
The Parliament of the Commonwealth of Australia

20th Anniversary Seminar

Report 162

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Terms of reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament;
 - (ii) a Minister; or
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

ASIC	Australian Securities and Investments Commission
ANU	Australian National University
DFAT	Department of Foreign Affairs and Trade
JSCOT	Joint Standing Committee on Treaties
MOU	Memorandum of Understanding
MP	Member of Parliament
NIA	National Interest Analysis



20 Years

**Joint Standing
Committee on Treaties**

Introduction

Purpose of the report

- 1.1 This is a report of the discussions at the seminar conducted by the Joint Standing Committee on Treaties (JSCOT) *In our best interest: treaty scrutiny in a connected world*. The seminar was held in Canberra on 18 March 2016 to mark the 20th anniversary of the establishment of the Committee.
- 1.2 A transcript of the seminar proceedings is included as an appendix to the report, as are a list of participants, the program and additional speeches provided by seminar participants.¹

Program and participants

- 1.3 The seminar was attended by approximately 80 participants from a diverse range of backgrounds including parliamentarians, academics, public and parliamentary servants, students, as well as representatives from business and other interest groups.
- 1.4 The seminar was preceded by a reception and formal dinner at Parliament House, Canberra, hosted by the Committee. The Deputy Chair, the Hon Kelvin Thomson MP, welcomed guests and reflected on his time on the Committee.
- 1.5 The Minister for Foreign Affairs, the Hon Julie Bishop MP, addressed the guests during the reception, emphasising the importance of the work of the Committee and talking about the significant inquiries during her time

¹ References in this report refer to an adapted copy of the Proof Transcript, included in Appendix C. The Official Transcript is available on the JSCOT website.

as Committee Chair. The Shadow Minister for Trade, Senator the Hon Penny Wong, addressed guests during the course of the evening and the Committee Chair, the Hon Luke Hartsuyker, wrapped up the event, wishing everyone all the best for the seminar on the following day.

- 1.6 The seminar looked at the effectiveness of the 1996 changes from a variety of viewpoints: academic, government, political and social. Speakers and participants included academics, government departments, members of JSCOT and interested members of the public. The presentations were enhanced by public discussions canvassing the ideas raised.

Background

- 1.7 Although the Australian Constitution confers the power to make treaties on the Executive, there has been decades of debate and discussion about a role for Parliament in the treaty-making process. After a number of attempts to create a measure of parliamentary scrutiny, reforms were introduced in 1996 to establish the current process.
- 1.8 Under these reforms, all treaties are tabled in the Parliament at least 15 joint sitting days² before the Government takes definitive action on each treaty. A Joint Standing Committee on Treaties (JSCOT) is set up under a resolution of both Houses, and a National Interest Analysis (NIA) is prepared and tabled for each treaty.³
- 1.9 Over the past 20 years, JSCOT has considered over 800 treaty actions and produced 160 reports. Many of the treaty actions have dealt with routine matters including taxation, air services, social security and the exchange of information. However, as this seminar demonstrated, during that time treaties have become increasingly complex, covering a wider range of subjects and presenting a growing diversity of issues for consideration.
- 1.10 As the Committee commented in its report on the history of its work, it has actively developed and refined its process, ensuring relevant information is provided in the NIA and continuing to push for broader, more effective consultation. It has endeavoured to work in a bipartisan manner and, on occasion, it has recommended that ratification be delayed or not take place. Where it has seen fit, it has recommended changes to both content and process.⁴
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2 Later 20 joint sitting days for Category 1 treaties and 15 sitting days for Category 2 treaties (for further information on treaty categories see Joint Standing Committee on Treaties (JSCOT), *Report 160: A history of the Joint Standing Committee on Treaties: 20 years*, March 2016, pp. 18–19).

3 For details of the history of the 1996 reforms refer to JSCOT, *Report 160*.

4 JSCOT, *Report 160*, p. 61.

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- 1.11 The Committee held two previous seminars marking milestones and assessing the 1996 reforms: the first in 1999 coincided with the final stages of a Government review of the reforms⁵; the second in 2006 coincided with the tenth anniversary of the establishment of the Committee.⁶
- 1.12 This seminar provided an opportunity for reflection after 20 years of operation, to examine some of the issues for treaty making today and to consider possible future directions. The four sessions broadly covered four themes:
- an assessment of JSCOT's work from 1996 to 2016;
 - the changing nature of trade agreements and the implications for treaty making;
 - instruments of less than treaty status; and
 - customary international law.
- 1.13 Chapter two looks at the reflections on JSCOT's work, provides an assessment of its performance and identifies some issues for future consideration. Chapter three contains an overview of the seminar presentations.

5 JSCOT, *Report 24: A Seminar on the Role of Parliaments in Treaty Making*, August 1999.

6 JSCOT, *Report 78: Treaty Scrutiny: A Ten Year Review*, September 2006.

Figure 1.1 Seminar Participants



Reflections and assessment

Introduction

- 2.1 The seminar highlighted the significant role of treaties in everyday life; as Australians become more connected to the broader world through trade, education and migration. International agreements increasingly affect not only broad issues of state but the actions and responsibilities of individual citizens.
- 2.2 In his opening remarks at the seminar the current Chair of the Committee, the Hon Luke Hartsuyker MP, provided practical examples of the effect of treaties on people in his electorate, particularly the economic benefits and employment opportunities expected to eventuate from trade treaties. In Mr Hartsuyker's opinion, the most important role for the Committee is identifying and examining the impact that a treaty will have on the lives of the Australian people:
- There is a special role that we elected representatives can bring into the treaty-making process – that is, we represent the people, people who have an interest in how treaties will affect them and people who want to have an opportunity to contribute to the debate about whether a particular treaty is a good thing or is not a good thing. I think the core work of the committee is where the real benefit lies in framing the debate about a treaty in terms of how it will impact on ordinary people.¹
- 2.3 However, as the obligations imposed by treaty actions on states become pervasive, the tension between globalisation and state sovereignty

1 The Hon Luke Hartsuyker, Chair, Joint Standing Committee on Treaties (JSCOT), *Committee Hansard*, Canberra, 18 March 2016, p. 1.

escalates. The Hon Kelvin Thomson, current Deputy Chair and long-term Member of JSCOT, summarised the challenge this presents for governments:

Allowing countries the freedom to make their own decisions is important but at the same time we need to have an effective rule of international law and we need to have a United Nations capable of resolving conflicts wherever they occur, otherwise we will continue to witness the terrible misery and hardship which has blighted our world in recent years. Having effective global conflict resolution processes while at the same time giving people around the world a real say in the decisions that impact their lives is a massive challenge. That is why I believe that the treaties that we negotiate and the way we negotiate them has never been more important.²

- 2.4 This theme resurfaced throughout the seminar, as presenters and the audience acknowledged the achievements of JSCOT while grappling with the ongoing difficulties presented by including parliamentary scrutiny in the treaty making process. The dilemma of protecting the rights of the individual through greater transparency and consultation, while ensuring global security and stability, ran through the seminar: concern over balancing the often unforeseen impact of treaty actions on ordinary people and supporting Australia's national interest.
- 2.5 This chapter looks first at some of the statistical background to JSCOT's 20 years of operation and then provides a review of the overall assessment of JSCOT's work.

Statistics³

- 2.6 The following statistics have been compiled and collated by the JSCOT Secretariat from information contained in the Committee's reports over the past 20 years. The statistics cover the period from June 1996 until February 2016. The Secretariat advises that the statistics have not been independently verified.
- 2.7 During the period 55 Senators and 69 Members of Parliament served on JSCOT and the Committee considered over 800 treaty actions and produced 160 reports. The number of treaties considered per parliament

2 The Hon Kelvin Thomson MP, Deputy Chair, JSCOT, *Committee Hansard*, Canberra, 18 March 2016, p. 3.

3 Full details can be found in Appendix E.

- peaked in the 43rd Parliament at approximately 150.⁴ Overall there has been a slight downward trend in the number of treaty actions considered.
- 2.8 The Committee met for an average of 48 hours per year, taking into consideration public hearings, subcommittee meetings and private meetings. Total meeting hours have also declined slightly over the period.
- 2.9 The Committee has 15 or 20 *joint sitting days* to consider a treaty action, depending on the category of the treaty. However, in *calendar days* the average length of an inquiry is 111 calendar days. The shortest inquiry took nine days⁵ and the longest took 736 days.⁶ The average time for an individual inquiry is increasing.
- 2.10 Approximately 40 per cent of the treaty actions that the Committee has looked at have been international, multilateral or plurilateral treaties. The Committee has examined bilateral treaties with 128 different countries. Forty-nine of those countries have only one treaty with Australia and 29 have only two treaties.
- 2.11 Determining what treaties cover is difficult. Even when the subject matter appears to be the same, the detail of the treaty action may be quite different. Broadly: 41 treaties relate to air services; 78 to tax; 43 to ships or the sea; 25 to nuclear energy or nuclear cooperation or nuclear waste; 13 to extradition and 24 to pollution.
- 2.12 In 20 years the Committee has received approximately 4,564 submissions, excluding responses to questions on notice from government departments. Forty-one per cent of inquiries have attracted no submissions, 33 per cent received one submission and the remaining one-quarter of all inquiries have received two or more submissions. In other words, 10 inquiries have received two thirds of the submissions.
- 2.13 In 76 per cent of cases, the Committee has recommended that the Australian Government take binding treaty action. In another 22 per cent, the Committee has made no recommendation. In nine cases the Committee recommended that binding treaty action not be taken.
- 2.14 Government responses to the Committee's recommendation take, on average, 404 days. The longest took 1,651 days⁷ and the shortest 56 days.⁸

4 For the dates of each parliament see Joint Standing Committee on Treaties (JSCOT), *Report 160: A history of the Joint Standing Committee on Treaties: 20 years*, March 2016, p. xii.

5 *Exchange of Notes constituting an Agreement between the Government of the United States of America and the Government of Australia to amend the Agreement concerning Space Vehicle Tracking and Communications Facilities of 29 May 1980, as amended* (Report 109)

6 *Agreement between the Government of Australia and the Government of the United Arab Emirates on Cooperation in the Peaceful Uses of Nuclear Energy* (Abu Dhabi, 31 July 2012). The inquiry lapsed at the end of the 43rd Parliament and was re-referred at the beginning of the 44th Parliament.

7 *Convention on the Rights of the Child* (New York, 20 November 1989)

Joint Standing Committee on Treaties

- 2.15 JSCOT was described as a ‘very, very good institution’⁹ that has made a ‘really significant contribution to treaty-making in Australia’.¹⁰ The Committee’s work was seen as a ‘key vehicle’ for achieving public confidence in the treaty-making process.¹¹ The seminar highlighted a number of factors that have contributed to JSCOT’s positive role over the last 20 years, including its largely bipartisan approach and the forum it provides for public debate on proposed treaty actions.
- 2.16 JSCOT has established a ‘strong reputation’ for its bipartisanship.¹² The Hon Mr Thomson noted the hard work that went into arriving at consensus on difficult topics and the ‘spirit of common sense and goodwill’ that usually prevails.¹³
- 2.17 JSCOT’s inquiry process provides both an opportunity to disseminate information regarding proposed treaty actions and a forum for public participation. The Committee publishes the treaty text, the National Interest Analysis (NIA) and related documents on its website, calls for submissions from interested parties and holds public hearings in Canberra and, when it considers necessary, at other locations across the country.¹⁴
- 2.18 The process is often a catalyst for a ‘substantive’ and ‘robust’ national debate.¹⁵ Submissions and public hearings allow a wide range of people to put their point of view and help the Committee and the Government identify areas of concern:
- ... JSCOT works fantastically well to bring out the areas of contention and the areas of agreement. It provides a space for those who wish to contribute to that, both from business, professional bodies and the NGOs and individuals.¹⁶

8 Attorney-General’s response to Recommendation 14 of JSCOT *Report 116: Review into Treaties tabled on 24 and 25 November 2010, 9 February and 1 March 2011 and Treaties referred on 16 November 2010 (part 3)*.

9 Ms Anna George, Adjunct Professor, Sir Walter Murdoch School of Public Policy and International Affairs, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, p. 24.

10 Ms Katrina Cooper, Senior Legal Adviser, Legal Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 18 March 2016, p. 10.

11 Professor Tim Stephens, Professor of International Law, University of Sydney, *Committee Hansard*, Canberra, 18 March 2016, p. 24.

12 Ms Cooper, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 9.

13 The Hon Mr Thomson, Deputy Chair, JSCOT, *Committee Hansard*, Canberra, 18 March 2016, p. 3.

14 For more detail regarding the inquiry process see JSCOT, *Report 160*, pp. 18–20.

15 Ms Cooper, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 9.

16 Ms George, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, p. 25.

2.19 JSCOT's inquiry procedure is also seen as a 'fundamental' part of the ongoing process of consultation regarding proposed treaty actions.¹⁷ A lack of stakeholder consultation was a key issue that the 1996 reforms were designed to address. Other sections of the reforms specifically targeted consultation but JSCOT has also contributed:

... in the consultation context, it is important that JSCOT has also engaged very extensively ... in consultation with civil society and through seeking submissions on particular proposed treaty actions. So JSCOT itself plays a very important role in consultations on proposed treaty actions.¹⁸

2.20 One of the issues raised in the Senate report which triggered the 1996 reforms was a perceived 'democratic deficit' due to the lack of parliamentary scrutiny in the treaty making process.¹⁹ Although the recommendatory role of JSCOT has meant that some of the arguments regarding the 'democratic deficit' remain unresolved, JSCOT's active role in scrutinising proposed treaty actions before they are ratified by the Government has allayed many concerns.²⁰ The work that JSCOT has done has convinced one initial sceptic:

... my views have shifted over time. With the rise of free trade agreements over the same period, I now sometimes have concerns about these major treaties and the way in which they can intrude on the domestic jurisdiction. I think there is a real risk of unintended and undesirable consequences unless we have some debate and more expert input into those large treaties.²¹

Concerns

2.21 Despite the generally positive assessment of the Committee's work over the last 20 years, several concerns were raised during the seminar. When JSCOT was established many saw it as 'window dressing'²² or a 'rubber stamp'²³ for foregone government decisions. In its report on the seminar

17 Ms Patricia Holmes, Assistant Secretary, Trade Law Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 18 March 2016, p. 29.

