are interested in. Not many people know about it, and that is why I mention it for your general knowledge.

This session will survey the treaty making role in other parliaments around the world and consider whether their experiences offer lessons for all the parliaments in Australia. We have had a number of speakers already presenting detail and comment on the impact and efficiency of the treaty making process here in Australia. In this session we are going to take the broader international view. In the next session, with our good friend from over the Tasman, we are going to look in greater detail at the New Zealand situation.

As a member of the House of Representatives and also a past member of the House of Assembly in Tasmania, the more I am involved in committee work in this parliament the more I see that we are touching global issues and that there will be a continuation of a need for us to engage in a world dialogue and in some ways formalise that dialogue into treaties. On another committee, the Regional and Rural Affairs and Transport References Committee, we are starting to look at gene technology and how it affects our primary producers and our opportunities or lack of opportunities in that area. I see the area of trade and certified standards et cetera coming out of those sorts of dialogues also going towards treaty making. Treaties have been growing in influence in our daily lives, as Bill Campbell touched on in his address today. Helen mentioned that she sees a role for her new committee. I think we have to be very conscious—that is why there are so many state people here today—that our federation gets it right and that the implementation of treaties and the extent to which we have input into the decision making process goes right across all our states and territories and gives people the opportunity to make a contribution.

With that, I would like to welcome Associate Professor Donald Rothwell from the faculty of law at the University of Sydney. Professor Rothwell's major research interests include constitutional and institutional law, with a specific focus on federalism, international environment law, law of the sea and law of the polar regions. He has been a visiting fellow at Cambridge University, the University of Alberta and the University of Wollongong. He

has taught a range of courses, including constitutional law, law of the sea, international law and diplomacy, international environmental law, international law and the use of armed forces, maritime law and public international law. Professor Rothwell has published extensively on a range of subjects. I now invite him to give us a presentation.

Prof. ROTHWELL—Thank you for that introduction, Mr Chairman. This is the second time that I have spoken on this topic after lunch. The first time was in Wellington last year, and I made a comment to the New Zealand audience that I thought that that was in some response to the fact that the Wallabies had just defeated the All Blacks the weekend before and this was a New Zealand retaliation against the Australians. I note today that the New Zealanders have yet again got in on me, because Mr Quigley follows me, so I have the running in the post-lunch session.

I would like to thank the committee for the invitation to speak you before here today. The committee may be interested to know that this year at the University of Sydney we have taught for the first time a postgraduate course called international law and Australian institutions. That course actually requires our postgraduate students to look at a national impact assessment and also requires students to actually mock up a draft report of the committee. In doing that, my students found that they gained a much greater appreciation of the very wide range of issues that are involved in treaty making and treaty implementation in Australia. It is quite clear that the discussion already today has made us more aware of those types of questions. As you can see, I am going to try to use a powerpoint presentation to enliven your interest after lunch.

Overheads were then shown—

Prof. ROTHWELL—This presentation is one in which we will be looking at a comparative assessment of a range of countries in terms of looking at how they deal with treaties. I have selected three countries for that purpose: Canada, Germany and the United Kingdom. I will say a few introductory words about these. The Canadian example is one that is most appropriate for us, because we are looking at another federation which has a similar but slightly different constitutional background to ours. It is interesting to reflect upon how the Canadians have responded to some of the challenges of globalisation and perhaps whether they have responded to some of the issues which the Australian parliament has also dealt with during the past decade.

In the case of Germany we have another federal state, in this case a European federal state. As a result of that we have another dynamic introduced into the equation, and that is Germany's membership of the EEC and the consequence that has for the German parliaments. In the case of the United Kingdom, though it may be a foreign power, it is, of course, a state which Australians have always look to in terms of understanding our constitutional history, but which in terms of this type of practice with respect to treaties has always been quite relevant.

I should say that I could have selected a range of other countries, and for those of you who are interested in looking at the treaty practice of other countries the report of the Senate Legal and Constitutional Affairs Committee in 1995, the report that has been referred to already, the *Trick or Treaty?* report, has a section which looks at a number of other states in

terms of their treaty practices, including some other federations in Switzerland, India and so forth. So, for those of you who want to go beyond just the three countries that I am looking at, the *Trick or Treaty?* report is relevant.

In terms of the focus of the review I want to look at, I thought it would be appropriate initially to in every instance say a few words about the role of the executive. We are looking at different constitutional structures and it is therefore important for us to have an understanding as to how those other states operate. Then we should obviously look at the role of the parliament, and finally we will look at some recent developments in those three states.

Let us move on to our first consideration, which is the Canadians. The first important point to make about the Canadians is that in 1876, under the provisions of the Canadian constitution, the issue of the role of the parliament in terms of entering into and implementing treaties was one that was silent under the provisions of the Canadian constitution. There is a clear similarity, of course, to the Australian Constitution on that particular point.

The Canadians also have a very similar constitutional history to Australia in the sense that at Canadian confederation in 1876 most, if not all, of Canada's international affairs were still conducted by England. It was really not until the 1920s and 1930s that Canada began to gain independence in international affairs in exactly the same way that Australia did with the eventual acceptance of the Statute of Westminster. The current Canadian practice is found in the 1947 letters patent, which quite clearly confers upon the executive in Canada the ability to enter into and adopt treaties.

Perhaps I should say a quick word about the role of provinces in Canada. It is accepted that the provinces do have the ability to enter into international agreements of less than treaty status. Some of the Canadian provinces have been quite active in this area. Quebec especially has been active and from time to time there has been quite considerable controversy about the ability of Quebec to enter into a range of agreements with other Francophone states, especially France. At the moment, though, it does seem to be accepted that the Canadian provinces do have the ability to adopt certain cultural agreements. They may be with other Francophone states as in the case of, say, Quebec or New Brunswick. In the case of those Canadian provinces which border the US, there may well be clear cultural links between, say, British Columbia and the state of Washington.

In relation to the ability of the Canadians to negotiate various treaties, it is quite clear that the executive does have a very exclusive role in this particular area, taking into account the comments that I have just made with respect to the roles of the provinces, which are fairly limited. That power is an exclusive one and there is no provision under the Canadian constitution for the parliament to be consulted at all. There is, however, a discretion for the executive to lay treaties before the parliament. However, there is no binding rule in this respect, and it will be interesting to contrast this with the practice that exists in the United Kingdom, which I will be talking about a little later.

The position with respect to the role of the parliament in Canada is that there is no constitutional obligation for the Canadian parliament—that being the House of Commons and the Senate—to actually approve treaties that Canada is engaged in the negotiation and

implementation of. To that end the Canadian position constitutionally is of course a mirror image of that which we find in Australia.

I have indicated that the provinces do have a very limited capacity to enter into international agreements. However, the provinces are actively involved with the federal government in treaty negotiation. To that end I was interested to read in the literature that occasionally a Canadian provincial official or minister may well in fact head Canadian delegations which are engaged in international treaty negotiations. Whether or not they are self-funded, I cannot answer that question, but it does indicates that there is a fairly high degree of acceptance of the legitimate role that the Canadian provinces play.

In that regard you need to recollect that, under the Canadian constitution, the Canadian provinces do have a very discrete list of powers in which the federal government cannot interfere. So the Canadian constitutional position is different from that in Australia where the states, if you like, have the residual powers, or those powers which are dealt with in a complementary fashion with the Commonwealth. But in Canada the provinces do have distinctive powers and so, in areas such as education where the provinces do have the real constitutional power, it may well be most appropriate that Canadian provincial ministers take the lead in any negotiations in that particular area. As for the power to implement treaties, once again the executive has the greatest power, and to that end it is the Governor-General or, perhaps more effectively, the Secretary of State for External Affairs, who is responsible for signature and ratification.

I should say a word about the role of the parliament in the implementation of treaties, because here we do see a real distinction from the position that exists in Australia. Under section 132 of the Canadian constitution—and this is an original position that existed as from 1867—the Canadian parliament was given power with respect to what are known as British Empire treaties. That would seem to us to be a rather anachronistic term in 1999, and I think the Canadians would also consider it to be rather anachronistic.

The difficulty is, though, that section 132 of the constitution in Canada has not been amended and that, following the decision by the Privy Council in 1937 in what is known as the labour conventions case, that provision in the constitution was very narrowly construed. As a result of that, the Canadian federal parliament really only has power to implement treaties in relation to the British Empire treaties, which are effectively those that were entered into prior to confederation or perhaps up to about 1920 or 1930, or those which very clearly fall within the power of the Canadian federal parliament. As a result of that, the federal parliament has no real power in matters that really fall discretely within provincial power under the constitution. This results in quite a different scenario to that which we find in Australia.

