

Government Response to the 4th Report of the Joint Standing Committee on Treaties, *Treaties Tabled on 15 & 29 October 1996*

As is the case with all the reports tabled since the Committee's formation in June 1996, the fourth reflects thorough and expeditious inquiry into a remarkable range of subjects. The Government appreciates the marked improvement the Committee's scrutiny has made to the Australian community's awareness of and confidence in the treaty-making process.

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The report supported Australian entry into all of the sixteen treaties in question, and appropriate action is being taken in each case; as of March 1997, six were already in force. The only formal recommendation was 1.20: 'The Committee recommends that Australia takes action in due course to propose that the Convention on Nuclear Safety be amended to include research reactors.' Australia ratified the Convention on 24 December 1996, and it entered into force for Australia on 24 March 1997.

Along with other countries involved in the negotiation of the Convention on Nuclear Safety, Australia has taken the view that a nuclear safety incident involving a research reactor would be unlikely to have international consequences warranting coverage in the Convention. Nevertheless, the Government takes note of the Committee's recommendation that Australia propose the amendment of the Convention to include research reactors, and will consider in due course whether any such action is appropriate in the light of our experience with the Convention's operation. In this context, it should be noted that the Contracting Parties have yet to hold their first review meeting, at which proposed amendments could be discussed. The first review meeting must take place before 24 April 1999.

The report also made some observations on consultation in treaty making that call for Government comment:

- . 1.19: 'we believe it would be useful if, in future, NIAs provided information about the actual responses from the States and Territories about the texts of treaties proposed for accession.'
- . 1.99: 'The Committee is concerned that the Australian rice industry was not consulted during the preparation of the NIA for this Agreement [recognizing the International Legal Personality of the International Rice Research Institute (IRRI)]. Implicit in the reforms to the treaty-making process is wide and thorough consultation, during the NIA process if not before, with bodies likely to be affected by treaties. In its supervisory role of the process, the Department of Foreign Affairs and Trade needs to devote greater attention to consultation with such bodies.'
- . 3.7-10: 'The Committee believes that the revised processes for treaty-making are working well, with one exception: consultation with the States and Territories. Although no specific action was taken, in both the first and second reports we had concerns about the quantity and quality of some of the consultation which seemed to have taken place with the States and Territories in the processes which led to the tabling of treaties and the accompanying National Interest Analyses (NIAs)... The process of Parliamentary scrutiny of treaties was established, in part, to ensure that the views of the States and Territories were registered because of their legal responsibilities for some

matters about which the Commonwealth Government enters into binding international obligations for Australia... Because of these general and specific concerns, the coordinating role of the Department of Foreign Affairs and Trade in consulting with all interested parties on the treaties which come before the Committee will receive particular attention in future.'

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In response, it should first be noted that a summary of the views of the parties consulted on the terms of a treaty, including the States and Territories, is now required in the pro forma for a National Interest Analysis (NIA) for presentation to Parliament. Since late 1996, the version provided to line Departments and agencies has included under the Consultation heading: 'A relatively detailed statement setting out the consultations that have occurred in relation to the treaty action between the Commonwealth and the States and Territories and with community and other interested parties. A summary of the views of these parties should also be included.' Another change recommended in the Committee's *First Report*, provision in NIAs of contact details for the responsible areas of Departments or agencies, has also been acted on in recent tablings. And prompted by the Committee's remarks, especially in the fourth report, the Department of Foreign Affairs & Trade has prepared a simplified table of treaty-making steps – a condensation of relevant sections of the Information Kit (*Australia and International Treaty Making*) and *Negotiation, Conclusion & Implementation of International Treaties & Arrangements* that are already widely distributed – and is making it available to line officials, with reiterated advice on the importance of consultation.

3.7-10

Second, the Committee's concern for the adequacy of consultation with the States and Territories is noted by the Government. In no case that the Government is aware of (since the May 1996 reform of the process) has any area of Commonwealth Government failed to inform the States and Territories of significant treaty developments, or resisted cross-jurisdictional co-operation when the States and Territories have sought it. The Government would be interested to know of any specific examples the Committee may be able to provide in which consultation with the States and Territories has been deficient, and especially in which the treaty negotiations have been of sensitivity and importance to the States and Territories.

The Commonwealth will continue to provide full and early information to the States and Territories about treaty negotiations and actions contemplated or underway – but thereafter relies on the other jurisdictions to identify their own interests and to become involved accordingly. There are already several Commonwealth-State institutions that provide forums for discussion of treaties, both general (notably the Standing Committee on Treaties (SCOT) and the Standing Committee of Attorneys-General) and subject-specific (such as the Intergovernmental Committee for Ecologically Sustainable Development, or the Consultative Forum on Mutual Recognition Agreements on Conformity Assessment). The Council of Australian Governments (COAG) established the Treaties Council to consider international instruments of the greatest concern to the States and Territories at Head-of-Government level. And there is the general principle, spelt out in the *Principles & Procedures for Commonwealth-State Consultation on Treaties* agreed on by COAG at its meeting in June 1996, that the States and Territories will be fully involved at every stage – from the negotiating mandate through the negotiating delegations to the domestic implementation – for all treaties that they identify as being of sensitivity and importance to themselves.

1.99

Third, as to the underlying philosophy of community consultation and the role of the Department of Foreign Affairs & Trade in giving effect to it: consultation in treaty making was the main theme of the Government's reform of the process last year. There is no standard formula for adequate consultation (beyond the invitation to States and Territories through the SCOT process); Departments and agencies are advised to think widely and carefully about those interested and affected. Different circumstances apply to different instruments, so deliberate duplication was built into the system. Sections of the community with concerns about a treaty or class of treaties are welcome, for example: to contact the Department for information about the status of the instruments in question and to be pointed to the responsible area of the machinery of Government; or to develop dialogue with Government Departments about continuing programs; or to make representations through Ministers; or to raise concerns through Members of Parliament; or to enlist the States and Territories in taking an interest. The responsible officials in line Departments and agencies must identify the main stakeholders for particular treaties – but the safety net for consultation is Parliamentary tabling and the Joint Standing Committee on Treaties. It is not a lapse of the process when proposed treaty actions before the Committee attract some submissions or evidence that has not already been incorporated in the Government's consideration; this is one reason the *Trick or Treaty?* inquiry recommended such a Committee's establishment.

There are several reasons why an NIA might record only limited consultation before a treaty reaches the final and most public forum (that is, Parliament): international practice as it relates to the confidentiality of bilateral treaties before signature; the routine nature of the action in question or the fact that the Government had not been aware of any particular controversy; a nil response from those invited to contribute; or urgency (not that urgency lessens the eventual requirement for transparency). In the case of the IRRI-NIA, the Government had taken the view that the regularising of the Institute's international status was not directly of concern to the domestic industry – though it is now prepared to accept that it would have been better to seek confirmation from farming and ricegrowing industry bodies before presenting the action to Parliament. The Department of Foreign Affairs & Trade ensures a standard format, readily understood prose, and the provision of an appropriate level of detail against all the sub-headings of the NIA pro forma. Its invariable advice in discussing treaty finalisation with the responsible officials is to remind them that before the binding step is taken, the whole proposed treaty action will be published and scrutinised by the Committee, and that the consultation undertaken must therefore be defensible.