18 Mr Richard Rowe, Adjunct Professor, ANU College of Law, Australian National University (ANU), *Committee Hansard*, Canberra, 18 March 2016, p. 32.

19 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp.229–239.

20 Ms Cooper, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 8.

21 Professor Penelope Mathew, Dean and Head of School, Griffith Law School, Griffith University, *Committee Hansard*, Canberra, 18 March 2016, p. 13.

22 Professor Mathew, Griffith University, *Committee Hansard*, Canberra, 18 March 2016, p. 14.

23 The Hon Mr Thomson MP, Deputy Chair, JSCOT, *Committee Hansard*, 18 March 2016, p. 3.

held to mark its tenth anniversary, the Committee presented a robust rejoinder to this assertion, identifying many of the arguments that were re-stated at the current seminar.²⁴

- 2.22 A common criticism is that JSCOT has no input to the pre-negotiation process and only sees a treaty after it has been signed (but before it is ratified). The tension between maintaining necessary confidentiality and accountability and transparency poses a range of problems that, so far, remain unresolved.
- 2.23 The Hon Melissa Parke MP, a long standing Member of the Committee, proposes that an arrangement similar to that in place for the Joint Committee on Intelligence and Security to hear sensitive material could be implemented for JSCOT.²⁵ The Hon Mr Thomson suggests that the existing mechanism which JSCOT uses to obtain private briefings could be improved to alleviate this deficiency in the Committee's process.²⁶
- 2.24 A further concern is the quality of the information given to the Committee regarding treaty actions. This consists primarily of the information in the NIA which is supplemented in some cases, but not always, by submissions from academics, experts and the general public. The lack of independent analysis on the economic, social and environmental consequences of proposed treaties is seen as detrimental to the Committee's deliberations.²⁷
- 2.25 The Committee acknowledges that independent analysis would at times be useful, but it does call on a wide range of expertise when it identifies gaps in its own knowledge or the evidence more generally. For example, during its recent inquiry into the *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy*, the Committee asked a number of experts with varying views to provide both oral and written evidence to assist it in understanding the technical and legal implications of the treaty.²⁸
- 2.26 As previously mentioned, the Committee can also use the process of obtaining private briefings with relevant witnesses to better understand the background to a treaty action or to improve their knowledge of a particular topic.

24 JSCOT, *Report 78: Treaty Scrutiny: A Ten Year Review*, September 2006, pp. 33–36.

25 The Hon Melissa Parke MP, Member for Fremantle, *Committee Hansard*, Canberra, 18 March 2016, p. 11.

26 The Hon Mr Thomson MP, Deputy Chair, JSCOT, *Committee Hansard*, Canberra, 18 March 2016, p. 10.

27 Ms Westwood, Seminar Participant, *Committee Hansard*, Canberra, 18 March 2016, p. 11.

28 See JSCOT, *Report 151: Treaty tabled on 28 October 2015*, September 2015.

2.27 However, Professor Mathew from Griffith University sounded a note of warning regarding the treatment of expert advice by the Committee. In her examination of dissenting reports, Professor Mathew found that expert advice had been ignored or questioned by some members of the Committee, perhaps bowing to popular sentiment instead of fostering informed public debate.²⁹ She suggested that there may be times when the Committee has to consider whether the expert advice provided indicates that the national interest may be in conflict with public opinion:

... it would be good to see an attempt to grapple with the ideas and evidence of experts ... rather than simply portraying them as outsiders or ideologues or hopelessly divided or mere political tools. By eschewing or downplaying the role of experts, I think the dissenters in these two cases also overlooked the benefits of Australia participating as a citizen on the world stage.³⁰

Conclusion

2.28 The Committee appreciates the positive assessment that the seminar provided on the work of JSCOT over the last 20 years. The Committee members that have served on JSCOT during that period have done so with enthusiasm and dedication.

2.29 However, the Committee accepts the constructive criticism that has been provided by the seminar and will continue to revise and refine its processes and procedures to accommodate the changing nature of treaties and to meet the challenges presented by our increasingly connected world.

29 Professor Mathew, Griffith University, *Committee Hansard*, Canberra, 18 March 2016, pp. 16–17.

30 Professor Mathew, Griffith University, *Committee Hansard*, Canberra, 18 March 2016, p. 16.

Figure 2.1 The Hon Luke Hartsuyker MP, Chair, The Hon Kelvin Thomson MP, Deputy Chair, The Hon Melissa Parke MP



Overview of seminar

Introduction

- 3.1 The seminar was broken into four sessions that broadly covered four themes: reflections on the work of JSCOT over the past 20 years, trade agreements, instruments of less than treaty status and customary international law.
- 3.2 The previous chapter summarised the reflections on the Committee's work. This chapter provides an overview of the other topics discussed.

Trade agreements

- 3.3 The increasing significance of bilateral trade treaties was acknowledged throughout the seminar. The way these treaties are changing the process of treaty making was examined by two presenters. Ms Anna George discussed the impact of these agreements and the ongoing management of trade obligations. Ms Patricia Holmes showed how the consultation process for treaty making had been influenced by the negotiation of trade treaties.
- 3.4 Ms George identified the major differences between the obligations Australia enters into under multilateral agreements and bilateral agreements, arguing that the latter can have more far reaching consequences than the former.¹ Bilateral trade treaties impose a

¹ Ms Anna George, Adjunct Professor, Sir Walter Murdoch School of Public Policy and International Affairs, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, p. 25.

‘harmonisation agenda’ on the parties which can give authority to third parties to influence policy decisions.²

- 3.5 As the number of treaties increases, it becomes more difficult to implement treaty obligations in an already complex environment. Interpretation of the treaty language can prove vital. To combat possible problems of interpretation, Ms George suggests that the information that JSCOT collects during its inquiry process should be systematically recorded:

What JSCOT allows us to do is listen, hear and read the evidence, particularly from the negotiators, who explain why something is not a problem, or why this person is saying this but really it is that. That is a very important set of information, because the negotiators know the meaning of the language and what they agreed on. Sometimes the language itself can be sitting there but there is agreement behind that, the meaning of which has been very clearly stated in the negotiations.³

- 3.6 The consultation process undertaken before, during and after the negotiation of trade agreements has evolved over the last 20 years. Ms Holmes detailed the changes and identified some of the causes. In the 1990s the only stakeholders likely to be consulted were industry and specific interest groups.⁴ However, the consultation process has become more inclusive in line with community expectations:

... consultations are important, are taken seriously and do influence outcomes. They are a critical part of the trade negotiations, before we even start negotiating, during the process, during the JSCOT process and, indeed, after the negotiations.⁵

- 3.7 Ms Holmes explained that the push for greater public participation in the treaty making process that drove the 1996 reforms, also prompted changes to the government’s approach to consultation.⁶ The development of the internet and the growth of social media heightened public awareness and changed public participation patterns, forcing governments to adapt to new expectations.⁷

2 Ms George, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, pp. 25–26.

3 Ms George, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, p. 25.

4 Ms Patricia Holmes, Assistant Secretary, Trade Law Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 18 March 2016, p. 27.

5 Ms Holmes, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 28.

6 Ms Holmes, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 27.

7 Ms Holmes, DFAT, *Committee Hansard*, Canberra, 18 March 2016, p. 27.

3.8 The change in the content of trade agreements from tariff and quota issues to broader non-tariff factors was another theme of the seminar. These ‘behind-the-border agendas’ have implications for a range of domestic policy areas including migration programs, copyright and intellectual property.⁸ The possible impact of investor state dispute settlement (ISDS) provisions, for example, has proved particularly controversial with regard to recent trade agreements with Korea, Japan and China.⁹

Figure 3.1 Mr Bill Campbell QC, Professor Penelope Mathew



8 Ms George, Murdoch University, *Committee Hansard*, Canberra, 18 March 2016, p. 25; The Hon Mr Thomson MP, *Committee Hansard*, Canberra, 18 March 2016, p. 30; Professor Mathew, *Committee Hansard*, Canberra, 18 March 2016, p. 13.

9 See JSCOT, *Report 142: Treaty tabled on 13 May 2014*, September 2014; JSCOT, *Report 144: Treaty tabled on 14 July 2014*, October 2015; JSCOT, *Report 154: Treaty tabled on 17 June 2015*, October 2015.

Memoranda of Understanding

- 3.9 An emerging area of debate discussed at the Seminar is international instruments of less than treaty status, generally referred to as Memoranda of Understanding (MOUs).
- 3.10 MOUs are non-legally binding arrangements for cooperation with other countries both on a government-to-government, foreign minister-to-foreign minister, or agency-to-agency basis.¹⁰
- 3.11 According to Andrew Byrnes, Professor of International Law at the University of New South Wales:
- ...a significant part of the regulation of both bilateral and multilateral cooperative activities internationally is now governed by not just treaties but arrangements of less-than-treaty status. That is true particularly of bilateral but also multilateral relationships.¹¹
- 3.12 The Committee's Resolution of Appointment does not permit it to inquire into MOUs unless they are related to a treaty inquiry. The Committee does occasionally consider MOUs in circumstances where the MOUs are relevant to the treaty before the Committee and are not considered to be confidential.
- 3.13 For example, bi-lateral air services agreements are, as a matter of convention, implemented as MOUs for the first 12 months of their operation. As part of the Committee's consideration of air services agreements, the Committee is provided with a copy of the related MOU.
- 3.14 In addition to some general criticisms of the current process for parliamentary review of treaties, Professor Byrnes discussed MOUs in detail. He described them as having "an enormous effect in terms of the way in which governments and states behave."¹²
- 3.15 Further, he argued that:
- ...the nature of international law making and regulation today is much more complex than one which focuses only on treaties, and that the principal objects of the 1996 reports were only partly achieved by a focus on treaties – a very 19th-century approach...¹³

10 Professor Andrew Byrnes, Professor of International Law, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, pp 17-18.

11 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 17.

12 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 17.

13 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 17.

3.16 Professor Byrnes identified the following issues associated with MOUs:

- The Australian practice in relation to the publication of these documents is inconsistent, unsystematic and incoherent. Many MOUs are not available to the public for any apparent good reason.¹⁴

To demonstrate his point, Professor Byrnes emphasised the variety of approaches to publishing MOUs across the Australian Government, ranging from the MOUs being secret to what he considers to be the current best practice, the Australian Securities and Investment Commission's (ASIC's) collection of over 50 MOUs:

All of them are nicely assembled on the ASIC website and, indeed, on the websites of its counterparts.¹⁵

- Some MOUs cover areas of significance and may contain detailed content about the exercise of broad administrative powers conferred by statute. Professor Byrnes referred by way of example to MOUs on the exchange of information such as criminal vetting.¹⁶

According to Professor Byrnes:

Although they do not necessarily create international legal obligations, they nonetheless give rise to expectations on both sides, can significantly affect the way in which the Australian government agencies work with their international counterparts and may, indeed, have an impact on the rights of Australian citizens and residents.¹⁷

- Transparency, the accountability of the exercise of government power and transnational relationships – some of the fundamental reasons for adopting the 1996 treaty reforms – apply as much to MOUs as they do to treaties.¹⁸

Professor Byrnes indicated that he would like to see the Committee have an expanded mandate to include MOUs. In his view:

To focus only on the formal distinction between treaties and such documents fails to understand the complexity of interstate

14 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 17.

15 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 19.

16 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 18.

17 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 18.

18 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 18.

relations and how norms influence relationships. It is a very formalistic approach.¹⁹

- 3.17 Professor Byrnes suggested an audit of existing MOUs with a view to developing a systematic approach to publishing the MOUs.²⁰ As a guiding example, Professor Byrnes pointed to the development of the Australian Treaties Library 20 years ago, which was a documenting and listing exercise.²¹ According to Professor Byrnes:

We need to adopt an approach in the negotiation of those instruments that makes it clear that publication will be the normal approach adopted by the Australian government, unless a compelling case is made about the subject matter or the nature of the relationship and that they should be kept confidential from the public.²²

- 3.18 David Mason, Executive Director, Treaty Secretariat, Department of Foreign Affairs and Trade (DFAT), pointed out that the Department did not know the number of MOUs in existence, but that the numbers were very large and covered the spectrum from anodyne—such as sister city relationships— to sensitive—such as classified defence relationships. Mr Mason also emphasised the diversity of government agencies entering into MOUs.²³

- 3.19 Mr Mason made the point that government agencies are encouraged to lodge their MOUs with DFAT, but that the quantity of MOUs meant there was no current capacity for DFAT to actively pursue agencies to lodge MOUs. Mr Mason stated:

Since no government agencies are required to reveal what it is they are doing, ... I do not quite know how we would get those MOUs together or how JSCOT would then start to be able to look at them.²⁴

- 3.20 In line with his view that the formal distinction between treaties and MOUs fails to encompass the complexity of interstate relationships,

19 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 17.

20 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 18.

21 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 20.

22 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 20.

23 Mr David Mason, Executive Director, Treaty Secretariat, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 18 March 2016, p 21.

24 Mr Mason, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 18 March 2016, p 21.

Professor Byrnes believes that there are good grounds for the Treaties Committee to have its mandate extended to enable it to undertake regular, systematised reviews of MOUs.²⁵

Figure 3.1 Professor Ben Saul, Mr Richard Rowe, Dr Edwin Bikundo, Professor Tim Stephens



Treaties and customary international law

- 3.21 Another emerging field discussed at the seminar was the interaction between international treaty making and customary international law, and whether Parliament should have a role in customary international law.
- 3.22 The matter of parliamentary scrutiny of customary international law was discussed in *Trick or Treaty*²⁶, but did not result in any recommendations. The Committee itself has never considered the issue of parliamentary scrutiny of customary international law.²⁷
- 3.23 Customary international law, along with treaties, is one of a number of sources of international law identified by the Statute of the International

25 Professor Byrnes, University of New South Wales, *Committee Hansard*, Canberra, 18 March 2016, p 18.

26 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

27 Dr Edwin Bikundo, Senior Lecturer, Griffith Law School, Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 36.

- Court of Justice.²⁸ The Statute defines customary international law as ‘International custom, as evidence of a general practice accepted as law.’²⁹
- 3.24 Bill Campbell QC PSM, General Counsel (International Law), International Law and Human Rights Division at the Attorney-General's Department, stated that two principles frame customary international law: the first is the existence of a general practice; and the second is whether the practice reflects obedience to a perceived rule of law.³⁰
- 3.25 The connection between customary international law and treaties is a significant issue in the contemporary international legal scene.³¹ Dr Edwin Bikundo, Senior Lecturer, Griffith Law School at Griffith University, described the relationship as mutually constitutive.³²
- 3.26 Mr Campbell emphasised the interdependence of customary international law and treaties:
- While the content of many treaties is reflective of customary international law... treaties themselves can amount to practice contributing to the development of international law, which are in part founded on treaty practice, and will bind states irrespective of whether they are parties to the relevant treaties.³³
- 3.27 One of the defining features of customary international law in comparison with treaties is the capacity for customary international law to develop reasonably quickly to respond to new challenges.³⁴
- 3.28 Under these circumstances, Mr Campbell pointed out, it is unlikely that a treaty could be developed in the time necessary.³⁵ As an example, Mr Campbell identified the legal basis for responding to the threat posed by well-organised non-state actors operating out of one country and carrying out armed attacks within the borders of another country:

28 Mr Bill Campbell QC PSM, General Counsel (International Law), International Law and Human Rights Division, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

29 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

30 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

31 Mr Richard Rowe, Adjunct Professor, ANU College of Law, Australian National University *Committee Hansard*, Canberra, 18 March 2016, p 32.