What exactly is the role of the parliament in Canada in treaties? There is a standing committee on foreign affairs in Canada. However, that standing committee does not have an ongoing role in treaty review and in assessing treaty implementation in the way, for example, that JSCOT does. From time to time, though, the government will refer major international negotiations to that standing committee, and recently in the area of NAFTA that committee has been quite active. A Canadian colleague advises me that the free trade area of the Americas is one matter which that committee has before it.

But, quite clearly, while there is a standing committee on foreign affairs, it does not—as a general rule—deal with treaties in the same way as we see JSCOT doing. When the Canadian parliament is called upon to enact domestic legislation to give effect to treaties, there will be an opportunity for committee discussion on those issues but I wish to stress that, once again, this will be an ad hoc discussion and it will not be a formal process which will occur in every single instance.

Let us move on to Germany. One of the real distinctive features of the German constitution is that we do have provisions in that constitution which quite clearly detail the role of the executive in relation to international affairs and also, most importantly, the role of the German states—the Lander—in terms of their capacity to engage in international affairs and also their capacity to approve of international treaties that the federal government has been involved in the negotiation of. Article 32 of the German constitution quite clearly says that the foreign relations of Germany are to be conducted, on behalf of the federation, by the President and on behalf of the executive.

Article 59 also quite clearly entrenches the role of the federal parliament in that particular process, and I will come back to say a few words about the role that the parliament plays in approval and implementation. As I said, the real major difference from Australia and also Canada is that, under article 32 of the German constitution, the German states have a real capacity to determine treaties which fall within their particular domestic constitutional competence. Once again, my reading indicates that this is mostly in the areas of cultural agreements. Nevertheless, it is interesting that this is a provision which is entrenched in the German constitution and to that end the German states, I would suggest, are in a much stronger position than the Canadian provinces or even the Australian states in this area.

In relation to the power to negotiate treaties, the role of the executive is predominant in that, while the role of the parliament is entrenched in article 59 in terms of implementation and giving effect to treaty obligations, it is very much still the executive which takes the lead in this particular area. So perhaps the question is: what exactly is the level of participation that the German parliament engages in? The wording of article 59 actually says that the parliament shall approve of or participate in the formation of relevant federal laws. Whether that would suggest that during the negotiation process the parliament play an active role or not is somewhat ambiguous, but apparently the practice in Germany is that this is very much a process that is still driven by the executive and that the role of the parliament is not uppermost.

I have already said a few words about the role of the German states and I have indicated that under the German constitution they have a role to engage in negotiation. There is also an intergovernmental agreement in Germany between the states and the federal government called the Lindau agreement. That agreement provides that the German states are to be consulted on any matters that affect that particular state. That would seem to indicate that certain agreements which may affect all the states would obviously bring them into the process but that individual agreements which may affect one particular state more than the other would also mean that that state would be consulted in the negotiation process.

In terms of the implementation of treaties, once again the executive's role is uppermost but, most importantly, under article 59(2) of the German basic law the parliament has a really clear role in terms of the approval and implementation of treaties. To that end, there are established parliamentary committees which will review each one of the treaties which are being considered by the German parliament. From my reading, there is no general central committee such as JSCOT but there may well be a range of committees which would discuss or consider treaties on environmental issues, human rights, military relations and so forth.

In relation to the states, the role of the German Lander, there is a permanent treaty commission that exists—perhaps overtones of what we see in Australia. That permanent treaty commission must be consulted in relation to the implementation of treaties that affect the states, and the consent of that permanent treaty commission is required. Then of course there are certain treaties that fall within the power of the states over which they have the ability to implement.

In summary, what is the role of the German parliament? Quite clearly, they have an entrenched role under article 59 of the German constitution. Treaties will be laid before the parliament when approval is required, depending on the circumstances. One of the consequences of this is that, because there is parliamentary approval, in effect treaties in Germany are self-executing. That is a term that some of you may have come across in terms of the role that the US Senate plays in the ratification of treaties in the United States. This is effectively the situation that also exists in Germany.

Concerning EC legislation, I indicated before that one of the dynamics that exist with Germany is that Germany is a party to the EC. As a result of that and because of the tremendous growth in EC legislation and EC treaty relationships, there has been the development of certain processes in the last 10 years or so which allow for greater parliamentary participation in terms of treaties dealing with the EC, and the Bundesrat—which is the upper house, effectively the states house—will very much play a role in EC legislation when the roles of those states are being affected.

Finally, the UK position in some respects will be familiar to most of us. The executive power rests very much in the United Kingdom in terms of the ability to enter into treaties as part of the prerogative power which has existed in England and in the United Kingdom for many centuries and that power is effectively exercised by the government of the day. As a result of that, the power to negotiate treaties is very much one for the executive, effectively exercised through the Foreign and Commonwealth Office and by the Secretary of State for Foreign and Commonwealth Affairs. The treaty negotiation power and the role therefore of the parliament are extremely limited in the United Kingdom.

The implementation of treaties is an area where we have seen some recent developments in the United Kingdom. One development, though, has been in place for a very long period of time, that is, the Ponsonby Rule. This rule was introduced by the Undersecretary of State for Foreign Affairs in 1924—a member of parliament—in which it was put forward that any treaties being adopted by England be laid on the table for 21 sitting days. That rule exists today. It has been modified only recently in terms of double taxation agreements. Effectively, with the exception of double taxation agreements, all treaties are laid before parliament for 21 days in both the Commons and the Lords.

The recent development is one that Australians will see as an influence that may be coming from Australia, that is, in 1997 the British parliament decided to require that explanatory memoranda accompany all treaties that are laid before the parliament. These explanatory memoranda have a number of common features about them. They apply to all treaties apart from double taxation conventions, which is consistent with the Ponsonby Rule. In the explanatory memorandum, the role of the relevant departments must be identified. There is a standard content for an explanatory memorandum, much in the same way that we see in the Australian national interest analyses. Also, ministerial responsibility for that treaty must be indicated and the responsible minister must actually sign off on the explanatory memorandum before it is laid before the parliament.

I have already identified that the Ponsonby Rule has a role in the power of the parliament to implement treaties. More significantly in relation to the need for legislation: when does the UK parliament need to enact legislation? There are a number of well established areas where parliament must enact legislation: in taxation when domestic law is affected, when territory is ceded, when private rights are affected and when new powers are conferred on the Crown. It may well be that when there is a need for new legislation that legislation must be enacted and must be in place before the treaty is enacted, ratified and comes into effect.

In summary, in the UK, the role of the parliament is very much dominated by the historical precedent of the Ponsonby Rule, the role of the parliament in terms of the enactment of legislation prior to ratification, where that is necessary, but also we see in the UK the role of the European Community. In that regard, there are clear similarities between the UK and Germany, as I identified beforehand. The Ponsonby Rule will also apply to all EC conventions but perhaps most importantly in relation to EC legislation there are a range of select committees that exist for both the House of Commons and for the Lords which will review all EC legislation because once the EC adopts obligations, even though they may be in a regional sense, they become binding upon the UK and it needs to implement legislation to give effect to those EC directives and initiatives.

It is quite clear that we have seen a variety of practices that exist amongst the three states that I have considered. If I had undertaken a much wider review, we would have seen an even wider variety of practices. So the one general comment to make is that really no one state is alike, although quite clearly those states which have federal systems do have some similar aspects in terms of the interests of the states or the provinces in the treaty making and treaty implementation process.

In relation to the Canadian position, there are clear similarities in terms of the constitutional position of the Canadian executive and the Australian executive in terms of the ability to enter into and to negotiate treaties. The major distinction is that in Canada of course we do have some limitations because there is a clear lack of an external affairs power under the Canadian constitution. I refer to the effect of the labour conventions case. Interestingly, Canadians have been looking at Australian developments over the last 10 or 15 years, starting with the Tasmanian dam decision. More recently, they have been interested in some of the reforms that we have seen in Australia over the last five years. Why haven't the Canadians responded to some of these developments? It could be surmised that Canadians have had their own constitutional difficulties, perhaps matters of greater import than the ones

we have been addressing, in terms of just keeping Canada together. It may well be that once those issues have been dealt with they may look seriously at whether they might want to adopt some of these developments that have been seen in Australia or in other states.

In the United Kingdom, the most recent significant reform is the introduction of the explanatory memorandum which, quite clearly, has some parallels to the introduction of the national impact analysis. The other point to note is that in the UK there has been longstanding practice in laying treaties before the parliament in terms of the Ponsonby Rule. To that end, the parliament has been at least made aware of the developments that have been occurring in treaty making.