32 Dr Bikundo Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 36.

33 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

34 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

35 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

... there was an undoubted need for the development of the law in that area. I do not think that the development of a treaty in a timely manner was a realistic proposition. One only has to recall the stalled negotiations on the comprehensive convention on terrorism to understand why the timely negotiation and entry into force of a treaty regime dealing with self-defence against non-state actors was not a viable option.³⁶

3.29 Developments in customary international law can of course be overridden by a treaty, although Mr Campbell felt this was not always wise:

...the international community should exercise a degree of caution in attempting the negotiation of a comprehensive multilateral treaty on a topic where that topic is already the subject of well-developed rules of customary international law or where the development of those rules is proceeding in an orderly way.³⁷

3.30 Mr Campbell pointed out the risks that might be associated with developing a treaty in an area already comprehensively covered by customary international law. In particular, if the treaty was only ratified by a small number of states, it might have the effect of winding back or undermining accepted customary international law.³⁸

3.31 Customary international law can also be useful in interpreting treaty provisions in such a way as to bring about the intended effect of a treaty despite apparent contradictions with the actual text of a treaty.³⁹ Even if the treaty does have a built-in amendment procedure, the process can be lengthy and uncertain, especially if it is a multilateral treaty and any amendment is subject to ratification.⁴⁰

3.32 Mr Campbell put this interaction succinctly as:

... how can we modify a treaty without amending it?⁴¹

3.33 For example, the United Nations Convention on the Law of the Sea originally required a state intending to establish a continental shelf

36 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 34.

37 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 34.

38 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 35.

39 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 35.

40 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 35.

41 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 35.

beyond 200 nautical miles to lodge a submission with the Commission on the Limits of the Continental Shelf within 10 years of entry into force of the convention for that state. When it became apparent that most states with an extended continental shelf would miss the deadline, the states' parties to the convention adopted an understanding at one of their annual meetings effectively extending the deadline.⁴²

- 3.34 Mr Campbell emphasised that, in relation to the ability of the parliament to have some say in a matter of customary international law, these matters are, essentially, beyond Australian control.⁴³
- 3.35 In part, that lack of control is because they involve the practice of states, generally, and not just the practice of Australia. For Mr Campbell, this makes it difficult for the Treaties Committee to consider customary international law matters.⁴⁴
- 3.36 Dr Bikundo posed the question of the Treaties Committee's role in customary international law in a different light. He brought the issue back to the initial reason for the establishment of the Committee: the democratic deficit in the Australian Government's involvement in international relations.
- 3.37 In customary international law, Dr Bikundo argued, parliament is completely bypassed. With only the courts and the executive having a role, he argued, there definitely is a gap in parliamentary oversight.⁴⁵
- 3.38 To resolve this gap, Dr Bikundo suggested the time has come for a joint standing committee on public international law. Such a Committee might lend clarity, weight and precision to Australian state practice and its view of the legality of that practice.⁴⁶
- 3.39 In particular, Dr Bikundo believed that parliamentary oversight would provide transparency and consultation to the process of customary international law.⁴⁷
- 3.40 For example, Dr Bikundo proposed that such a committee might provide a platform for the minister to present and discuss the Government's approach to particular issues of customary international law.

42 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 35.

43 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

44 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 33.

45 Dr Bikundo, Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 36.

46 Dr Bikundo, Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 37.

47 Dr Bikundo, Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 37.

- 3.41 Further, such a committee might provide an additional forum for the expression of customary international law, as Australia participates in the creation and modification of customary international law.⁴⁸
- 3.42 When asked about what role parliament might play in customary international law, Mr Campbell argued that it might be useful for the Treaties Committee to provide the parliament's views on the subjects currently under examination by the International Law Commission.⁴⁹

Conclusion

- 3.43 The presentations and discussions held during the seminar highlighted both the Committee's achievements and the challenges that still exist. Although the Committee has fulfilled the aims of the 1996 reforms in introducing Parliamentary oversight into the treaty-making process, there is room for further improvement.
- 3.44 Some issues—such as the complexity, sensitivity and level of public interest surrounding trade treaties—were not considered to be serious concerns 20 years ago. The Committee's inquiries have had to change to meet the evolving nature of treaty making and increasing global interconnectedness.
- 3.45 Other issues—such as customary international law, and instruments of less than treaty status—were deliberately placed outside the Committee's remit when it was first established. However, given the recognised quality and utility of the Committee's inquiries and reports, it may now be time to revisit the Committee's jurisdiction, with a view to expanding its oversight role.
- 3.46 The Committee would like to thank all of those involved in the seminar; particularly the presenters. The Committee is very pleased to be able to place these thoughtful, interesting and considered presentations into the historical record.

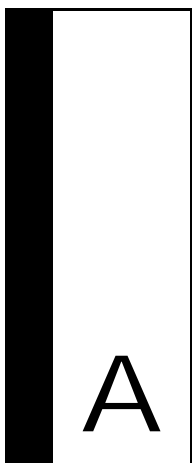
The Hon Luke Hartsuyker MP

Chair

2 May 2016

48 Dr Bikundo, Griffith University *Committee Hansard*, Canberra, 18 March 2016, p 38.

49 Mr Campbell QC PSM, Attorney-General's Department, *Committee Hansard*, Canberra, 18 March 2016, p 38.



Appendix A—Program

Thursday 17th March 2016

Venue: Members' Dining Room Alcove

6.30 Reception

6.45 Welcome by the Hon Kelvin Thomson, Deputy Chair JSCOT

Speech by the Hon Julie Bishop MP, Minister for Foreign Affairs

7.00 Dinner

Speech by Senator the Hon Penny Wong, Shadow Minister for Trade

Speech by the Hon Luke Hartsuyker MP, Chair JSCOT

9.00 Close

Friday 18 March 2016

Venue: Main Committee Room

9.15 Registration

9.45 **The Hon Luke Hartsuyker MP** – Chair, JSCOT

Welcome and introduction

The Hon Kelvin Thomson MP – Deputy Chair, JSCOT

Reflections on JSCOT membership

Ms Lynley Ducker

Statistical overview of the work of JSCOT

Ms Katrina Cooper

The past 20 years – the DFAT perspective

10.55 *Group photo*

11.00 *Morning tea*

11.25 **Prof. Pene Mathew**

The price of participation: dilemmas in treaty making

Prof. Andrew Byrnes

Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover instruments of "less than treaty status"?

Session Chair: Prof. Ben Saul

12.20 DFAT Treaties Exhibition opening – first floor gallery

12.40 – 1.45 *Lunch*

1.45 – **Ms Anna George**

The impact of bilateral agreements and changes to the ongoing management of trade obligations

Ms Patricia Holmes

The practice of consultation during trade agreement negotiations

Session Chair: Prof. Tim Stephens

2.45 *Afternoon tea*

3.15 **Mr Bill Campbell QC**

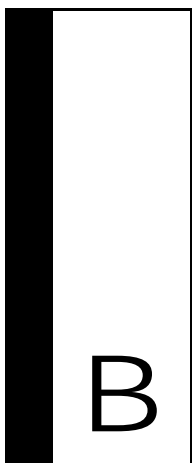
Beyond scrutiny – new developments in customary international law and treaty interpretation

Dr Edwin Bikundo

Could be there more parliamentary oversight in the area of customary international law's relationship with treaty law?

Session Chair: Mr Richard Rowe

4.30 Close



Appendix B—List of Participants

Mr Matt Alexander, Legal Officer, Department of Foreign Affairs and Trade

Ms Chelsey Bell, Senior Legal Officer, Attorney-General's Department

Ms Rhianna Benjamin, Legal Officer, Attorney-General's Department

Dr Edwin Bikundo, Senior Lecturer, Griffith Law School, Griffith University

Mr Michael Bliss, Assistant Secretary, International Legal Branch, Department of Foreign Affairs and Trade

Ms Ruth Blunden, retired from Department of Foreign Affairs and Trade

Mr Kevin Bodel, Senior Researcher, Department of the House of Representatives

Ms Grace Boglev, Department of Environment

Mr Kris Boyapati, Manager, Department of Defence

Mr Lloyd Brodrick, Assistant Secretary, FTA Legal Issues & Advocacy Branch, Department of Foreign Affairs and Trade

Mr James Bunce, Senior Researcher, Department of the House of Representatives

Professor Andrew Byrnes, Professor of International Law, University of New South Wales

Ms Laura Cameron, Legal Officer, Attorney-General's Department

Mr Bill Campbell QC PSM, General Counsel (International Law), International Law and Human Rights Division, Attorney-General's Department

Mr Malcolm Cayley

Ms Thea Chesterfield, Attorney-General's Department

Ms Melanie Conn, Assistant Director, Postal Services, Department of Communications and the Arts

Ms Katrina Cooper, Senior Legal Advisor, Department of Foreign Affairs and Trade

Mr John Croker, Legal Counsel, Australian Federal Police

Mr Salim Daizli, Graduate, Department of the Environment

Ms Peggy Danaee, A/g Committee Secretary, Department of the House of Representatives

Ms Lauren Davy

Ms Hannah Dorfmeister, Policy Officer, Department of Communications and the Arts

Ms Lynley Ducker, Committee Secretary, Department of the House of Representatives

Ms Joy Duncan, Assistant Director, Department of Communications and the Arts

Ms Dana Esperanza, Policy Officer, Attorney-General's Department

Miss Sarah Fitzgerald, Legal Officer, Attorney-General's Department

Dr Andrew Gaczol, Senior Research Officer, House of Representatives

Ms Anna George, Adjunct Professor, Sir Walter Murdoch School of Public Policy and International Affairs, Murdoch University

Mr Stavros Georgiadis, CEO/Creative producer, Popular Culture Productions

Ms Jennifer Harkness, Team Member INTERPOL-EUROPOL Engagement, Australian Federal Police

Hon Luke Hartsuyker MP, Chair, Joint Standing Committee of Treaties

Miss Mhairin Hilliker, Graduate, Department of Environment

Miss Georgia Hinds, Legal Officer, Attorney General's Department

Ms Patricia Holmes, Assistant Secretary, Trade Law Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade

Miss Sophie Hope, Law Student + Youth advisor to hNO, ANU + headspace

Mr Vincent Hudson, Principal Consultant, Auspex Strategic Advisory

Ms Nikki-Lynne Hunter, Adviser, Delegation of the European Union

Ms Stephanie Ierino, Attorney-General's Department

Mr Michael Johnson, Principal Legal Officer, Attorney-General's Department

Mr Evan Johns, Assistant Director, Legal, Department of Foreign Affairs and Trade

Mr Lal Kuruppu, APH

Dr Joanne Lee, Department of Foreign Affairs and Trade

Dr Cherisse Lyons, Department of Communications and the Arts

Mr David Mason, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

Professor Penelope Mathew, Dean and Head of School, Griffith Law School, Griffith University

Ms Jane McCosker, Senior Legal Officer, Office of International Law, Attorney-General's Department

Dr Narelle McGlusky, Inquiry Secretary, Department of the House of Representatives

Mr Nicholas Metherall, Graduate, Department of the Environment

Mr. Benjamin Molan, Policy Officer, Department of Communications and the Arts

Ms Vina Novianti, Student, Australian National University

Ms Amber O'Shea, Investment and Cultural Diplomacy, Department of Communications and the Arts

Ms Eleanor Pahlow, Legal Officer, Attorney-General's Department

Hon Melissa Parke MP, Committee Member, Joint Standing Committee on Treaties

Miss Kelly Pearson, Policy Officer, Department of Environment

Ms Julia Pitts, Board Member, EDO (ACT)

Mr Daniel Raca, Policy Officer, Department of Communications and the Arts

Mr James Rees, Director Chamber Research Office, Department of the House of Representatives

Ms Sue Robertson, Assistant Secretary, Attorney-General's Department

Ms Catherine Ross, Legal Officer, Department of Foreign Affairs and Trade

Ms Cathy Rouland, Department of the House of Representatives

Mr Richard Rowe, Adjunct Professor, ANU College of Law, Australian National University

Professor Ben Saul, Professor of International Law, University of Sydney

Professor Mark Scully, EUCLID University

Ms Nell Shipley, Department of Foreign Affairs and Trade

Dr Janice Simjansimk, sessional academic/home maker, Griffith Law School

Mr Andrew Smith, Senior Policy Officer, Department of Communications and the Arts

Ms Shennia Spillane, Principal Research Officer, Senate Committees Office

Professor Tim Stephens, Professor of International Law, University of Sydney and ANZSIL

Mr Ashley Stephens, Research Officer, Department of the House of Representatives

Hon Kelvin Thomson MP, Deputy Chair, Joint Standing Committee on Treaties

Ms Elizabeth Toohey, Department of Foreign Affairs and Trade

Ms Ruxandra Voinov, Graduate, Attorney-General's Department

Ms Rosie Wagner, Assistant Director, Department of Foreign Affairs and Trade

Ms Pauline Westwood, Retired, APS

Mr Devon Whittle, Senior Legal Officer, Attorney-General's Department

Mr Ernst Willheim, Visiting Fellow, College of Law, Australian National University

Mr Max Wolfram, Student, Australian National University

Miss Penney Wood, Department of the Environment

Mr Mark Woodberry, Senior Legal Officer, Department of Prime Minister and Cabinet

Ms Belynda Zolotto, Research Officer, Department of the House of Representatives



Appendix C—Transcript

Committee met at 09:49am

Session 1

CHAIR (Mr Hartsuyker MP): Good morning, ladies and gentlemen. Welcome to this conference celebrating the 20th anniversary of the establishment of the Joint Standing Committee on Treaties. Today marks an opportunity to reflect on the treaties committee's role in the treaty-making process and also to examine some of the issues pertinent to treaty making today. You will hear about how the committee's work has developed over its 20 years and about its relationship with the Department of Foreign Affairs and Trade. The treaties committee plays an unusual role in the treaty-making process. The Australian Constitution vests treaty-making power solely in the executive arm of government. The parliament has no formal role in treaty making in Australia. Nevertheless, the Australian government had the foresight to recognise that involving elected representatives in the treaty-making process would enhance the legitimacy of treaty making for the Australian public by providing a mechanism for people affected by treaties to have their views taken into account. While the treaties committee has been around for a while, I joined the committee less than a month ago, on 22 February 2016. I certainly thank my deputy chair for his support, particularly at the welcome function last night.

The task assigned to the treaties committee is to test whether a treaty is in the national interest. It is one that I think members of the House of Representatives and the Senate would understand instinctively. There is a special role that we elected representatives can bring into the treaty-making process – that is, we represent the people, people who have an interest in how treaties will affect them and people who want to have an opportunity to contribute to the debate about whether a particular treaty is a good thing or is not a good thing. I think the core work of the committee is where the real benefit lies in framing the debate about a treaty in terms of how it will impact on ordinary people. Let me give you some examples of how it is impacting in my electorate of Cowper on the North Coast of

New South Wales. For example, we have a major dairy cooperative, Norco, which exports fresh milk and ice cream into China. It is owned by Dairy Farmers and employs some 700 people. The China-Australia Free Trade Agreement, which was ratified late last year, was controversial but the agreement's benefits to dairy farmers and the agricultural sector more broadly are not in doubt. Thanks to ChAFTA, the tariff on fresh milk exports to China will drop from 15 per cent to zero over nine years and the tariff on ice cream will drop from 19 per cent to zero over four years. Norco expects the tariff reduction will result in an increase in exports of fresh milk to China from one million litres annually to 20 million litres annually. That is going to have a huge impact on the local economy of the North Coast. For me, as a representative of those people, the dry statistics about tariffs and what it means for the ongoing employment of 700 staff is absolutely relevant. They might be dry statistics but what they mean on the ground are higher farm-gate prices for farmers, more employment on farms and more opportunities in the manufacturing of milk products. These are big differences to local people, and on the North Coast it means local jobs for people. It means that a key industry can compete effectively with New Zealand on a level playing field, rather than enduring the disadvantages that we have had up to this point. We also have massive expansion in our blueberry industry. That is another industry that is set to benefit from free trade agreements not only with China but also with Japan.

Another example of the important work that the committee does is the agreement for strengthening the implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific. That is a mouthful. It sounds somewhat esoteric and is something, perhaps, that only scientists would be interested in, but this is not the case. The Niue Treaty attempts to prevent overfishing of migratory fish species. We can prevent overfishing of migratory species in Australian waters but only an international treaty can protect these species across the whole range of their movements. Yellowfin tuna, one of the species protected by the Niue Treaty, is highly prized by both recreational and commercial fishermen. From the ports in my electorate, like Coffs Harbour, it brings in money from a commercial catch and attracts tourists to the region. The Niue Treaty, for me, is not only about patrols and considering fish stocks across the South Pacific but also is potentially about having an impact in the local area that I represent on lifestyles and the work prospects of the people. For me, the treaties committee is about the impact of major international agreements across the people of Australia, across the people that we, as elected representatives, represent. In an increasingly complex world, we have an increasingly complex treaty-making process, and the role of this committee going forward over the next 20 years will only become more important. We see a whole range of legislation which is struggling to keep up with the changes in technology. I think changing technology is going to have major implications for the treaty-making process.

May I thank you for your interest and your attendance today. May I thank the presenters for bringing their expertise to what is going to be a fascinating discussion, and I look forward to the rest of the day's proceedings. Thank you, ladies and gentlemen. It is my great pleasure to introduce my deputy chair, Kelvin Thomson, who will share some of his reflections of a much longer experience on the committee than my one month. Welcome, Kelvin.

Mr KELVIN THOMSON MP: Thanks, Luke. For those of you who do not know me, I am Kelvin Thomson and I am the federal member for Wills. There is a profile of me here in the 20-year profile seminar, and I found it very informative. As well as acknowledging the honourable Luke Hartsuyker as the chair of the treaties committee, I also want to acknowledge the honourable Melissa Parke, member for Fremantle. It is appropriate that Melissa is attending today, because I think she has the best attendance record of any of the committee members over the course of the past decade.

I also acknowledge Lynley Ducker, secretary of the committee. Lynley pointed out the emergency evacuation arrangements. The red bells are ringing now; that may be an emergency, but you are not required to evacuate.

When I joined the Joint Standing Committee on Treaties as chair in 2007, we were up to report No. 90; this week we tabled report No. 160, so I have reasonable grounds for believing I have read more treaties committee reports cover to cover than anyone else in the whole world except maybe David Mason. I have been the longest-serving treaties committee chair and the only person to serve as both chair and deputy chair.

Treaties have a long history and they are a fundamental feature of modern diplomacy. But, for as long as they have existed, they have had critics – people who are suspicious about treaties and people who are probably not in agreement when they hear the statement of Mao Zedong's foreign minister, Zhou Enlai, from 1954: 'All diplomacy is a continuation of war by other means.' They may also approve of Plato's observation way back in 390 BC: 'The rulers of the state are the only ones who should have the privilege of lying, either at home or abroad; they may be able to lie for the good of the state.' To say nothing of Sir Henry Wotton, who in 1604 said: 'An ambassador is an honest man sent to lie abroad for the good of his country.'

The Joint Standing Committee on Treaties was initiated 20 years ago by the newly elected Howard government. I do not think I am doing that government a disservice in saying that the committee was intended to give comfort to those on the political right who were suspicious that the power to enter into treaties was being used by Labor governments to pursue left-wing agendas. And some of them had a rather conspiratorial view about the role of the United Nations as well.

But I think that over the years the committee has also received considerable support from the left of politics, who have wanted to use the committee to

scrutinise the globalisation and free-trade agenda of large corporations. It has also received support from independent observers, who have seen it playing a positive role in ensuring that treaties receive more scrutiny than they used to and that the states, stakeholders and the general public are given an opportunity to express a view about them.

I think that the subject matter of its work has become more important over time, rather than less. I personally think that the issue of what arrangements nations enter into to regulate their affairs has never been more important or more controversial. On the one hand, I detect a great yearning around the world for peoples and nations to be genuinely sovereign and capable of managing their own affairs and making their own decisions. There is a strong push-back against the use of trade treaties to promote the free movement of goods across borders, regardless of its impact on local jobs of local standards of environment protection or consumer safety. The strong opposition to the Trans-Pacific Partnership Agreement from both Republican and Democratic US presidential contenders is a classic example of this.

There is strong opposition around the globe to the free movement of people too, whether under the auspices of the United Nations Refugee Convention or not. How else do we explain Donald Trump, UKIP, the push for a Brexit and the rise of the European populist anti-immigration parties? I acknowledge that President Barack Obama is investing heavily in the TPP, but I cannot help but point out that treaties were not always so fashionable with US presidents. George Washington said in his farewell address of 1796: 'It is our true policy to steer clear of permanent alliance with any portion of the foreign world.' Thomas Jefferson described treaties in his inaugural address of 1801, 'peace, commerce and honest friendship with all nations; entangling alliances with none'.

My own view on the TPP controversy is that, given that it has now been confirmed that the US congress will not consider the TPP implementing legislation until after the November presidential election, there is no case for us to rush in ahead of them in our consideration of it. I continue to support more independent analysis of the costs and benefits of the TPP for Australia, for example from the Productivity Commission.

Allowing countries the freedom to make their own decisions is important but at the same time we need to have an effective rule of international law and we need to have a United Nations capable of resolving conflicts wherever they occur, otherwise we will continue to witness the terrible misery and hardship which has blighted our world in recent years. Having effective global conflict resolution processes while at the same time giving people around the world a real say in the decisions that impact their lives is a massive challenge. That is why I believe that the treaties that we negotiate and the way we negotiate them has never been more important.

I joined the treaties committee as chair in 2007. At the time, I said to other members that I did not believe in insincere unity, that there was no shame in legitimate disagreement and that I would not be upset if members wanted to dissent or express individual rather than party positions. Notwithstanding that, I am proud that during my time as chair the committee members worked very hard to achieve unanimous reports and that we were able to do so on controversial issues such as nuclear non-proliferation and disarmament, even though committee members came to these issues from quite different perspectives. A spirit of common sense and goodwill has continued to be my experience as deputy chair post the 2013 election.

There are times when the committee has stuck its neck out and made much more complicated recommendations than simply that a treaty be ratified. I think that treaties committee reports are taken seriously by government, and during my time many of our recommendations have been adopted. Just as importantly, events have tended to vindicate various recommendations that we have made. On the nuclear cooperation deal with Russia, the committee raised serious concerns about the enforceability of treaty provisions and the Realpolitik of dealing with a military superpower. Subsequent events in Crimea and Syria have underscored our concern. The author Mark Twain wrote in his book *Tom Sawyer Abroad*:

... I asked Tom if countries always apologized when they had done wrong, and he says:

'Yes; the little ones does.'

The treaties committee also raised serious concerns about the anticounterfeiting trade agreement, or ACTA, including the lack of detailed economic assessment and the lack of clarity about whether it would require changes to domestic law. We recommended that it not be ratified until a number of conditions were met. The government response agreed to undertake further work and indeed the government has never moved to ratify ACTA. With only one ratification, from Japan, the ACTA is not in force, being short of the required six ratifications.

I want to single out one other committee report – which was in 2002, before my time on the committee – which concerned East Timor and petroleum in the Timor Sea. The committee received many submissions about this issue. Normally the submissions we get to an inquiry are concerned with its impact on Australian interests, either individually or as a nation, but in this inquiry many submitters wanted to ensure that Australia was treating East Timor fairly and not taking advantage of its fragility. The report stated:

Continued ill ease at the vulnerability of East Timor was reflected in expressions of concern to the Committee that Australia had failed to treat its northern neighbour fairly in treaty negotiations.

Nearly 15 years later, this issue remains unresolved. In my view, it is time that Australia negotiated a maritime boundary with East Timor or submitted to proper international arbitration of this issue in accordance with the UN Convention on the Law of the Sea.

The biggest frustration for committee members and the public alike in the treaty process is that we do not get to see the text of any treaties while they are being negotiated. They only come to us after they have been signed. People understandably think that we are being presented with each treaty on a 'take it or leave it' basis, that the treaty is a fait accompli and that the committee is a rubber stamp. I believe that it would be considerably better if the committee had some form of access to treaty negotiations while they were being conducted, as I understand happens in the United States. We would not want to know about every treaty – many of them are uncontroversial – but the trade treaties that we have been entering into are very controversial and it feels like some people are being consulted while others are being kept in the dark. In the 43rd Parliament, JSCOT made a recommendation about future trade treaties which was not picked up but which I think still has merit. That was that, prior to commencing negotiations for a new agreement, the government table in parliament a document setting out its priorities and objectives, including independent analysis of the costs and benefits of the agreement. Such analysis should be reflected in the national interest analysis accompanying the treaty text.

In conclusion, I have enjoyed working with some very talented and professional staff at the committee secretariat as well as with numerous entertaining, intelligent and conscientious colleagues. Notwithstanding the amount of reading involved, it has been a pleasure to serve on this committee. I want to conclude with a line from the US President Dwight Eisenhower in 1959:

... what we call foreign affairs is no longer foreign affairs. It's a local affair. Whatever happens in Indonesia is important to Indiana.

... ..

As long as any ... cannot enjoy the blessings of peace with justice ... there is no peace anywhere.

Thank you.

CHAIR (Mr Harksuyker MP): Thank you, Kelvin, for that address and the benefit of your many years on the committee. Our next presenter is Lynley Ducker, committee secretary. Lynley has been a committee secretary in the House of Representatives since August 2015. Lynley's previous career in the Public Service has focused on oversight and accountability roles, including the Australian National Audit Office and ombudsmen's offices in both Australia and Papua New Guinea. I invite you to welcome Lynley.

Ms Ducker: Thank you. As you have heard, I am the committee secretary for JSCOT. The secretariat work very much in the background, so today I am just going to give you a statistical overview and pull up some facts and figures, largely without comment, if I can help myself. The reason that I have chosen these particular statistics is to answer the questions that I had when I arrived. I have only been in this job for a few months, and when I arrived I had questions like: how many, how long does it take, what are these treaties about, does anyone care

and does anything change? I am not sure if facts and figures can answer all of those, but I will give it a go.

A PowerPoint presentation was then made –

Ms Ducker: This first graph shows number of treaty actions by year that the report was tabled. The first question I had was: how many treaties does the committee look at and is it getting any busier? My guess was that it was getting busier. We are in a more connected world and there is more stuff being negotiated; does it make its way through to the committee? That is not reflected by the stats, though, which show a slight downward trend. There is a bit of a drop in the election years, as you can see, but other than that it is reasonably consistent. This graph shows the same information but broken up by parliament rather than by calendar year. The blue is the number of treaty actions reported on per parliament and the green is the number of reports. The 43rd Parliament was busiest by a long way. The 44th Parliament obviously has not finished yet, but I doubt that it will catch up, and again it shows that slight downward trend. Another way of looking at workload is meeting duration. The secretariat compile how long all the meetings go for – public hearings, subcommittees and private meetings – on a six-monthly basis. This does show a decline in the number of meeting hours over the 20 years. The average is about 48 hours of meetings a year. 2015 was busy, but that average was not met in the several years before that.