In Germany it is really quite distinctive, because we have a constitutionally entrenched position for the German parliament in the treaty making and treaty implementation process. As I said, perhaps somewhat similar to the US position, we have a situation where because of the need for the German parliament to approve treaties we see in Germany a self-execution provision. Also, the German states are recognised in the German constitution as having a role. It may not be significant because their powers are constrained. Nevertheless, they do have some role in treaty making and implementation.

Mr JASPER—I have a quick question to Donald. You mentioned the 21 days in the UK. Is the treaty brought before the parliament and debated? What happens at the end of the 21 days? Does it need to be debated? If it is not debated, does it automatically become accepted as a treaty?

Prof. ROTHWELL—My understanding is that it is laid before the House of Lords and the Commons for 21 parliamentary sitting days. If it is not debated during that period and it passes without comment, then there is no restraint imposed upon the executive in terms of ratification. So really the onus is upon the houses as to whether or not they show interest in that particular territory and take up the opportunity to debate and discuss it.

Mr ANDREW THOMSON—What scope is there then for the Australian states to conclude international style agreements? Is there any residual scope? A state can include an agreement with a foreign corporation concerning some development, but what is to stop Premier Kennett from concluding a treaty with another nation or another state of another nation?

Prof. ROTHWELL—The standard answer to that would be that the federal government represents Australia in terms of the conduct of its international affairs and as a result of that the federal government effectively has the international personality to engage in treaty making and treaty implementation on behalf of Australia. That is not necessarily the case in terms of instruments of less than treaty status. So there are from time to time examples you can point to where the states and even the territories have agreed upon instruments of less than treaty status with other countries. There is the very interesting example of a memorandum of understanding the Northern Territory has with one of the Indonesian provinces which deals with cultural exchanges. In that regard, it mirrors the Canadian or the German experience. I think though that most international lawyers would say to you that if New South Wales sought to enter into a treaty with New Zealand it would not be recognised

as a treaty for international law purposes but it may well have some other status—as a commercial agreement, for example.

Mr ANDREW THOMSON—But it could have municipal effect in some way?

Prof. ROTHWELL—If it were given effect by a legislative act of the New South Wales parliament, it could well do so but it would not be seen as an international instrument.

Mr DUCKWORTH—The executive in Britain does not usually give any power to the parliament unless there is a reason. What happened in 1921 which made them willing to give parliament this type of role? Was there some international development or pressure which you are aware of which made them—

Prof. ROTHWELL—Are you referring to the Ponsonby Rule?

Mr DUCKWORTH—Yes.

Prof. ROTHWELL—I cannot elaborate on the background as to why that was developed.

Mr NIXON—I think the examples you gave were very interesting. I was in Canada last year, and it appeared to me that 'mirror image' is a very good expression, because Canada is different from Australia in that the provinces appear to be the creatures of the federal government rather than the other way around in Australia. When we move on to both Germany and Britain, now that they are members of the European Union, how do the German government and the British government deal with treaties that are made by the European government in Brussels?

Prof. ROTHWELL—My understanding is that, because of the consequences of the Treaty of Rome and because of the subsequent European conventions, as soon as there is the adoption of legislation by Brussels there becomes an international obligation for the European states to give effect to that. It therefore becomes imperative that the parliament play a role in the negotiation and in the implementation of the EC treaties and conventions because of this overarching obligation that exists within the European Community. You are quite right that, in relation to EC treaties and conventions and to a lesser extent perhaps even EC directives, the parliaments in both the UK and Germany and I would presume in most of the European Community countries do play a much greater role.

Perhaps one of the interesting things for us to speculate about is what could be the consequence of the development of a much larger regional trade grouping within the Asia-Pacific. What would happen, for example, if APEC became an Asian-Pacific variant of the EC? Would that mean there would be an imperative need for a change in the treaty making and implementation processes in countries like Australia and New Zealand?

Mr MASON—I have two questions, one on a more technical matter and the other a broad question. The first is on the more technical matter: this question of the Canadian provinces having the capacity to enter into treaty agreements, I think you said. I know there was a question on that a little earlier, but I am a little unclear on exactly what sort of status

such agreements could have. I say that because my understanding is that, if they are less than treaty status—as you said they are—then they are mere memoranda of understanding or resolutions, in which case, they have the status of being political statements or they have political force or moral force but they specifically do not have force under international law. If that is what we are talking about when we say that the Canadian provinces have this capacity to enter into so-called treaties, then I am forced to query whether we really mean treaties in that context. I assume what you really mean is agreements with a small 'a'—and this is not being pedantic but they are not really treaties in that they are not binding under international law. That was my first question.

The other was a very broad question: I was very taken by what Professor Rothwell outlined in what the states do in those three countries. I would be interested to hear what those three countries do in terms of public involvement in treaty making. As you know, in Australia that comes through access to treaties and through the JSCOT hearings and so on. What happens in those three countries he mentioned in terms of the public having a role?

Prof. ROTHWELL—Thanks for those questions. In relation to the first question, David, I think you have perhaps correctly picked me up in that I may well have been suggesting that the Canadian provinces have the ability to enter into treaties. I do not think that is the case. If they do possess any capacity, it is much the same as the Australian states or territories in terms of instruments of less than treaty status.

What is distinctive though is that the Canadian provinces have been much more robust in suggesting that they have a capacity to conduct international relations than the Australian states have been. I think that reflects the peculiarities of Quebec but also reflects the high degree of integration that exists between some of the Canadian provinces and some of the US states in terms of US-Canadian affairs and relations. As a result of that, those provinces have been much more robust in suggesting that they can conduct a limited degree of international relations.

In relation to the second question, I can speak with some authority on the Canadian and the UK position because much of my research was conducted via the Internet. I was interested to see that, for example, there was very little information available through Canadian government sources on Canadian treaties. There is a fairly extensive web site provided by the Canadian equivalent of the Department of Foreign Affairs and Trade but it by no means contains a treaties library such as we see in Australia.

In the case of the UK, the Foreign and Commonwealth Office also has a web site which contains some information, but my one observation is that it was by no means up to date. For example, with the explanatory memorandum that I referred to that the UK has recently adopted in terms of its practices for the House of Commons and the House of Lords, the most recent one was March 1998. So it was over 12 months out of date. To that end, one would contrast it with the availability of national interest analyses on the Australian DFAT web site.

Mr LENNARD—Our mouths watered at the prospect of special rules for tax treaties in the UK as long as they are special rules that are facilitating the passage. Is that because they are templates or because they are generally non-controversial? Are you aware of the particular reasons for that?

Prof. ROTHWELL—I am not aware of the particular reasons but I would surmise just as you have indicated that, because they are effectively template agreements, they are seen as broadly non-controversial and therefore they have been excluded under the Ponsonby Rule and under the EM requirements in the UK. To that end, I was interested to hear earlier in the day some of the comments made about the way the double taxation agreements are being dealt with in Australia now.

Mr ADAMS—Thanks very much, Professor Rothwell, and everyone who participated in that session. There is a big opening for all of us to see what is happening especially in Canada and Germany which have very similar states to ours.

[2.17 p.m.]

The role of the New Zealand Parliament in treaty making

Session chairman: **Mr Kerry Bartlett MP, Member, Joint Standing Committee on Treaties**

Session presenter: **Hon. Derek Quigley MP, Chair, Foreign Affairs, Defence and Trade Committee, New Zealand Parliament**

Mr BARTLETT—Good afternoon, ladies and gentlemen. As with the chairs of our earlier sessions, I am a member of the Joint Standing Committee on Treaties. It is my great pleasure this afternoon to introduce the Hon. Derek Quigley who will address us on the involvement of the New Zealand parliament in the treaty making process. Mr Quigley has much to offer in this regard. He has an extensive knowledge of the New Zealand political system and has been a strong advocate of parliamentary reform. He has been closely involved in the recent changes to the handling of treaties by the New Zealand parliament.

Mr Quigley has been a minister of the Crown and has held numerous cabinet positions. He is currently the Chair of the Foreign Affairs, Defence and Trade Select Committee of the New Zealand parliament. Mr Quigley is currently the only non-government member to chair a select committee of the New Zealand parliament, a fact which I think reflects the high regard in which he is held. Mr Quigley has also contributed much to the debate about treaties and the treaty making process. I note in a very interesting article in the July 1998 edition of the *New Zealand Parliamentarian*, Mr Quigley has made some comments that were echoed by a number of elected representatives here this morning about the treaty making process. I quote briefly what Mr Quigley said:

> The government has to listen to the views of members of parliament in this important process. Members do represent the electorate and reflect community values. They tap into sources of information which are sometimes not open to officials. They are part of the rhythm and pulse of public opinion which they sometimes shape and occasionally lead.

They are views that I am sure many of us would echo. There have been both similarities and differences between the two countries, Australia and New Zealand, in the treaty making process. Both countries in recent years have tackled a number of the critical issues: the interaction between the executive and the legislature; the growing recognition of the need for adequate parliamentary scrutiny of the treaty making process; and the interaction between international treaties and domestic law.

While New Zealand and Australia have both initiated processes to address these issues, there have been a number of differences in approach. We look forward to the light Mr Quigley will share on the treaty making process in New Zealand and, more generally, his contribution towards our mutual understanding.

Mr QUIGLEY—Thank you, Kerry, and ladies and gentlemen. Thank you too, Andrew Thomson, and JSCOT, for the opportunity to be here today. It is a great chance to listen to some very interesting speeches and to get a much wider perspective than we get in New Zealand. I have just been joined at the table by Allan Bracegirdle. Allan is part of the team that we have brought over here for this particular conference. Allan is a practitioner in the

whole treaty process, so all the curly questions will be dealt with by him. He has been dealing with those on a day-to-day basis for a very long time, currently as a parliamentary counsel.

What I really want to focus on today is the differences that exist in New Zealand in terms of the parliamentary scrutiny of the treaty making process. I want to deal with the topic from three particular points of view. First of all, I will touch on the background of parliament's involvement in New Zealand in the process. Secondly, I will look at the process to date and, thirdly, I will comment on some of the changes that I think are still necessary.

The first point that I have to make is that we are quite different from you. To begin with, we have no formal constitution. That makes a very substantial difference. The second point is also one of considerable substance. We have a unicameral structure in New Zealand so we do not have to deal with—I was going to use the word 'nonsense', but perhaps it is not an appropriate word to use in a forum like this—two houses of parliament in most states and two on a federal level. When we are talking about treaties we deal with the executive, with parliament and with the public.

A few years ago when I was Minister of Works and Development we got involved in a dam controversy—a bit like the Franklin Dam in Tasmania a few years ago. When the water right fell over we had two choices. We either had to reapply for a water right—and probably we would still be involved in the hearings had we gone down that particular track—or, the other option, the one that we chose, was to put in place special legislation. Special legislation was put through. We had a half constructed dam in place, and I can tell you I had more difficulty with my fellow caucus members—two of them in particular—than I did with anyone else outside the parliamentary environment.

Coming back to the treaty process and its scrutiny by parliament, there was a growing level of interest in this prior to the 1996 election. After the 1996 election it resurfaced. You will remember that we adopted the MMP at that time. When it arose in my particular committee—and the person who raised it first on that committee was the Rt. Hon. Mike Moore—we involved ourselves in an inquiry into parliament's role in the treaty making process. The interesting part of the early phase was the reaction of the Rt. Hon. Don McKinnon, the Minister for Foreign Affairs. He is a very competent and very experienced parliamentarian. Don gave me the impression that he was a little nervous on behalf of the executive of becoming involved in the process. His way of dealing with it was to call a number of informal meetings in his office. Committee members were invited to come along and we talked the issues through, in my case with a scotch and in some of the other members' cases with a beer or a gin.

We had about three of those informal meetings, which took quite a lot of time, but finally I said, 'Look, Don, we are not having any more of these. We're going to progress this in the select committee.' I made that decision on behalf of the committee, basically for a couple of reasons. One was that all the members of my committee are very much concerned that we act as a committee of parliament and that we are therefore independent of the executive. The second reason we wanted to progress it was that there was quite a head of steam building up around the MAI and, had we progressed an issue like that in the

committee forum much earlier, a lot of the public anxiety that did arise could have been dampened down very substantially.

Secondly, how did the process that we introduced work? It was a very tentative approach. I have to say right at the outset that we spent quite a lot of time looking at the work that you people have done over here, in that you set up a specific committee to deal with treaties, that you had a number of staff dedicated to the task. I was a little nervous that, without those sorts of resources within the New Zealand parliament, certainly at that time we would have been really stretched, had we become involved in such a comprehensive exercise. So we started off with only the capacity to look at multilateral treaties and others of significance that are in fact referred to the foreign affairs committee by the executive.

The formal process was only put in place as at May of last year, and since then there has been a reference of only 14 treaties to the foreign affairs committee. We do not have to deal with those ourselves. Although we have dealt with some, we have the capacity to pass them over to other select committees and, in a number of cases, we did. I make the point again that there is no dedicated select committee within the New Zealand parliament to deal particularly with treaties.

I also come back to the point I have already made that what we became involved in was a trial process. Under current standing orders procedures it is due to lapse at the end of this parliament, unless we take steps, which we are currently taking, to put it in place on a more permanent basis.

As I mentioned, only 24 treaties have been referred to select committees. As you can appreciate, we were in a transitional stage, so a number of the treaties that were referred to select committees in fact had already been preceded by legislation, so it was almost a process of shadow boxing in some cases, if you see what I mean. There were no controversial treaties either; and again, as I have mentioned, I was very conscious that the committees themselves were pretty busy with their own legislation and their own inquiries and the other matters they have to attend to as a matter of course.

One of the points that is worth making is that the new parliament which came into force after the 1996 election was very new indeed—something like 40 per cent of the members after the 1996 election were in parliament for the very first time. Some of them actually finished up initially in cabinet, and that showed up, I can tell you.

My own committee was fairly busy. I was conscious also that I had come back to parliament after many years away from that institution and, as I said, many of the members around that committee table were new to parliament. We were also quite busy on a number of other areas, so we started off with an educative process, not dealing with treaties but with other areas.

We started by looking at New Zealand's place in the world, at New Zealand's role in Asia-Pacific security, and then we moved on to a very comprehensive inquiry into New Zealand defence. We are about to make our final report to parliament within a month or so. That has been a very comprehensive exercise. So you can see what would have happened had we become as involved as your committee has been in dealing with the treaty process.

No treaties actually resulted in the calling of public submissions. I think that certainly will change after the next election.

The committees were also constrained because of the time limit that the executive imposed on committees for dealing with them. We originally recommended the same time frame as you have—a 21-day sitting period—but the executive came back and said, 'Thirty-five days or a slightly longer period if you are in the Christmas recess.' That meant that there was very little time, with all the other work that select committees were involved in, to get involved in a public process. There was always the danger that if you did not get involved in a detailed public process the government could in fact ratify the treaty despite the fact that you were still halfway down the track as far as your hearings were concerned.

We do not, either, have a process for a formal debate in parliament of the reports back from the select committees on treaties. There has been one debate—and that is one of the matters that I am sure we will attend to in the course of the current inquiry—but that was in fact a filler. It was more to do with the lack of other business on the government agenda than it was about a serious discussion of this issue. In fact, when it cropped up, it was going to be on and then it was not going to be on, and then it came on at short notice on an issue of inter-country adoptions. I said, 'No, I'm not going to participate in this debate. If you're going to have a serious debate on treaties and on the treaty issue, set down a proper time and give us appropriate warning, and we will have a public debate on what is a very important issue.'

The third area is: what sorts of changes do we need? I have already foreshadowed some of them. One is the time provision. I do not think there is any serious difficulty in having longer for select committees to consider these treaties. If you look at the 14 that have been progressed, eight of those were open for signature for more than five years. Of those eight, five have been open for signature for more than 10 years. So I do not think there is any great rush that the executive can say should be applied in those cases to get them through and get them signed off.

Another thing that we need to look at is the NIA. When the government finally adopted most of the select committee recommendations, it subsumed a couple of areas, which we had specifically identified in the NIA as separate categories, in others. The two were the advantages and disadvantages to New Zealand of the treaty entering into force, and the economic, social, cultural and environmental effects of the treaty for New Zealand. As I say, they were not identified as separate categories. Had they been, I think people would have taken a little more notice of those two very important areas in particular.

We need to give consideration to the establishment of a permanent process, and I am sure that will happen. We also need to give consideration to the scope of treaties that we may well look at. As I said, our brief is only to look at multilateral treaties and any others that are referred to us. One of the interesting things to me is that probably the most important treaty in New Zealand is not one that would be regarded as the subject for inquiry. It is the Treaty of Waitangi. It was signed in 1840. Probably one of the flow-ons of that was a piece of legislation which was put in place as a temporary measure in 1863 whereby separate seats for Maoris were established.