How long does it take the committee to look at something? The committee has agreed to conduct its inquiries within 15 or 20 joint sitting days, although it can take a longer period of time if it needs to. That is sitting days, though; this is calendar days. It shows the average inquiry time in days per parliament. The average over the 20 years is 111 calendar days, just under four months. The shortest was a cracking nine days – that was an agreement with the USA on space vehicle tracking and communications facilities – and the longest was 736 days, just over two years, and that was for the agreement with the UAE on the peaceful use of nuclear energy. That is an example of an inquiry that lapsed at the end of one parliament and was re-referred and more inquiry was undertaken in the next parliament.

Is the committee getting quicker? No; it is actually taking longer. Average inquiry times are increasing. This may well be linked to the previous graph about meeting duration. Less time being taken to meet perhaps means inquiries take longer overall. It may be that our elected representatives are getting more calls on their time and that perhaps they do not have as much space for committee work. That is perhaps a topic for another day.

In the 20 years, who have the agreements been with? Everybody, basically. I have not even bothered putting labels on this because it gets so small so quickly. The big blue chunk is more than one country – international, multilateral and plurilateral – and they form just on 40 per cent of all the treaty actions that the

committee has looked at. Of the 128 countries that there have been bilateral agreements with that the committee has looked at, with 49 countries there was only one and with a further 29 there were only two. Only 21 countries, plus this big multilateral basket, have five or more agreements, which looks like this. I do not think that list would surprise anyone other than the fact that I have included the European Union as a separate country, but for the purpose of this graph I thought it was okay. The United States, New Zealand, Singapore, Japan, the EU and China are probably the countries you would expect to see. What surprised me as a newcomer was the diversity of arrangements. I would have thought that the committee would look at a larger number of treaties from a narrower range of countries, but that is not the case.

What are the treaties about? This is the very unscientific Wordle version, where you put the text of the titles into the software, it spits this out and the more frequent they are the bigger the word is. It has no basis in science at all, but it looks to me like they are the kinds of things that countries have to agree on to make the world that we live in work the way it does. I think that, if you put that in front of someone cold, they might think, 'Yes, these are international issues.' I did try to get some better stats around what the treaties are about, but it is quite hard. I can tell you that there were 41 treaty actions relating to air services that the committee has looked at; 78 had the word 'tax' in their title; 43 are about ships or the sea; 25 are about nuclear energy or nuclear cooperation or nuclear waste. The committee has looked at 13 extradition treaty actions and 24 on different types of pollution. But, when you look a bit closer at these treaties, even if they had the same title and were about the same kind of thing, they were all different. That should not surprise me because they were negotiated separately in a different context, but I think I had thought that treaties would be more formulaic than is actually the case.

The next thing I wanted to know was: who cares about committee inquiries? A good marker is the number of submissions that we receive for each inquiry. In 20 years, the committee has received 4,564 submissions, which works out at an average of 7½ submissions per inquiry, but obviously they are not at all spread evenly. This graph shows the most common number of submissions – that is the big blue chunk and it is a big fat zero. I should say, though, that for this purpose I have not included responses to questions on notice by government departments. We process those as submissions. What I wanted to see was who cares outside the Parliamentary Triangle, basically, so I have not done those ones. Forty one per cent have no submission, a further 33 per cent get one submission and the remaining one-quarter of all treaty actions have two or more submissions. Or, to look at it another way, there were 10 inquiries by the committee that resulted in just under two thirds of all submissions received over the past 20 years.

This is the big 10. There is more information on all of these in Report 160, which is the 20-year history that is in your bags, but I will just run through them. The top

one is the OECD Multilateral Agreement on Investment; that is a treaty that did not happen, but it was been negotiated between 1995 and 1998 and caused quite a lot of public concern. Then, there is the Convention on the Rights of the Child. That was ratified in 1990, before the committee even began, but it undertook an inquiry because there was a great deal of community concern. The third one, which also was not a specific treaty action, was a broad based inquiry into the nature and scope of Australia's relationship with the WTO.

Then, we have the International Criminal Court, US free trade, Kyoto Protocol, China free trade, the Timor Sea treaty that Mr Thomson mentioned, the inquiry into non-proliferation and nuclear disarmament, Korea free trade, and, lastly, the Lombok treaty with Indonesia on the framework for security cooperation.

One thing I did want to see was whether there was any trend in the submissions. Are people becoming more or less engaged? I could not quite get a numerical answer on that because the distortion effect of these big inquiries is so great that you cannot really make a proper trend over time; however, I can tell you that the new technology is going to make a huge difference. If you add together all the submissions the committee has received over the past 20 years, and then triple it and then add a few more, then you will get the number of items in our inbox about the TPP. I think that at the 30-year seminar, this graph could look very different.

The next question I had is: what is the outcome? The committee makes recommendations. By far the most common one is that the government take binding treaty action as is. That is the big green part of this graph, and it makes that recommendation in 76 per cent of cases. In another 22 per cent, that is the blue wedge, the committee does not make a recommendation at all. For example, if it is a deemed acceptance provision, where it will automatically take effect, then community does not usually make a recommendation for action.

In a small number of cases – that grey slice – the committee's inquiry has raised enough concern for the committee to recommend that the government not take binding treaty action at this point. This is the list of occasions when the committee has recommended not to take binding treaty action. I do not have time to go into the back stories of all of this, but some of them are really quite interesting. There is the list.

As I said, in over three quarters of the cases, the committee, after inquiry, is satisfied that the treaty is in the national interest and makes that single recommendation. In most of the remaining inquiries the committee still recommends that the treaty go ahead but makes other recommendations as well. Those recommendations tend to fall into three main groups. The committee makes recommendations to minimise potential problems: the inquiry has thrown up some issues, go ahead with the treaty, but you need to this as well to make sure that these risks do not eventuate. The other group is to maximise potential

benefits – good treaty go ahead, but if you really want to make the most out of it, take these actions as well. The third big group of recommendations is about the process, either the JSCOT process itself or the preparliamentary inquiry process in relation to treaty negotiation and consultation.

The most recommendations, unsurprisingly, are those inquiries that also receive the most submissions – the ones that generated the most interest – and the winner is the Convention on the Rights of the Child with 49 recommendations. The stats and the graph relate to what happens with those recommendations after they are made. So 17 per cent of committee reports required a government response – that is just under one fifth. According to the Speaker's schedule, only one is outstanding to the China-Australia Free Trade Agreement, and that has not yet reached the six-month deadline for responses. The shortest government response was in 56 days and the longest took 1651 days, which is over five years, and again that was the Convention on the Rights of the Child with all those recommendations. The government response, as an average, is 404 days. As you can see, the majority of recommendations were agreed to by the government with a further 10 per cent agreed in part – that is the grey wedge. I will put a caveat on that statistic, though, because the nature of government responses can be quite ambiguous. My question was: what changes as a result of committee inquiry?

I will leave you with this last slide, which contains two particular responses to recommendations. They went into my graph as an agreement – the government has not rejected these; it has not declined to take action on these things – but whether anything changed as a result of that response, I am refraining from comment.

Hopefully, that has given you all something to think about. I have kind of cracked through it. But the committee will be doing a report of today's events, and I am sure there will be a spot for some more stats. Thanks.

CHAIR (Mr Hartsuyker MP): Thank you, Lynley. I find it somewhat surprising that there has been a downward trend in treaties. I think, anecdotally, everyone would have intuitively thought that there would be more activity in the space, rather than less.

Our next presenter is Katrina Cooper, Senior Legal Adviser for DFAT, who is going to discuss 'The past 20 years – a DFAT perspective.' Ms Cooper is a career officer with the Department of Foreign Affairs and Trade. Since December 2013, she has been a departmental senior legal adviser with oversight of international and domestic law issues. From 2008 to 2012 she was Australia's Ambassador to Mexico. Welcome Katrina.

Ms Cooper: Thank you very much, Luke, for that kind introduction and thank you to the other presenters who have also spoken in the introduction. I think it has been a really fascinating opening and bodes really well for a very interesting seminar. I thought your statistics were really fascinating, Lynley. It is my very

great pleasure to be here today at the 20th anniversary of JSCOT to talk on behalf of DFAT about the importance of treaties and the very important contribution of JSCOT. The treaties secretariat, which is headed by David Mason, who is ably assisted by Ruth Hill, falls within my division. Both David and Ruth are here today and work incredibly closely with JSCOT.

Before I begin my reflections, I did want to take the opportunity, up-front, to acknowledge all of the work of the many parliamentarians who have served on JSCOT. We have some here today. I want to congratulate Luke Hartsuyker on his recent appointment as chair and acknowledge the great work of the secretary, Lynley Ducker. We had a small dinner last night and, in listening this morning to our parliamentary speakers, the effort and the seriousness with which our parliamentarians focus on treaties, through this process, is indicative of the importance of the treaty-making process. It is not simply a process that we need to go through – either at the negotiating level or the parliamentary scrutiny-level or executive level – but it is a very important part of who we are and what we do as a nation. My remarks today will go to some of those comments.

I will not be telling anybody in this room anything new when I say that we negotiate treaties because it is in our national interest to do so. If we think of a world in which military projection or economic power were the main means by which our national objectives could be pursued, I would say that Australia would be a little bit vulnerable. We benefit enormously from interaction between states and from a framework that is based on fair, agreed and transparent rules that are agreed in treaties. We benefit from that, all states benefit from that and the community of nations benefits from that.

Australia, as you probably know, is not a member of any single, rigid regional grouping, although we fall within a few in a UN context. We do not coalesce like other groups. In fact, when I was in Mexico, as the Ambassador, the Norwegian Ambassador, who had a bit of a sense of humour, set up a non-group group. There were four of us who met regularly: the Aussies, the Kiwis, the Norwegians and the Swiss. We really did not move any mountains during our meetings, but I think it does indicate the kind of special role that Australia has within the international system. What do we do? We work really hard to build global and regional alliances across groupings, and we seek to influence their standards. We seek to influence, through those various groupings, how international relations are conducted.

Treaties, really, are one of the most powerful tools at our disposal to set those standards. There are many examples, but one I like in particular is the Antarctic Treaty and the broader Antarctic Treaty System. It is a very live and important issue for Australia – the means to which Antarctica is put; how it is used. That treaty system ensures that Antarctica remains non-militarised, which is very much in Australia's interests, that the pristine environment is protected and, through the

protocol that was negotiated some time after the Antarctic treaty, that there is no mining that takes place in Antarctica. Importantly, too, under that very innovative treaty our sovereign claims, while not recognised, are preserved. The fact that treaty, that has such significant and real consequences for Australia, continues to set those norms and standards more than 50 years after it was negotiated is a, really, neat example of the importance of treaties.

It has been mentioned many times – and I am sure we will hear it throughout the day – that we are more interconnected in a globalised world and, therefore, we are bumping up against each other more. So we will continue to need more and more international agreements to regulate our conduct, to regulate how we interact. Treaties are going to remain a very important part of that, notwithstanding Lynley's stats that show a decline. That may or may not continue. It may peak back up. Regardless of the quantity of treaties, the treaty system will remain absolutely central to Australia's wellbeing.

Today, I want to unpack a little bit why treaties matter. I want to do that for many reasons but one of the reasons is that we hear, quite loudly and frequently, now, lamenting about the death of multilateralism and how it is all coming to an end. Often, people point to trade context and the WTO. I know my colleague, Patricia Holmes, will give a defence of the WTO, later today, because we have had some progress, particularly at the WTO ministerial meeting in Nairobi last year, so I do not want to diminish that. People also look to the conference on disarmament in the UN, which has made very little if any progress over a number of years.

It is hard to reach consensus with 160 or more states, but multilateralism has had some recent wins. The most significant one of those is worth remembering: the Arms Trade Treaty, which only entered into force in late 2014. That has 80 parties and 130 signatories, which is a decent number. More important, is what that treaty does: it regulates the trade in conventional weapons. We could not do that without a multilateral effort. No one nation or any group of nations would be able to achieve that. Also, reaching agreement on the Trans-Pacific Partnership, while not a multilateral deal, is a significant trade deal, the biggest trade deal in 20 years. That, too, was a very significant achievement.

Treaties, in fostering international consensus, can regulate states' behaviour for the global good. That is why we are so committed to them. We will hear, I am sure, long lists. Your list was interesting, Lynley, on how to ascertain the topics of treaties. It is tricky, sometimes, for all of the reasons that you say, but we know that trade, investment, aid, defence, human rights, transport systems, tax, social security, transnational crime, quarantine and other border measures – which are often forgotten but are really important to our national security, in a different way – are issues that require global approaches.

When we look at the stats we do see a growth in bilateral treaties, which is interesting. Overall, we are party to 2,000 treaties. As Lynley said, about 60 per

cent of those are bilateral. A number of treaties have fundamentally shaped the way we do business with other countries. They help create certainty where there might be ambiguity. They help promote the rule of law, which is very much in our interests, for the reasons I gave at the outset. Importantly, they help with a reasonable peaceful resolution of disputes.

We may not know it, even from hearing that list, and we may not register just how much treaties affect us on a day-to-day basis. If you think, for example, of the regulation of undersea cables, that provides the backbone of our global internet access. Where would we be, today, without being able to use the internet? On a more mundane level, we talk about trade treaties quite a lot but do we really appreciate, when we go to the supermarket or when we go shopping, that it allows us to purchase cheap and plentiful goods and services every day?

So if anyone were to argue that treaties are becoming less relevant in a globalised world, I would strongly disagree with them. We often hear those arguments linked to the rise of non-state actors.

Treaty making between states will continue to be an important and critical feature of state-to-state relations and they will continue to be a very important feature of Australia's foreign trade and aid relations. They are worthy of scrutiny and consideration and we want to make sure that those international agreements are working for us in Australia's national interests. JSCOT is an important part of that process. That is why I am delighted that we are here to celebrate the 20th anniversary of JSCOT and its work over the last couple of decades in helping to make our treaty-making process more open, more transparent and more democratic.

To go to the principles underpinning our treaty making system – again, I will not be telling anybody anything new, I am sure – treaty making is the responsibility of the executive. That power to negotiate and enter into treaties falls, in our system, squarely within the executive power of the Commonwealth, under section 61 of the Constitution. You will also know that they are not automatically incorporated into Australian law. Parliament alone has the power to incorporate treaty provisions into domestic law of Australia by exercising its constitutional power and, most notably, we hear of the external affairs power under section 51 of the Constitution.