That is a fairly long temporary measure, going from 1863 through to 1999. I think that treaty should be looked at, but not necessarily in the context of what we are talking about here today. I am sure a number of eyebrows would be raised if I or my committee were to suggest that it should be looked at in the foreign affairs committee. I am sure the Maori affairs committee in our parliament would express some views on that.

In conclusion, our executive, like a lot of executives around the world, has been a little reluctant to devolve power. But the process that we are now involved in, and that you are involved in in a much more comprehensive way, is a very important exercise indeed. I am very much of the view that it is part of the democratic process to look at issues that are of significance to a substantial number of people in our country and also in your country.

Let me conclude, finally with a quote from one of our current Court of Appeal judges, Sir Kenneth Keith. Sir Kenneth has taken a very substantial interest in this whole treaty making area. The comments are from the 1998 Harkness Henry lecture:

As at the time of publication of the New Zealand consolidated treaty list—

and it was in two parts in 1997—

New Zealand is or has been party to about 2000 treaties and according to the Law Commission list, almost 200 of the approximately 600 public Acts on the statute book have possible implications for New Zealand's international obligations arising from those treaties and other sources. The whole list demonstrates the pervasive effects of international law on our national law.

So that illustrates, ladies and gentlemen, that treaties are big business in any country and certainly in New Zealand. I think parliament would be derelict in its duty if it were not to scrutinise them seriously.

Mr BARTLETT—Ladies and gentlemen, we do have a few minutes for questions.

Mr WILSON—The opening address by Professor Herr, when I first came here this morning, suggested that with the signing of treaties came certain responsibilities. I thought that, by his opening comments, some implications were made that even states needed to comply actively with those responsibilities, in the making of statutes. Derek, you have mentioned the number of New Zealand statutes which are in response in some part to international treaties. Can I ask you and—with your permission—following your response, Andrew, as chairman of the federal committee: in how many instances have the New Zealand parliament and the Australian federal parliament failed to pass successfully legislation which has been designed in part or in whole to undertake the obligations of certain treaties?

Mr QUIGLEY—I will get Allan to answer that question.

Mr BRACEGIRDLE—I am thinking on it. I am not aware of any instance immediately to hand where a statute that has been designed to implement a treaty has not been passed for treaty related reasons. There have been occasions when the New Zealand parliament has discussed treaties per se, including in the context of legislation that has been getting enacted.

The GATT WTO instruments in 1984 were a case in point. While there may be an instance of a statute of the kind mentioned having been turned back, I cannot recall one offhand.

Very few statutes are probably rejected in the New Zealand parliament in any event. The great mass of legislation that comes in is government legislation. There is some greater delicacy about that legislation getting through these days. Virtually all the government legislation that comes into the House in some form or other tends to get passed. In the main, the legislation implementing treaties has not been controversial.

Another issue is the way in which treaties are implemented. Statute law varies enormously. It is not always apparent on the face of the legislation that it has been brought in to implement treaty commitments. It may just appear as an ordinary matter of government policy.

Mr ANDREW THOMSON—In the case of the parliament, I cannot recall any bills that, for example, the Senate has blocked that were based on a treaty. If the executive signs and ratifies a treaty, it is even scrutinised by the joint standing committee and thereafter some storm of controversy erupts and it is blocked, that is to come in the future.

Mr NIXON—Derek, I wonder whether you would like to comment. In New Zealand, have the courts ever reinterpreted New Zealand legislation because of international treaties?

Mr QUIGLEY—I am not aware of it. Again, I will get Allan to comment on that. They certainly have reinterpreted the Treaty of Waitangi and added their own gloss to it in a very substantial way. The Treaty of Waitangi was a very sparse document. The Court of Appeal filled the gaps with its own interpretation. We now have the treaty accepted by a number of people as actually having established a partnership between the two signatory parties, which was never part of the process. We are also finding in that same area that a number of our statutes have written into them 'This act shall be applied in accordance with the principles of the Treaty of Waitangi'. No-one other than the Waitangi tribunal has defined the principles of the Treaty of Waitangi. The courts, certainly 10 years ago, were very active in applying their interpretation to a number of issues.

Ms BURKE—What happens if someone does not abide by the treaty?

Mr BRACEGIRDLE—There should not be any consequences for that person if the treaty has not been incorporated into New Zealand law. Unless it is part of New Zealand law, the theory is that it has no domestic legal effect or consequences, notwithstanding that the executive is sometimes wont to suggest that people should comply with unincorporated treaties. As part of the new procedures, it seems to me that the executive needs to be exercising greater forbearance in making such claims. The promise in respect of treaty obligations is made by the government only in respect of the other states parties at international law. The consequences in respect of breach should not be visited on either the government or anyone else at domestic law; they should only be visited on the government at international law.

As to the previous question, the Treaty of Waitangi has been interesting in New Zealand law because the word 'treaty' is included in the title of the document. As a result of the

courts having had a number of cases dealing with the Treaty of Waitangi come before them, they have become very familiar with what they consider to be treaties more generally. The Treaty of Waitangi is of somewhat special status. There is certainly the argument that whatever its original status might have been prior to its actual adoption, on the adoption, because of the nature of what it was bringing about—the ceding of sovereignty in a certain respect—at that point in time it ceased to be a document subject to international law. However, it is regarded these days as a founding constitutional document.

So you have a document with the word 'treaty' in the title that may not even be an international treaty in strict terms but has led the courts to become familiar with the use of treaties. As a result of that, they have been very active in New Zealand in recent times—in the last 10 or 15 years, I suppose—in making reference to and even applying international treaties virtually directly in New Zealand law. It does seem to me that that judicial activism, if you like, has been a not unimportant element in the background of the debate in New Zealand about treaties and treaty making: where the decisions in relation to treaties should be made, and so forth.

We had a case last year where the courts plucked a rule of customary international law out of a treaty that they could not apply directly because the treaty had not been incorporated in New Zealand law, but they used the fact that the treaty provision, so they said, embodied a principle of customary international law to apply the treaty provision directly in New Zealand law—and, on the back of it, look at a whole host of other provisions and treaties. In other words, they used that treaty provision virtually as a Trojan horse to bring in a whole mass of other stuff that it otherwise would not have been possible to do.

We have had a very recent case, in the last month or two, in the High Court in New Zealand in the immigration area—where a lot of cases of difficulty have arisen. The courts have applied, virtually directly, provisions in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child and they have done that virtually without any linkage or even reference to any statute. It can be argued that that is impinging on parliamentary prerogatives, that they should be doing that only if the treaties concerned had been specifically incorporated into New Zealand law.

Of course, the Teoh case here, as I understand it, was based in no small part on a decision of the New Zealand Court of Appeal in 1994 in the Tavita case, where the courts, led in part by a rather unfortunate argument that was put forward by the Crown that the Crown was not obliged—so the Crown apparently said to the Court of Appeal in that case—to take account of international treaties, that they applied only at the international level and that the Crown could safely ignore them. I think that was the comment that might actually have been made.

That led the president of our Court of Appeal, who was not loath to respond to challenges that were laid down to the Court of Appeal when he was president, to make the point that it was unsatisfactory if New Zealand's entering into these treaties was simply a matter of window-dressing—that was the much quoted comment that he made—and therefore the Crown should be obliged to take some account of these treaties. It was a judicial review case in terms of the exercise of a minister's discretion and the considerations that the minister should take into account.

The court was coming very close to saying that treaties, even treaties that people might never have thought of, might be regarded as mandatory relevant considerations in terms of executive decision making. The comment was doubly unfortunate, it seems to me, because New Zealand is bound to take account of those treaty obligations but it is bound to do so only at international law and it is accountable at international law and not in the domestic courts in respect of any non-compliance. The comment by the president of the court appears to have been made in the context of endorsing international law, giving greater credence to international law, but in fact it tends to operate, on a different analysis, almost as a put-down of international law, a lack of faith in the international enforcement mechanisms, on the basis of which the court was taking upon itself the right to step in and take a decision in respect of treaties that it probably should have been leaving alone.

I will not go on with details of a number of other cases. There have been a series in recent times, most of which since in the Court of Appeal have involved the court, it might be reasonable to say, in returning more to orthodoxy in terms of the principles that it has been applying. But every now and then it finds it hard to resist taking things further. As I say, this really does get back to the whole question of separation of powers, parliamentary prerogatives, proper appliciation of treaties, and so on and so forth.

Mr BARTLETT—That is all the time we have for this session. Please join me again in thanking the Hon. Derek Quigley for a most valuable contribution to our seminar.

[3.08 p.m.]

FINAL SESSION: FUTURE DIRECTIONS IN PARLIAMENTARY CONSIDERATION OF TREATIES

Seminar outcomes

Session presenter: Professor Gillian Triggs, Faculty of Law, University of Melbourne

Senator BROWNHILL—This session of the program will summarise the key issues raised in the seminar and identify measures that may improve the effectiveness of parliamentary involvement in treaty making. I welcome Professor Gillian Triggs, who will present this session of the program. Professor Triggs is an Associate Professor of Law and an Associate Dean. She has a 30-year academic and practising career, and has published her research in public international law on issues of state sovereignty, law of the sea and energy resources and environmental law. I am also told that she was the Senior Lecturer in Law who got Andrew Thomson through university—but not, he tells me today, with honours.

Professor Triggs has a particular interest in the implementation of Australia's treaty obligations, ranging from the International Covenant on Civil and Political Rights to Australia's commitment under the Kyoto Protocol on Climate Change. Clearly, Professor Triggs is very well qualified to chair this important session, and it is my pleasure to invite her to speak to you.

Prof. TRIGGS—I suppose the greatest pleasure for a university academic is to see one's own students do well; it really is marvellous to see you, Andrew, in this position, and I deeply regret that I did not manage to sneak a first in for you when you came through.

Relatively few people have a reputation for speaking for longer than politicians; certainly university professors tend to speak for 50 minutes, once the bell goes. I will not do that. I am very conscious of the fact that you have been talked at a lot today, but a lot of very interesting ideas and thoughts have been emerging. If it is not unacceptable to you, I will speak now about some of the paradoxes that seem to me to have arisen out of the discussion, focus on a few themes of the seminar today and finalise by looking at what seem to me to be possible outcomes and recommendations for the future. I will then hand over to Andrew.

I will begin by picking up those paradoxes in the field of international law that perhaps exacerbate the public failure to understand what it is we are dealing with. The first is the historical paradox of sovereignty. When treaties were first negotiated, they were negotiated by the sovereign in his or her personal position—usually, of course, negotiated for their personal advantage. For example, in looking at classic cases like the Parliament Belge decision, we really are looking at a treaty by the Belgian king which gave him sovereign immunity over the commercial activities of a ship that collided in English territorial waters.

This is a very outdated case and I do not want to take your time up with it, but it does make the point that the reason that treaty making is an executive function is that that is

where sovereignty lay. Now, of course, sovereignty lies elsewhere: it lies with the people, and it is to be given its effect within the context of a parliamentary process. So the sorts of issues we are discussing have a historical base, where we do not really see our constitutional capacities able to keep up with where the sovereign interest lies today.

The second difficulty is that the international personality lies with the state, with Australia, and Australia in its dealings in the international community needs to play sometimes a leadership role, taking the people of Australia towards a resolution of what we have seen increasingly as a global problem in ways that may not suit the parochial interests of states and territories within the federation. The paradox then is that, while we are dealing in a modern environment in which treaty making is the preferred method of achieving international law, the state must make its judgments consistent with its view of international interests. These may become increasingly divergent from those of their constituent political elements. This, I think, is a profound problem for Australia.

That leads me also to the problem that many of the issues taken and dealt with by treaties as the preferred law making method are issues that can only be resolved at a global level. So obviously, if we look at questions of trade, we can see that we can only deal with modern trade approaches through organisations like the WTO. The other and obvious example is environment, where we find that issues such as global warming can only be dealt with at a transnational level. One can go on with more and more examples of this central point. So there may be times in which it is simply necessary to take state leadership in resolving some of these problems rather than be concerned with the community level interests that we have seen expressed today.

There is yet another paradox, as was raised a few moments ago: the reality that one can be in conformity with international legal obligations and in breach of domestic law; similarly, one can be in conformity with domestic law and in breach of international obligations. In this sense, we do have a sort of dual system to international law. It is very confusing for individuals to understand how this has occurred. So, when we come from a historical background to deal with global problems, we expose the problems that are being considered by this seminar today.

Some of the themes that seem to be emerging from the discussion are the following. The first and most obvious is the gulf between the constitutional power and practice of the executive and the political demands of voters in the community. As was pointed out, that seems to be coming through very clearly from the presentations made this morning by those elected members of our states and territories who are here today.

The public cannot understand how we can go through the agonising process of amendments to the Native Title Act and then find the Convention on the Elimination of Racial Discrimination making a finding of our being in violation of international law. We are in violation of international law, and that has been broadly agreed to by Australia in either treaties, draft treaties on indigenous peoples or developments of customary international law that have, broadly speaking, attracted Australian consent. For most Australians, this is a very strange phenomenon—and understandably so.

Similarly, the Toonan case was facilitated by the willingness of the Australian government to agree to the ratification of the optional protocol to the International Covenant on Civil and Political Rights. That covenant is not directly implemented into Australian law other than being scheduled to the Human Rights and Equal Opportunity Act—as Professor Shearer points out, a form of quasi incorporation. Nonetheless, it is a very powerful form of incorporation because, in this way, an individual can move beyond the state to an international body—the human rights committee or the racial discrimination committee—to achieve a finding which is contrary to a position achieved within the domestic legal system. We understand why and how that has happened, but nonetheless it is extremely worrying.

Another example is the role of the World Heritage Commission in the context of the Jabiluka milling and mining site. Again, how is it that bodies of this kind are playing a role in Australian law in ways that the general public, at least, is having trouble understanding? It seems that one way of attempting to deal with this problem is by understanding the role that parliament needs to play. It is for that reason I believe this discussion today has been so extremely helpful, and I will come back to that.

Another theme running through discussions today has been the role of the Internet. I find it extremely interesting that, in this reform process—which seems to have gone exceptionally smoothly and well in a very short period of time—an Internet site has been created for Australian treaties which is probably the best in the world for a domestic treaty system. I find it is now possible to do what in my career as an international lawyer I have never been able to do: within seconds, I can know whether or not Cambodia is a ratified party to a treaty. Years ago I had to ring up my mates in the Department of Foreign Affairs and hope they had their lists in front of them and could tell me the answer. But for a practising solicitor, lawyer or academic it was extremely difficult to be an accurate international lawyer—other than for those who worked within governments, such as David and Richard.

The Internet is important. It has made an enormous improvement in getting information across to members of the public with access to the Internet. This point I think has been made enormously dramatically in the context of the Multilateral Agreement on Investment. The review of that astonishingly devastating process through the OECD has concluded that one of the causes for the downfall of the MAI was the Internet. It was not parliament that was scrutinising that legislation with its political impact; it was not even academics, practising trade lawyers or anybody else. It was particular interest groups using the Internet in ways that we might see as being highly undesirable.

It was misinformation that was deliberately contorted and twisted, despite the provisions that we knew were in that draft to protect the interests in particular of the environment, indigenous peoples, labour and so on. The debate was so twisted, distorted and developed within the Internet that, in the end, it became impossible to move the matter forward—perhaps for good reasons too. I am not at all commenting on the merit or otherwise of that result. What I am commenting on is the power of the Internet.

I would like to make the suggestion that, if state and territory parliaments and parliaments throughout the world do not play a closer role in scrutiny, you will simply be taken over by a much wider public involvement in this process. Somebody mentioned responsibility earlier this afternoon, and I think that is something that we really need to look

at in the context of the role of our parliamentary representatives in the context of sovereignty.

That leads me to the point that we are going to see a much greater role by the NGOs and individuals. We have been talking about sovereignty in very traditional terms—the nation state and the role of the state in the treaty making process—but we all know that in the 21st century we are going to see a much greater role of other entities. It was interesting earlier this morning that a gentleman here raised the point of the role of ACOSS in the future of the scrutiny of treaties. That is something of a ray of light on the kinds of concerns we are going to have in the 21st century. We have to take these up.

Timing is clearly another fundamental issue. Everybody has raised that. However, timing is a difficult one to deal with. On tabling for 15 days—it is not actually 15 days; it is a minimum of 20 and, arguably, 100—but 15, 20 or 100 days does not really matter a lot: if the parliamentary process has been engaged in the negotiation from the very early stages then 15 days is neither here nor there. But another speaker has said, 'These treaty processes take years. The law of the sea took 10 or 11 years.' In truth, it is speeding up in some areas, and we have seen something like the Multilateral Agreement on Investment and the framework conventions and others moving with amazing speed. Nonetheless, 15 days seems to be extremely niggardly when we are talking about parliamentary sovereignty and the need for people to be involved.