That is not the case in every country. That is how Westminster countries operate. In the United States, for example, we know there is a different system. For treaties to enter into force two-thirds consent of the Senate is required. A very important point to note about the US Senate system is, once consent is found, once the treaty is approved, the treaty is self-executing. They automatically entered into force, in the US, and they are directly enforceable by US domestic courts. For the sake of completeness, on the US side, the President does have the power to conclude

executive agreements, without requiring approval of the Senate. But, by and large, it is Senate approval that is used and required.

It is an executive power but parliament, too, has an important and critical role, not least because they need to pass the legislation to implement the treaties. In fact, everything hinges on the passage of that implementing legislation through the parliament. If the parliament decides not to pass the legislation required to implement the treaty into domestic law, the practice is that the government of the day would not take any action to bind Australia as a party to the treaty. Of course, and the subject of today's discussion is very much so, parliament has a significant role in scrutinising the treaties. Through the committee system it examines the treaties, prior to Australia taking binding action. The primary committee that has responsibility for that is JSCOT.

That brings us to the work of JSCOT. We all know of it, to one degree or another, and I am sure it will be mentioned through the day, but it is useful to reflect a little bit on how the committee came about. We all know that they emerged following the 1995 inquiry into the Commonwealth treaty-making power and the external affairs power. There was concern, at the time, which has been mentioned, that the Commonwealth government was overreaching in the application of its external affairs power and was legislating in areas that traditionally had fallen within the remit of the states.

The Tasmanian dams case galvanised thinking on that point. I remember that case, vividly, as a Tasmanian and the implications of it. It was hotly debated even in high schools through Tasmania. There was also something that we have heard repeated over the decades: a perceived democratic deficit in the treaty-making process that resulted from that lack of parliamentary scrutiny and involvement.

I think the former high court judge, Sir Ninian Stephen, said it quite nicely in 1995. He said: 'The problem consists of the likelihood of a democratic deficit at the stage when adherence to some treaty or convention is being decided upon. The deficit becomes very apparent in the case of Westminster-type governments, because, with them, the process of treaty-making is a purely executive act.' This is why, with the continued move towards internationalisation, we must be alert to ensure subsidiarity and we must devise mechanisms to ensure that our democracy retains its meaning. Those concerns dated back to the 1980s, when many parliamentarians and the wider community had begun to express some concerns about our treaty making process. Those concerns and those voices grew steadily, particularly within the states.

We then come to 1995, when the Senate Legal and Constitutional Affairs References Committee inquired into the Commonwealth's treaty making and external affairs powers. We then had further ventilation of the criticisms of our treaty making process. In November that year, the Senate committee tabled its report, *Trick or treaty? Commonwealth power to make and implement treaties*. That

report recommended that legislation be enacted to establish a parliamentary committee which would, among other things, report on proposals by Australia to join the treaty – JSCOT. The report addressed very directly what many, like Sir Ninian Stephen, had considered to be the democratic deficit in the way that the executive branch at that time exercised exclusive responsibility for treaty making. On the third sitting day of the 38th parliament – so not at all long into it – in May 1996, the then government tabled the government response to the report and initiated the reforms to the treaty making process that we are celebrating today. Those major reforms included the requirements that treaties be tabled in parliament at least 15 joint sitting days before binding treaty action could be taken by the government and that they be tabled with a national interest analysis, and, most importantly, those reforms included the establishment of JSCOT to scrutinise those proposed treaty actions.

The introduction of JSCOT really did see an overhaul in consultation on the treaty making process. Those reforms very much gave a voice to the wider community. The JSCOT public hearings provide a forum for people to voice their views – and I think Lynley's presentation of the stats was very instructive. It is interesting too, I thought, that a large number of hearings received no submissions and some received a lot. I will talk a little bit later about the need for flexibility in the system. That is critical; not all treaties are created equal.

Often those hearings, as we have all seen, catalyse a national debate on how Australia will be affected by entering into certain treaties. We are seeing that right now, of course, with the TPP. To my mind, at least, that is a really essential part of any healthy democracy. As a government official who has worked closely with JSCOT over the years, I have seen firsthand how important those exchanges are, how substantive they are, how robust they are and how they contribute to the effectiveness of our treaty making process.

One really interesting thing about those reforms is that they were not implemented through legislation, as was the recommendation at the time. They were implemented as a matter of government policy through administrative decision. Although it may not have been intended at the time – perhaps it was; I was not there – I think it has been part of their strength, because, when refinements have been required, the system has been able to accommodate them quite easily. Notwithstanding that capacity to change them, overall, in the last 20 years, the system has largely been left untouched. The system has been supported consistently by successive governments, and JSCOT has established a very strong reputation for working in a bipartisan matter. I think that is a testament to how effective the initiatives have been in serving the national interest.

As I mentioned before, the flexibility the current system gives us is important. It is flexible enough to accommodate a wide variety of treaties, including really urgent treaties and very complex ones. One of the criticisms that was levelled at the time

of the creation of JSCOT was that it would slow down the treaty making process, but the record shows that that criticism was unfounded. JSCOT has a very impressive record for meeting its time frames. Again, that really is a credit to those who have served on the committee and to the secretaries and the secretariat.

Sometimes, though, we need to implement treaties more quickly than we otherwise would, so there is a national interest exemption within the system. It is always exercised sparingly and it has only been used a handful of times in the last 20 years. I will give you a recent example, because I think it illustrates why we need that national interest exemption. It was a case that I was personally involved with. It was in relation to the tragic downing of flight MH17 on 17 July 2014. The Australian government had personnel ready to deploy both to the Netherlands and to the crash site in the Ukraine. The people who were about to deploy, who were from a number of agencies, had a really difficult task ahead of them to locate and identify the bodies of the 298 innocent people who were killed on that flight, including 38 Australians – people who call Australia home; some were citizens and some were residents. But the Dutch required a legally binding treaty to govern the deployment of Australian personnel on Dutch soil. Who can deploy on a country's territory goes very much to the sovereignty of the country, and they wanted a binding treaty. We had tried for several days to find a fix – whether we could make it a document of less than treaty status. We had quite substantive negotiations with the Dutch and we were able to look at different ways for some aspects of it, but in terms of the deployment to the Netherlands the Dutch were quite clear that they needed a treaty. They advised us of this on the Wednesday. On the Thursday we forwarded them a final text, which were able to agree. Then the Governor of South Australia, who was acting in the absence of the Governor-General – at that time the Governor-General was in fact in the Netherlands – got on a plane to Canberra to preside over an extraordinary meeting of the Executive Council that was held on the Friday morning. The Dutch scheduled an extraordinary meeting of their council too on the Friday. The meeting finished here at 5.30 pm on the Friday. We sent the advice that it had been approved to our ambassador in The Hague. He went straight to the Dutch ministry of foreign affairs to sign the document. At six o'clock the treaty had entered into force. Given those urgent circumstances, it was my view that that national interest exemption was rightly invoked. The treaty entered into force and then was subsequently tabled in parliament and scrutinised by JSCOT.

The complexity that we have now has increased, particularly with the trade agreements. In the past few years some of the trade agreements that JSCOT has considered include Japan, Korea and China, and I have mentioned the TPP. These negotiations are very, very complex. They are often years in the making, and they are painstaking negotiations involving dozens of people. They rightly generate significant interest from the public and relevant stakeholders. There is often lengthy debate and it requires the engagement of JSCOT on very complex and

technical concepts. The work on those, in particular, should be commended, and, as public officials, we try our best in working with JSCOT and appearing before JSCOT to try and present the thinking behind the negotiations and the context of the treaty so that they can be understood and the public can be as well informed as possible.

When we reflect back over the last 20 years, I would say that JSCOT and the 1996 reforms have stood the test of time pretty well. Of course, treaty making will always remain an executive power – it is in the Constitution – and the checks and balances that we have in place have produced a more transparent, open and accountable treaty making system than we had before. But there is always room for debate, for discussion, for exchange, for testing assumptions and for asking whether the system is as robust as it needs to be or if it is structured in the right way. Kelvin Thomson very kindly and openly shared some of his views on the treaty system. Last night at dinner Senator Wong made an important point when she said we need to listen to the views of the community, whether we agree with them or not. We all have different views, but they indicate that there is an interest out there and there are views out there. Ultimately, of course, how the treaty making process will be structured is the decision of the government. From my own observations, I have seen that it does have a lot of flexibility. I come back to this point of flexibility because in the media and in articles we often tend to see a focus on specific treaties, but we have to remember that there are a broad range of treaties, so the system needs to be flexible and able to cope with a broad range of treaties. The number of submissions on some of those indicates strong public interaction. I think that JSCOT has had a real impact, and your stats show that on the treaties too – the recommendations of JSCOT and how they have been taken into account.

In conclusion, I think that, no matter what our view on the treaty-making system, we can all agree that JSCOT has made a really significant contribution to treaty-making in Australia, and that is what we are here to celebrate today. I think the principles behind the reforms certainly remain relevant today. They have influenced how the government works, they have influenced how the parliament works and they have influenced the way that the public engages in the treaty-making process.

I will conclude by emphasising the point that I made at the beginning. I think that, in an increasingly interconnected world where these challenges will require international solutions, treaties will continue to be very central to developing international norms and standards and are very critical to protecting and promoting our national interest. I can see JSCOT continuing to be a very important part of that treaty-making process going into the future.

CHAIR (Mr Hartsuyker MP): Thank you for that address. I think it certainly did put in context the work of JSCOT in the treaty-making process and was certainly

an interesting insight into what occurred with regard to MH17, the time pressures and the practical implications of treaty-making. We have got time for some questions for Katrina.

Mr Willheim: I am retired. For many years I was a Commonwealth officer. My question picks up a term that the chairman and others keep using, and that is the involvement of the committee in the treaty-making process. As I see it, the committee does not have a role in relation to the process; it has a role in relation to the outcome. My question really is whether that is inevitable. Now, any treaty negotiation involves a period of negotiation. It usually involves compromise on both sides – or all sides in a multilateral process – and, of course, the parties to the negotiation really don't and aren't able in that process publicly to disclose their negotiating positions, their fallback positions and so on. That's not confined to treaty negotiation; it applies in any negotiation. It applies also in Commonwealth-state negotiations, where people often complain that the Commonwealth and state parliaments are presented with a *fait accompli* on uniform legislation. But, again, there really is not much opportunity for parliamentary or other input into the negotiating process. So my question really is: is there any scope for committee input into the negotiating process as distinct from looking at the outcome and whether the outcome is favourable?

Mr KELVIN THOMSON MP: I am happy to respond briefly. You are absolutely right. This has been a matter of some public concern, with people suggesting that we ought to be more involved while the treaties are being negotiated. It seems to me that it might be possible to loosen this up. On a couple of occasions the committee has sought briefings – usually from the Department of Foreign Affairs and Trade, but it could be another department, depending on the subject matter – in relation to a treaty that we are particularly interested in and about which we are aware that it is a matter of negotiation. Those briefings have been confidential and for the reasons you described have not told us anything of substance about what is being negotiated. They have not been unhelpful – it has been a useful process to have – but it does seem to me that we might be able to improve on it.

CHAIR (Mr Hartsuyker MP): I think that in complex negotiations it is always going to be the challenge. You identify the issues of the necessary confidentiality. I think it is quite a vexed question that you raise but I think that a move in that direction is probably something that we should be considering given the constraints that obviously exist.

Ms Cooper: I think the point you made about the confidentiality of negotiations is a critical one in terms of being able to get the best outcomes. That is where the tension lies, of course. You have properly identified the tension. I think it is common sense for anybody negotiating anything – even if you are buying a house, to simplify it right down – that you do not tell the other party what your bottom line is. The same, of course, goes for international negotiations. For complex

negotiations there are sometimes hundreds of balls up in the air which different parties are using as levers to negotiate.

I will not comment on how much it could or could not be opened up; as a public official and as I said in my address, that is very much a decision for government and there are different views out there. But I will say as a negotiator that, whatever arrangement there is now or in the future, for Australia's national interest that confidentiality absolutely has to be protected. You just do not want to see Australia's bottom line on any given part on a blog on the web somewhere, because it would totally undermine our national interests. It is a tricky balance and to some extent it is about trust and handling sensitive information.

Ms Parke MP: In relation to that last comment I would note that the Parliamentary Joint Committee on Intelligence and Security hears a lot of sensitive material and is still able to meet and go through its deliberations without jeopardising confidential information, so I do think that there could still be some arrangement that is made to deal with that issue and still allow the treaties committee to have more access to treaties while they are being negotiated. But my question – or comment, really – is more about this issue of the democratic deficit that JSCOT has been intended to address. That raises for me the question: we needed the treaties committee to address the democratic deficit for the issue of the executive making arrangements to enter into agreements with other countries without any reference to the parliament, but for me it raises the democratic deficit in relation to war-making powers. We have an executive that is able to go to war with other countries, and there is no involvement of the parliament in that process. That is something that, when we were talking about democratic deficit, seemed very obviously something that is missing in our system. Perhaps Kelvin might like to comment on that.

Mr KELVIN THOMSON MP: I am happy to comment in relation to that. It obviously has been highly controversial, and there have been some parliamentary endeavours made to get some parliamentary involvement in decisions to go to war. I share Melissa's view about this that it should not be a solely executive prerogative and that a decision to go to war is one of such monumental and lasting significance that it needs to have broad national support and broad national consensus. If you cannot get a proposition through the parliament, you do not have enough support to be entering into such an undertaking. So I do think that is an area where the parliament ought to be more involved, but, as people will be aware, it is neither government nor opposition policy to do it. It remains a highly political and controversial matter.

CHAIR (Mr Hartsuyker MP): We have time for one last question.

Ms Westwood: I am also retired. My concern goes to the evidence base that JSCOT is able to use, because it appears that most of the flow of information goes from DFAT and also from submissions by interested parties.

There does not yet seem to be any independent analysis of the possible economic, social and environmental consequences of these trade treaties which impinge so much on domestic law. There have been requests for a cost benefit analysis. I believe the Productivity Commission offered to do one – which I am sure it could have done – under confidential circumstances. As a spin-off to that, there are legal implications of one government taking a decision which will bind future federal and state governments on domestic policy.

Mr KELVIN THOMSON MP: I am happy to respond on the matter of independent cost-benefit analyses. I think with major treaties that is important. It is something that I and others have advocated in relation to the trade treaties. In my remarks this morning I made reference to that. I think it would be good if we had an independent cost-benefit analysis. That could be included as part of a national interest analysis if the department chose to go down that path or it could be provided direct to the treaties committee. The mechanism does not matter much. I agree with you that it is desirable to have as strong an evidence base as we can when something as important as this is being considered.