But that does not matter if we have a much more participatory cooperative process much earlier in the process of negotiating a treaty. In parenthesis, perhaps I can observe as an academic member of the DFAT negotiating bodies overseas that it is a great credit to Australia that we play such a strong role in providing the drafts in negotiating processes right from the beginning. Of course, it is an old technique of lawyers: you get to control the process if you write the draft, and it is a very good thing for Australia to do to ensure that we play the role we do. Nonetheless, there is absolutely no basis on which we can deny a participatory role by other groups within our community because we are engaged in the process of treaty making right from the very beginning. So timing is a rather odd one to discuss, I think.

I would like to briefly mention some of the points that Bill Campbell made. I read into what he was saying that treaties is a very narrow issue in the context of international law and domestic law. We heard examples from New Zealand a moment ago, where the courts are looking at various sources of law in international law and customary law for the purposes of implementation in domestic law. So there is a an element of narrowness about thinking only of treaties if we are concerned about the role of international law in our domestic legal systems. You would be very familiar with the powerful role that the advisory opinion of the International Court played in the Western Sahara case for the purposes of the decision on terra nullius for Mabo. However, there are many other examples that one could cite.

I should also mention, simply because it happened yesterday or the day before, the process which Bill described of the means by which a piece of implementing legislation will refer to the treaties to which Australia is a party, but in very broad terms. For example, the Environment Protection and Biodiversity Conservation Act was passed yesterday or the day before in two hours, with 20 relatively minor amendments. There is a very important

provision in either section 5 or 7—I have forgotten which—which says that one of the purposes of that legislation is to allow the implementation by Australia of its treaties with other countries—end of statement. I would suggest that you should go back and have a look at that one. It is too late, of course, but it should have been looked at and has not been, and it has received very little publicity, for quite obvious reasons.

It was extremely important to hear from Richard and David on the importance of the review process. The reforms have taken place quickly and quite smoothly. They have been enormously important, particularly in the Internet process with the establishment of the Treaties Council and the role of JSCOT in looking at treaties under Andrew's chairmanship. I think that was very important to demonstrate that in the main the response has been very positive to that process of reform, but I think it is just a start.

Don and Mr Quigley very helpfully gave us the comparative view. One thing one can learn from looking at the comparative view is that treaties are still in a very dynamic process. The increased role of treaties in our law has been a relatively recent process. Our parliamentary systems and committees have not really been developed to deal with them yet so that, if we do look comparatively, we actually find other nations searching for ways of engaging parliamentary committees in the process of negotiation.

I would like to finish by making a couple more observations that will lead on to consideration of proposals. I think just about everybody particularly commended the Victorian model that was explained by the Hon. Michael John MP from Victoria. That clearly has played a leadership role in the kinds of options that one might look for in the future, and I would suggest that we do look at that in more detail. There seemed to me to also be a proposal that the treaty council should be meeting more often and in a much more dynamic way.

The national interest analysis process has been discussed. If I may put a personal view, I think these are not as helpful as they could be. They tend to merely report the existing position, but they are not analytical at all. I say that with some caution because I obviously have not read them all, but I think there is enormous scope for improving the quality of that national interest analysis for the future.

I would like to again personally note how important I think the treaty process of public review has been. I was very happy to go to one that Senator Barney Cooney held in Victoria on the rights of the child, and I found that a very exciting and stimulating process. There were all sorts of NGOs and individuals—some slightly odder than others, me included—but it was an extremely interesting discussion, and I think arguably we should look at having more of those sorts of processes.

Finally, and probably most importantly, there is the proposal put forward by the Hon. Andrew Thomson as Chair of the Joint Standing Committee on Treaties that we look at some form of interparliamentary proposal, an interparliamentary working group on treaties, which would include the members of the committees that we see here today. I certainly think that is an extremely positive way forward. But now, if I may, I would like to hand over to Andrew to take that point forward and to give you a greater opportunity to discuss some of the matters that have arisen from today's seminar. Thank you.

Mr ANDREW THOMSON—Thank you, Professor. It being just about 3.30 p.m., a number of our members have to leave to make flights to Brisbane and Tasmania, and I think one or two are going to Adelaide. Thank you very kindly for coming. There are two proposed resolutions which I will deal with shortly. But, in the absence of some of the delegates who have made contributions today, rather than seek a vote on them in a formal sense, given that they are not here to vote on them, I suggest we incorporate these resolutions in the report of the seminar. If there are objections or proposed amendments to them, I suggest that such people who want to do so should write a letter to the committee secretariat, and we will incorporate those letters in the report so that they are on the record. If anyone has an objection or wants an amendment, at least it will be there for posterity.

We have got some time, so I invite some questions of Professor Triggs. Since you have come especially and there is still a reservoir of curiosity here, I think, we will have one or two questions and then I will move to these resolutions.

Mr REDFORD—Professor Triggs, you made a comment about the gulf between the executive and the voters and the misunderstanding that can happen, and I think you gave some examples relating to the native title legislation and the world heritage issue. Isn't it fair to say that part of that problem is that there is a lack of information?

I am not laying any blame at anyone's feet, but there is a lack of information that actually gets to ordinary people and, in particular, to members of parliament. The Multilateral Agreement on Investment is a classic case. In fact, I think I first heard about it from constituents who were telling me that it was going to be the end of the civilised world as we knew it. This was before I, as a member of parliament, had even heard of its existence, its negotiation or indeed what it was about from any agency, federal or state—and they were all involved. Doesn't that highlight the failure on the part of governments to properly communicate to ordinary members of parliament what they are doing? We cannot justify or defend the position of a government or a parliament if we are treated as people who should know as little as possible. The MAI, I would have to say, is a classic example of what can happen when we are excluded completely from the process.

Prof. TRIGGS—I think that in some ways your question suggests the answer: of course there is not enough public information. But I would have to say that in part this reflects the fact that, as somebody has pointed out, much of the treaty making process is extremely dreary, ordinary business. It might be the implementation of some form of seafaring cooks' wages under the International Labour Organisation. The truth is that we have hundreds and hundreds of treaties—bilateral, regional and multilateral—and only a few of them attract this level of passion, so it is a difficult one to deal with.

I certainly strongly support your point. Much bigger efforts have to be made at public education on these questions. I remember years ago, in the early seventies, Gerard Brennan from the Department of Foreign Affairs came around in delegations to the states to talk about the law of the sea treaty, which was—both philosophically and in detail—quite a revolutionary piece of international law making. Very serious efforts were made by the department to get that out into the public, but I do not think there was much of a response to it; it was pretty desultory, at least in Victoria. So it is a difficult thing to do, but the Internet and the kinds of exercises such as public scrutiny hearings are ways of improving that.

Mr REDFORD—I agree with you; 98 per cent of it is dreary and none of us will be interested in it. But, if we are given the opportunity—even by just getting that list—we may be able to say to our constituents, 'Hang on. You shouldn't be worried about this. I know about this so it is not a secret. I will get you the information.' But when they ring and you say, 'I haven't even heard of that,' they think, 'Ah hah, you're out of the loop. You're not part of the conspiracy, so you're on my side.' That is what happens.

Prof. TRIGGS—One point that could also be made—and it has again come up in discussions today—is lack of resources, frankly. I was speaking to Linda Lavarch over lunch and she was saying that many MPs in Queensland do not have direct access to the Internet. That is close to shocking. Also, the point has been made that the states themselves need to put more resources into these issues; so it is a two-way street, to a degree.

Mr MASON—If I could comment on Professor Triggs' answer in the sense of fully supporting what she has just said but elaborating a little on it, I would make these two points. The first is that I totally agree that crucial information about what treaties are being negotiated—like the MAI—is not somehow getting quickly enough to the public, and so you would hear about it in the roundabout way that you have indicated. The fact is that the federal government—the Department of Foreign Affairs and the Department of the Prime Minister and Cabinet—communicate to the state governments every six months with an updated list of all treaties that are going to be signed, all treaties that are being negotiated and what their standing is.

That all goes to the state governments, presumably to the premiers departments and cabinet offices, and it is perfectly appropriate—in fact more than appropriate—for the state governments to draw that information to the attention of the state parliamentarians. I think the fact that they do not does not indicate secrecy on their part, rather it just indicates a judgment about how much of this they think parliamentarians would be interested in. My point anyhow is that that is solvable; there are processes.