CHAIR (Mr Hartsuyker MP): If future governments become unhappy with a particular arrangement they may seek to take some form of action in the future. One of the challenges, for example, with regard to a cost-benefit analysis is that when one looks at trading arrangements between countries that have entered into free trade agreements there are often many benefits that have not been contemplated at the time. So there is the potential, if you are looking at it purely from the point of view of a cost-benefit analysis, that you may be understating the potential benefits from a whole range of economic events that occur by virtue of the fact that two nations just become closer together. They become more aware of each other. There is greater trade and interaction that occurs purely because of the fact that there is that greater awareness. I think we need to be cautious. Kelvin makes a good point that the more information you have to make a decision the better. I agree with that. But I think we need to be cautious that we do not undersell the potential benefits that we can derive. The reduction of tariff barriers is going to be a betterment. Whether it is X dollars or 1.1X dollars will be the subject of discussion, but certainly tariffs are drag on our economy. We are better off moving down the tariff-free route wherever possible.

Ms Cooper: I just want to make a comment coming at it from a slightly different perspective. I made some points in my opening address about the strategic value of treaties in our international system of dispute resolution in upholding norms and creating rules of the road, if you like. It is important that if a country, whatever its system of treaty making or its mechanism is – and I am not aiming at your specific question of, 'Can one government bind another?' – enters into a treaty, it is in our national interest that that is not taken lightly and that five years later it can simply be undone because they have changed their mind. We would end up then in quite a chaotic international landscape. So we enter into these

treaties in a very serious way. Those commitments need to be taken seriously by other countries for that global system to work and function well. We can all point to instances where countries may not have upheld their treaty obligations at all or in a way that we think is proper, but we do not want to be accepting of that approach to treaties. We want them to be taken very seriously by all countries across the globe.

CHAIR (Mr Hartsuyker MP): Thank you for your contributions this morning.

Proceedings suspended from 11:00 to 11:27

Session 2

Prof. Saul: Good morning, ladies and gentlemen. Welcome back. In this session we are going to shift gear from the inside view of JSCOT to a kind of outsider's view by some leading Australian international academics who have been heavily involved in the JSCOT and international law processes over the years to provide a bit of a critical perspective on how it has worked thus far and also some future directions for where it might go.

When Lynley was giving me instructions for today, she said I should be an active chair, which I interpreted as meaning I should say something provocative to kick things off. I was trying to figure out how I could do that and, firstly, I asked the question: what would Donald Trump think of JSCOT? But that was too easy, because he would just say: 'Abolish it. Abolish treaties' and probably abolish the parliament as well.

So then I shifted to the Marxist revolutionary Bernie Sanders and wondered what he would think of the process and I came up with three points. Firstly, he would probably say: 'Look, historically, absolutely JSCOT is remarkable, because it dragged our treaty-making process out of the Dark Ages and into the Middle Ages.' If your starting point is the executive can do what it likes internationally, there is no other real constraint on the process, then, yes, more scrutiny through JSCOT is fabulous and we deserve a pat on the back.

Secondly, he would probably move on to say: 'But, yes, we're still much less democratic than many civil law countries,' which, by the way, make up most of the world's national jurisdictions more than common law jurisdictions, where the parliament's involvement in treaty making is required much earlier and much more intensively. It depends on the system, but of course sometimes parliaments are involved prior to signature. Sometimes parliamentary approval is required and sometimes parliamentary disallowance or unsigned is involved.

Thirdly, he would probably go on to make his killer point, his sceptical point, and say: 'Look. At the end of the day, JSCOT is still just a kind of weak procedural constraint on treaty making by the executive and nothing really has changed.' In other words, it is a sort of ritualistic exercise of going through the motions of

gnashing our teeth about what is in the treaty. But there are three key problems. Firstly, because it is after signing, it is too late to make any difference to the content of the treaty, so there is really no democratic participation, in a broad sense, beyond, obviously, an elected government – which is something – making the treaty. Secondly, JSCOT's scrutiny rarely stops a treaty in its tracks. Thirdly, JSCOT's scrutiny is really unlikely to lead to the amendment of a treaty, even if it can fiddle with implementing recommendations for legislation down the track.

So Bernie's conclusion would be: Australia could, at the very least, have earlier public notification and consultation in relation to the government's intention to start negotiating, so that at least the public can say something like, 'We want this treaty' – or not – and, if we do want it, what are the kinds of broad contours, the broad red lines, that the public is willing to stomach without obviously giving away anything as to the confidential content of the negotiations which proceed. Finally he would say, 'Maybe there is a stronger role for parliament as well.' It may not be parliamentary approval. The relationship between the executive and the parliament is not static; the executive power in section 61 is as flexible as you would like it to be. There is an executive power to exclude aliens, but it is also the subject of a very longwinded Migration Act. You can have parliament involved in something that just happens to also be an executive power. So Bernie would like to democratise our foreign policy and our treaty making, even if you can relax because he is not going to get elected any time soon.

Firstly, Pene Mathew, the Dean of Griffith Law School, is going to talk to us about some of the treaties which JSCOT has looked at. I think the CEDAW optional protocol and the Kyoto Protocol are case studies. You have got a copy of her biography, so, please, warmly welcome Pene Mathew.

Prof. Mathew: Thanks very much, Ben, and thank you to JSCOT for the very kind invitation and the gracious hospitality last night. It was truly very enjoyable. Congratulations on also producing this wonderful report that talks about the history of JSCOT. It is quite interesting to find myself here, because I have to say, in the early nineties when a democratic deficit with respect to treaty making was first being debated, I was actually one of the sceptics. As a human rights lawyer, I wanted to see Australia participate in human rights treaties, and I was well aware of the problems that the United States faced in ratifying human rights treaties. Notably, of course, the United States is the only UN member state not to be a party to the Convention on the Rights of the Child, and I think that is really quite embarrassing.

However, I think my views have shifted over time. With the rise of free trade agreements over the same period, I now sometimes have concerns about these major treaties and the way in which they can intrude on the domestic jurisdiction. I think there is a real risk of unintended and undesirable consequences unless we have some debate and more expert input into those large treaties. So I come to you

with a little bit of ambivalence about the issues and I want to look at the intriguing ways in which JSCOT itself has sometimes divided in its assessment of the benefits of participation in particular treaties. I certainly have not done a scientific study of the sort that Lynley did for us or that the report on the 20 years of JSCOT has done. I did not have time; I am a law dean and I spend my time doing very mundane things these days. So I have chosen to look at the cases in which there have been some dissenting reports.

As we have seen this morning, JSCOT generally tries to achieve consensus and it generally recommends that binding treaty action be taken, and that could be seen as a very good thing and as politicians working well together. Some have certainly been very critical and have suggested that this shows that the process is not having all that much impact. For example, around 10 years ago Charlesworth, Chiam, Hovell and Williams said that, although JSCOT certainly has value, really it was 'window dressing' – and they actually used that quite provocative term. They said it 'allows the government to appear to take into account public and parliamentary concerns about international treaties while maintaining the government's complete discretion in the area.' There will be many in this room who disagree with that assessment; but I have to say that while JSCOT is still getting treaties at the point after which they have already been signed, I think that critique has a great deal of validity. And I think that the Senate Foreign Affairs, Defence and Trade References Committee report, *Blind agreement*, has made some very sensible recommendations about the ways in which parliament could actually be involved at an earlier stage.

That is where we have got consensus, and I thought, 'What can I do in the limited time I have got? I think I'll take a look at some of the juicy dissents and think about the democratic deficit there.' When I looked at these dissenting reports, I saw a lot of party politics at work, along with a good dose of populism. I began to wonder whether the deficit we should be concerned about is solely constraint of executive power – which is certainly something that is very important – or whether sometimes our democracy itself suffers a different kind of deficit, a deficit of informed and persuasive debate. I cannot claim to be scientific but I am going to be provocative and pick apart these two cases where we have got dissenting reports.

I am looking at two – one is a human rights treaty: the optional protocol to the Convention on the Elimination of all Forms of Discrimination against Women. That protocol allows individual communications by women as well as having an own-motion procedure where there is evidence of grave or systemic violation of women's rights. The second one is one of the times in which the Kyoto protocol has come to JSCOT.

In the area of human rights, I found the report on the optional protocol to CEDAW really fascinating, because there was a whole broader context of governmental

scepticism about the United Nations human rights system. In the year 2000 you might remember that the Howard government announced a review of engagement with the UN human rights system. The review seemed to have been sparked by a number of things, but perhaps the last straw was the concluding observations of the Committee on the Elimination of Racial Discrimination regarding Australia's 10th, 11th and 12th periodic reports in 1999. These made a number of critical comments, including commenting on Australia's treatment of refugees. The government really thought that the committee had exceeded its mandate. So the government announced a review, and some of the things it said in that announcement were eminently sensible. It wanted to look at better coordination of the treaty bodies, and everybody agreed – and I think still agree – that there could be better coordination of the treaty bodies. They also said it was necessary to 'ensure adequate recognition of the primary role of democratically elected governments and the subordinate role of non-government organisations. In other words, the treaty bodies were not paying enough attention to what democratically-elected governments say, as opposed to these unelected non-government organisations.

The government also announced some moves to disengage from the UN human rights system, including that visits from UN experts would only be facilitated where there was a compelling need, and that Australia would neither sign nor ratify the optional protocol to CEDAW. So Australia's accession to the optional protocol to CEDAW was delayed until the election of the Rudd government. And then the issue went to JSCOT and a majority recommended accession to the optional protocol, saying it would 'demonstrate Australia's commitment to human rights and allow international scrutiny of this commitment to take place. Somewhat predictably, the coalition members of the committee dissented. I thought it would be interesting to unpack the reasons of the dissent and what it says about the kind of debate we were having about this treaty.

The first three reasons given in the dissenting report really reflect the idea that 'if it isn't broke, don't fix it'. The dissent first says, 'Australia has strongly supported the principles of the convention since 1983'. I think that is a reasonably fair assessment actually but I do not see why it means that Australia should not sign up to all available scrutiny mechanisms.

Second, the dissent argued: Australia has met its obligations under the convention and has enhanced the standing of women as outlined in Australia's periodic reports to the CEDAW committee. We say we have got a record therefore we have got a good record. I think it is true that when you look at CEDAW's concluding comments on our reports they are, on the whole, very positive documents. Australia is trying very hard, but no country has a perfect human rights record. If you look at the concluding comments, both before and after this JSCOT report, there were certainly some areas of concern identified by the committee, including,

perhaps most obviously, domestic violence. I think, given the current debate that we are having, that that is totally unsurprising.

The third argument that the dissent put is: there are adequate remedies in Australia including the Sex Discrimination Commissioner. This ignores several factors. One is: there are many exemptions in the Sex Discrimination Act that I do not think have been addressed properly yet. It ignores the fact that, while we are trying hard as a country, there would be absolutely no need for a Sex Discrimination Commissioner if our record was perfect. If it were true that having a Sex Discrimination Act and a commissioner overcame all of the problems, then there simply would not be any communications to the CEDAW committee and no need for it to have an own motion inquiry. In a sense, it really is an argument to then sign up to the additional scrutiny mechanisms, because we really have nothing to fear.

The final point, and I think one of the most interesting, is that the dissent argued: there are concerns regarding the membership of the CEDAW committee. They did not specify what the concerns were, but I think it is clear that the concerns were expressed by a few of the submissions to the inquiry. I will just give you an example. One submitter said:

CEDAW's current and previous directors are radical feminists with a secular humanist agenda. They have and will interpret gender equality issues accordingly.

Groups like CEDAW will put growing pressure on Australian governments to liberalise their democratically elected governments.

It is important that people get to have their say, but I think that submitter actually displays a lack of understanding about equality. Equality is not what a majority says it means. I also wonder whether there is an impoverished understanding of democracy itself. Informed debate is essential to a properly functioning democracy and informed debate must allow the evaluation of ideas on their merits rather than proceeding on the basis of ad hominem – or perhaps we should say ad feminam attacks in this case. So that is a bit of an analysis of CEDAW, and I will come back and try to draw some conclusions.

I now want to talk about the Kyoto protocol. Kyoto has been before JSCOT on a number of occasions. There was a discussion paper that was essentially issued by JSCOT in 2001 which, I think, contributed to national debate but it actually did not recommend what the government should be doing. In 2009, the issue came to the committee again. What I think they were looking at was: what would be the successor to Kyoto? What would happen after Kyoto had expired? There was going to be the big debate in Copenhagen later that year.

In March 2009, JSCOT inquired into how Australia should 'approach the climate change problem in the post-Kyoto world.' It recommended that the Australian government be willing to adopt an 80 per cent target and take this as a negotiating position to Copenhagen. This is, I think, a really interesting use of JSCOT, because

one of the constant criticisms has been that the treaties only come to JSCOT once they are signed. So here was the committee being used to formulate a negotiating position. So I really think it is a terrific use of the committee.

The report underlining the recommendations really goes well into the science underlying the recommendations they are making about the target, about the means – they want to see a carbon market – and about various measures that Australia will adopt in order to meet the target. It comments specifically on the underlying approach to the report. It says:

The Committee has taken a conscious decision in this report to adopt a scientific evidence-based approach as it relates to the issue of climate change and greenhouse gas emissions.

The committee reasoned that scientific evidence is 'uniquely reliable' in this instance. I think that approach is justified, given the subject matter. But what is interesting about it is that as an attempt to take the committee's deliberations beyond party politics I do not actually think it worked. There is a dissenting report by the coalition members and senators. They actually state that they think that the committee process was being abused. I am not quite sure why; they do not really spell it out. As I say, I think it is both a useful activity for the committee to have been involved in and I think it is well within the terms of the resolution of appointment of the committee. I would be interested in hearing from those with experience on the committee about this argument that there somehow was an abuse of the committee's process.

In addition to alleging abuse of process, the dissent challenges – although a little bit half-heartedly – the scientific consensus concerning anthropogenic climate change. They state that:

Coalition Members and Senators recognise that there is conflicting science about the cause and extent of climate change.

We believe however that 'the planet should be given the benefit of the doubt' and that responsible action should be taken to reduce our global emissions.