My second point relates to the Internet. The fact of life is that on the Internet system now—on the DFAT treaties library—there is not just a listing but a reproduction of every treaty back to Federation—the entirety in both languages if necessary—that we have ever signed. In addition to that, there are NIAs on all the treaties since 1996. There are also links to things like the legislation that implements that and there are also links to the list of treaties under negotiation. So, in other words, quite apart from parliamentarians, any citizen out there who has access to the Internet can just pick up this information—as Professor Triggs said—at the press of a button and get it.

Finally, I come to the point that a lot of people do not have the Internet, for instance—as someone said—in rural Queensland. Yes, of course that is true. What we do to try to meet that concern is to make it clear that we will download and send to people hard copies of anything that they hear about and want. It takes just a phone call to us and we send it out. If one does not have an Internet—and of course many people do not—most public libraries and most universities will have Internet systems available. Even a citizen in the country—if he or she is keen enough—can get access to a library and to the Internet. But, if that is not possible, then they get it in hard copy from us.

So my basic point is that the systems are there but they are not being used sufficiently. The real thing we have to address is why they are not being used sufficiently. Is it because of a lack of interest out in the community generally? Or is it because the community is so cynical and turned off by all of us involved with treaties that they just do not think they could trust anything they saw?

Mr REDFORD—Those from departments also have to understand the demands and pressures in the life of a busy member of parliament. We are lucky that we have access to the Internet—we are ahead of Queensland—but we do not have time to go surfing the Internet on the off-chance, and you have to have your attention drawn to that. With the greatest of respect, it is a little trite to say, 'Look, it's all sitting on the Internet somewhere.' There needs to be a better form of communication. I am not being critical of you, the department or the Commonwealth. It is a matter of just having that information.

Mr ANDREW THOMSON—The proposed resolution from Western Australia deals squarely with this. Is there one final question?

Mr MINSON—Just on the same matter, I think there is now no argument—certainly not from me—that the information is available, and thank you for that information. I did not know that it was available. Now that I do, I will certainly not be spending every day poring over the several thousand treaties that we have signed, but it is good that we have them there.

The point about today—and the consensus that has come out of this, if I have read the meeting correctly—is that the parliaments in the states want to be included in the loop, not just to have access to the information but rather to have an avenue for meaningful input. That really is basically the intent of both of the proposals, certainly the one from Western Australia—but I think the one from the joint standing committee also has the same flavour about it. It gives the states a meaningful input to have some say about the information that is available to everybody.

Mr ANDREW THOMSON—Let me deal with those proposed resolutions. They are quite broad, and so I will read them carefully one by one. The one from Western Australia is proposed by the members of the Western Australian delegation. It reads:

Believing that it is essential for views of the various State and Territory Parliaments on the content of treaties to be taken into account by the Commonwealth, this seminar recommends that:

1. all State and Territory Parliaments have, as a matter of urgency, standing committees responsible for the review of all matters concerning treaties;

2. a protocol be established so that such committees of State and Territory Parliaments be informed by the Commonwealth Government of the texts of:

. all National Interest Analyses;

. all treaties being negotiated;

. all treaties that have been signed;

. all treaties on which binding treaty actions has been taken;

. any domestic legislation that has been passed by the Commonwealth Parliament, or is proposed, to give effect to treaty obligations; and

3. allowing for urgent treaty actions, the Commonwealth government only take binding action on any treaty after the Joint Standing Committee on Treaties has received representations on the matter from State and Territory Parliaments.

There is a lot in that and we would need another hour or two to debate it fully. I invite submissions by letter to be included in the report on how that might work in practice, or might not, if you think that way.

The second resolution is really the result of some consensus among the members of the Joint Standing Committee on Treaties. It reads:

Having regard to:

1. the desire to improve the level of parliamentary and public consultation in the development of international treaties; and

2. the recommendation from the Victorian Federal-State Relations Committee that the Commonwealth Joint Standing Committee on Treaties liaise with the Victorian Parliament (and other State parliaments)—

and, of course, we will include territory parliaments—

in conducting its treaty reviews;

This seminar resolves to support the formation of an inter-parliamentary working group on treaties.

The inter-parliamentary working group on treaties should:

(a) comprise members from all of the parliamentary committees represented at the seminar here today (and any other committees that may, over time, become interested in treaty matters);

(b) act as a forum for promoting public awareness of proposed treaty actions and encouraging wider parliamentary scrutiny of treaty making;

(c) meet every six months to review upcoming treaty actions in much the same way as Commonwealth and State officials meet as part of the SCOT (standing committee on treaties) process;

(d) be supported by the secretariats of our respective committees on a rotational basis. The secretariats could be responsible for preparing and distributing agenda papers, including lists of upcoming treaty actions and national interest analyses, and for preparing outcome reports for each participating committee.

As well as helping to improve public awareness of treaty actions, the results of these meetings would inject a State perspective into the deliberations of the Joint Standing Committee on Treaties and a Commonwealth perspective into any deliberations in which State Parliaments might become involved.

They are the two resolutions. Do we have time for some comment on them?

Mr JOHN—I would support a deferral of the two draft proposals because, firstly, I would feel that I have had no real notice to examine the wording of them. In principle, they

seem fine and I do not have a matter of principle objection. I do query whether it is the role of the seminar to pass such a resolution. Then there is the question of who votes, because a considerable number of people have already left to catch aeroplanes because they could not wait the full distance.

Mr ANDREW THOMSON—You are right in the sense that the seminar is for information.

Mr JOHN—And there are a lot of things: for example, David's information on the Internet was something I did not know before I came here, not in that detail anyway. I would like to think more about that. Finally, I do not think I am in a position to commit the Victorian government to expenditure such as the six-monthly meetings and the support of secretariats without authority from my government, and I do not have that authority.

Mr ANDREW THOMSON—I appreciate that.

Mr JOHN—Finally, we have two or three other reports in to the parliament in Victoria in which we touch on all of these matters and, at this point, the Premier and the government have not given us a final response. I am not trying to be difficult. I just feel that I would like to raise those points.

Mr ANDREW THOMSON—They were proposed as proposals, but shall we simply include them as proposals, so that in future the sorts of ideas that were proposed are clear? They will be on the record for students and others in the future. I do still renew the invitation to submit any comment on them by letter, because we can always make an appendix to a report for the purpose. Is there a final comment or two?

Mr WILSON—I tend to agree with previous speakers' summation of where this seminar is. I am a little loathe to have come all this way, as the New Zealanders have done, without some resolution as a response to the discussions. I want to make the observation that it seems to me that one of the key criteria that is perhaps perplexing to some of the states—and certainly the state that I represent—is the impact that any new treaty is likely to have upon existing law or upon any obligation and responsibility the state might have as a result of the Commonwealth or the nation being a signatory to that treaty.

It seems to me that the difficulties that are created within the community are because of those unknown factors and the fact that those assessments probably are not made in that context. There might be an analysis done from the point of view of a national interest, and I have heard a comment already in this afternoon's summary that the way it is being done currently may not be in the form that is most desirable.

I wanted to add something to the Western Australian delegation's proposal under the second part of that proposal, for your quick consideration. I do not want you to consider it now, but we can confirm this in writing, as you suggested, Mr Chairman. A further dot point could be added stating:

Any domestic legislation that will be required by any state or territory to give effect to treaty obligations.

And a subsequent dot point would be:

or any impact that a treaty may have on an existing law of any state or territory.

It seems to me that if, as part of the process, those assessments could be done we may all be much better informed of the consequences.

Mr HELM—We in WA discussed this matter because we wanted to get something of a little more substance from the meeting, because we have learned so much. We are coming from some point of ignorance. We did not know the information was on the Internet and we did not know how these things were formulated. We are learning all the time.

I take your point, Mr Chairman, that the way to go is to leave it in a letter. In No. 3 of our proposal, the last paragraph on the page, we would like to add a specified time limit to do the things we are asking to be done—for example, 60 or 90 days. In that way we then do not get wrapped up in the bureaucracy or have someone find it convenient to forget to tell us about the impact of some matters upon our state.

Mr ANDREW THOMSON—I will conclude by including in the record the URL address of the Treaties library site. It is www.austlii.edu.au/au/other/dfat/

Mr MASON—For the record that we are producing I will double-check that and make sure. Many people might have seen the treaties information handbook which your committee has been distributing. The full Internet address of both the treaties library site and the JSCOT site is spelt out in there.

Mr ANDREW THOMSON—This concludes a historic day. It is the first time since the Federation of this country that the states, Commonwealth and territories have gathered in this fashion to discuss something that is increasingly important. Thank you all for the expense and time to which you have been put in order to attend. Let us look forward to gathering again in a year or two to review our progress.

Seminar concluded at 3.48 p.m.