The dissent then goes on to say that the majority report is selective in the evidence it relied on, giving one example of an allegedly selective quotation of the CSIRO scientist, Dr Andrew Ash. The debate there was about whether the problems with the drought along the Murray-Darling Basin were anthropogenic or really related to El Nino. Dr Ash's answer in questions was:

... in terms of the historical rainfall patterns, as I said, over the Murray-Darling they are still within the natural bounds of variability from El Nino and Indian Ocean influences, so I think we can say that is certainly the case. As I have said before and reiterate again, the temperature increase we have seen even in the last hundred years does exacerbate slightly that natural drought that we see ...

So he is saying, 'Yes, it's within the bounds of normal variation', but he is also giving anthropogenic climate change a role there. The dissenting report says that

this demonstrates that really it is more about El Nino than man-made climate change. They say that:

This evidence by Dr Ash seems too much of an inconvenient truth to the majority to consider as worthy to include in the Report.

I really think that the coalition are clutching at straws there and that the evidence they have selected is not a great example for their case.

The dissent also argues that the report fails to deal properly with the economic impact of the target set for Australia. Perhaps that is a valid point. Perhaps the report could have devoted more time to explaining how green technologies could both save the planet and support a strong Australian economy in the longer term.

Finally, the dissent adopts a wait-and-see approach, arguing that instead of committing to a target and taking it to the negotiating table Australia should wait and see what position the rest of the world would take. I have to say that I found that a bit extraordinary. They were the aspiring leaders of the country. When you go to a conference, surely you have to have a negotiating position unless you just want the conference to fail – of course, the conference did actually fail in the end. So I found that criticism a little bit remarkable.

That gives you a flavour for the kind of debate that was going on between the majority and the dissent in these two reports. What do they tell us about JSCOT and democratic input into treaty making? One cynical viewpoint would be that they tend to confirm that, just as when there is consensus, when there is a division of opinion the result is not that much different in terms of impact on the government.

But I think a more interesting and perhaps subtle point to make is that the reports may also highlight a potential conflict at the heart of this discussion about democracy and treaty making. As I have said, I think a functioning democracy is based on informed debate. It is not just about having a say. It is about really listening and learning from each other and even perhaps being able to change your mind. I think I perceive a bit of a conflict here between the will of the people, whoever they may be, and the role of experts in a particular area, whoever they may be.

In the examples I have given, these two factors – expertise and the will of the people and the say of the people – collide in interesting but predictable ways. In the case of CEDAW, we see the dissenting report using majoritarian rhetoric regarding unrepresentative and allegedly ideological treaty bodies sitting in Geneva. So the experts on protection of women's rights are domestic bodies such as the Sex Discrimination Commissioner. Other potential candidates for the role of expert, such as non-government organisations who work with women on a daily basis, or people nominated by other governments to sit on the CEDAW committee, are, on the other hand, ideologues; they are not true experts. In the case of Kyoto, meanwhile, the majority attempted to base their recommendations

on scientific expertise, and then the dissent really attempts to undercut that by saying that expert opinion is really more divided than the majority thinks and to argue that, actually, despite the appeal to science and an evidence based approach, the inquiry itself is an abuse of process for political ends.

There is an entire literature on the role of experts and democracy, and I certainly do not want to claim that experts have all the answers. But it would be good to see an attempt to grapple with the ideas and evidence of experts, whether they are experts on sex discrimination or scientists, rather than simply portraying them as outsiders or ideologues or hopelessly divided or mere political tools. By eschewing or downplaying the role of experts, I think the dissenters in these two cases also overlooked the benefits of Australia participating as a citizen on the world stage.

Ultimately there are benefits to Australia's participation in human rights scrutiny that go beyond the improvement of the position of Australians. We have powers of moral suasion when we lead by opening ourselves up to scrutiny and criticism that are entirely lost to us when we do not participate. Meanwhile, of course, lack of leadership internationally in the area of climate change will be catastrophic for Australians and the entire planet in the longer term. What I want to leave you with is a note of concern that perhaps the price of participation by the electorate in treaty making may be very high and inconsistent with the national interest if it merely sees our politicians playing to existing popular sentiment instead of inspiring informed public debate. I will conclude there.

Prof. Saul: Thanks, Pene. I would like to introduce Professor Andrew Byrnes, who is an expert, like Pene was speaking about. Andrew was an external legal adviser to the Parliamentary Joint Committee on Human Rights, which is a position I do not think JSCOT has had the advantage of previously. Andrew is going to speak to us about whether JSCOT's remit should be expanded to instruments of less than treaty status.

Prof. Byrnes: Thanks, Ben, and my thanks also to JSCOT and to the secretariat, Lyn and her colleagues, for the invitation. As Ben mentioned, I come to this not just as an international lawyer who has observed at a distance the operations of JSCOT for some years but also having had the privilege of serving as the external legal adviser to the Parliamentary Joint Committee on Human Rights, and therefore I have had the opportunity to see close up the side of parliament that most people do not get to see – the non-question time adversarial behaviour of members of the House of Reps and Senate and the bipartisanship, the very substantive professional way in which parliamentarians go about wearing their hat as parliamentarians. Yet many of the critics of that committee raised similar issues to the sorts of criticisms that one could raise about the JSCOT committee – that, by the time the subject of inquiry – a bill or a treaty – gets to the relevant committee, it is too late to make substantial changes, and that therefore pre-

arrival, presubmission, prenegotiation or during the negotiation are critical stages for any real input from parliamentarians and others.

The second issue is that on big-ticket political items it is very difficult, whatever a committee says, to move the government. We have seen this in human rights – the big things went through. Those big things went through even though – certainly in the years that I was there – all the reports criticising a particular piece of legislation or raising human rights concerns were adopted by consensus by parliamentarians who shared that concern substantively but who were then constrained by the conventions of party political behaviour to vote in favour or against the particular problematic pieces of legislation. That, I suppose, is a constructive tension.

There are changes at the edges and perhaps in the attitude and the understanding of those who serve on these committees, their colleagues in the parliament and the broader community as result of the process. There are 125 senators or members of the House who have served on the committee. The fact that they have been exposed to an internationalist perspective will surely have some benefits for the country down the track in bending it in different ways. It is very difficult to document it in a way of a recommendation accepted or a recommendation rejected sort of way.

However, my focus today is not so much on the ways in which JSCOT has carried out the mandate it does have in relation to treaties but rather to suggest an expanded mandate. My argument depends to some extent on the assumption, which some may question, that JSCOT has done some good things and plays a useful role either in terms of producing results after its examination or perhaps in a disciplining effect in the way in which government presents its case to the parliament, marshals evidence or whatever – although I think the same sorts of comments that have been made about human rights compatibility statements, their vanilla nature, their tendentiousness and their failure to address issues could be made about many national interest analyses. I am thinking, particularly, of the one accompanying the China extradition treaty, which has recently been referred to JSCOT, but there are many other examples.

I am going to argue that the nature of international law making and regulation today is much more complex than one which focuses only on treaties, and that the principal objects of the 1996 reports were only partly achieved by a focus on treaties – a very 19th-century approach, to bring it up to date from Ben's medieval analogy reference. I am going to be making six arguments – and this may be the only chance I get to articulate them, given the time.

As I have said, a significant part of the regulation of both bilateral and multilateral cooperative activities internationally is now governed by not just treaties but arrangements of less-than-treaty status. That is true particularly of bilateral but also multilateral relationships. One only has to think of the Financial Action Task

Force, the Kimberley diamonds process, the sustainable development goals – all are instruments of non-treaty status which have an enormous effect in terms of the way in which governments and states behave. To focus only on the formal distinction between treaties and such documents fails to understand the complexity of interstate relations and how norms influence relationships. It is a very formalistic approach. So I am going to be looking at those instruments of less-than-treaty status.

My focus, in particular, will be on bilateral ones. That general situation, as is the case with Australia, makes regular use of MOUs and what I will call ILTs – instruments of less-than-treaty status – to embody arrangements for cooperation with other countries both on a government-to-government, foreign minister-to-foreign minister but also on an agency-to-agency basis. This is the sort of phenomena identified some years ago by Anne-Marie Slaughter in terms of transnational governmental networks. My third point is that the Australian practice in relation to the publication of these documents is inconsistent, unsystematic and incoherent. Many of these simply appear not to be available to the public and without any apparent good reason.

Fourthly, some of these MOUs cover areas of significance and may give detailed content to the exercise of existing, broad administrative powers conferred by statute – for example, in areas relating to the exchange of information such as criminal vetting – and therefore can have significant impacts. Some of the fundamental reasons for adopting the 1996 treaty reforms – transparency, the accountability of the exercise of government power and transnational relationships – apply as much to MOUs as they do to treaties.

My sixth point will be to suggest a number of steps that can be taken to audit the existing state of these instruments to adopt a systematic policy about publication and to provide for JSCOT to have a regular, systematised opportunity to review those that may be of significance. JSCOT, of course, under its current resolution of appointment, does already have such power to look at those instruments if they are referred to it by either house of parliament or a relevant minister.

How did I get to this issue? It goes back about 10 years – and some of my international law colleagues will have heard this from me before, but I think it is an interesting example to illustrate the point. In the years following the 9/11 attacks Australia entered into a number of arrangements with countries in our immediate region and beyond to enhance cooperation in efforts to combat international terrorism. Each agreement was embodied in a document entitled 'memorandum of understanding' between Australia and the other government, and the conclusion of the MOUs was announced in a self-congratulatory manner by relevant ministers in a series of ministerial press releases. By the end of 2005 Australia had entered into 12 of those, and since that time the number has expanded to 17.

Based on the relevant press releases and the few MOUs that have become available informally, it appears that these agreements set out a framework for cooperation between Australia and the other government. The designation of the agreements as MOUs obviously indicated that they were not intended to create binding obligations and were thus not to be viewed as treaties under international law. The MOUs were not published by the Australian government following their conclusion, nor, it appears, by any of the other governments.

The Australian government declined requests for copies of the documents, stating that to make copies available to the public would be inconsistent with the expectation of the other parties to the agreement. The government – and when I say 'the government' I am talking about senior bureaucratic officials – refused to take up suggestions that it might approach the other governments concerned to see whether they had any objections to the release of the documents. It is not clear that they did, given that when I wrote to two of the governments – Fiji and the Philippines – they sent me copies of the MOUs by return post.

To the best of my knowledge these MOUs have never been made public by the government, or, if they have, they are certainly not readily retrievable on any Australian government website. Yet it appears all of them are still in force, as they are listed on the website of the Department of Foreign Affairs and Trade as among the '[k]ey elements of Australia's international counter-terrorism efforts'. Some of them are also referred to on the relevant country brief pages on the DFAT website.

As I said, they are fairly anodyne documents when you look at them – general expressions of willingness to collaborate across a number of areas in relation to counter-terrorism. My particular interest – and those of others – was in the context of the debates around the importance of referring explicitly to the observance of human rights in counter-terrorism efforts. I was particularly interested to see whether these MOUs contained any explicit reference to those concerns. It appears – certainly in the ones that I have seen – that they did not. But it was very difficult for there to have been informed debate about this process without access to these, as I have said, relatively anodyne instruments.

But they are just one example of the many ways in which the Australian government and its agencies enter into such arrangements with foreign governments and agencies. Although they do not necessarily create international legal obligations, they nonetheless give rise to expectations on both sides, can significantly affect the way in which the Australian government agencies work with their international counterparts and may, indeed, have an impact on the rights of Australian citizens and residents. They are not treaties, so they do not come before JSCOT, nor is there any formal requirement that they be made available to the public. If they require legislative implementation – and many do not – they may come to the attention of the parliament. But, in many cases, that will not happen, and parliament will not get to see them at all.

Scholars have pointed to the growth in informal international law making – there are advantages; there is flexibility; there is the non-treaty status of them and so on. But the questions that I have in this context, which one scholar has called 'the relentless rise of the MOU' are: how many do we have? What areas do they cover? Are they publicly available? Do any of them raise significant policy issues that should be the matter of public debate? Are they regularly laid before parliament or a parliamentary committee?

Does parliament otherwise get the opportunity to view the important ones?

As I said, there appears to be no consistent policy or practice in relation to the publication of these. I have not undertaken a comprehensive survey, because it would be impossible given the nature of these, but I have come across quite a number of them. Let me illustrate why I think they are important. There are some patterns of publication – as I said, incoherent and some of them are important. There were 17 MOUs on cooperation in relation to counter-terrorism. None were published, though many are mentioned on DFAT country pages and on counter-terrorism pages. MOUs in relation to treatment of asylum seekers on Nauru and Manus Island appear on the DFAT country pages and also on the thematic people-smuggling and trafficking page, yet the MOU on resettlement of refugees in Cambodia appears only on the Cambodia country page. An MOU on migrant smuggling with Sri Lanka, which was of course quite controversial and a matter of public debate, was not published until three years afterwards and in response to an FOI request, and it appears on the FOI register of the A-G's Department. I think the response was to a request by the Human Rights Law Centre. Sometimes the only place you can find them is on a foreign government's website – for example, an MOU with Indonesia on cooperation in the field of education; one area where there are lots of MOUs. It is referred to on the DFAT web page without any links to anywhere. The only place I could find it was on the Republic of Indonesia treaty database, the English version. An Australia-New Zealand arrangement on trans-Tasman retirement savings portability, which is referred to in Australian legislation, is available only on a New Zealand government website, not any Australian government websites. There are MOUs on the exchange of criminal history information for vetting with New Zealand. There was a trial memorandum, which appears only as an annex to an evaluation report on the A-G's website. That was apparently renewed in 2015, but it appears that one can find the contents of that 2015 MOU nowhere. It was obviously of some significance in relation to privacy concerns, the protection of the rights of minors and other issues.

By contrast, a US-Australian memorandum of understanding on combating crime, which is related to our continued enjoyment as Australians citizens of the Visa Waiver Program and travel to the United States, was published by both governments – in fact, by both leaders – at the time it was signed and it entered into force, on both the Australian prime ministerial website, which was archived

and it became unavailable through that form, and the President of the United States website. I suppose an example of best practice in this field is that ASIC has entered into over 50 MOUs with its counterpart securities and regulation agencies in other countries. All of them are nicely assembled on the ASIC website and, indeed, on the websites of its counterparts.

I go to some other examples of why this might be a concern. Sometimes these things are referred to in legislation and yet the document is not put before the parliament at the time the legislation is considered and it is not available publicly, either as an annex or a schedule to the legislation or otherwise. One example I have come across was the International Development Law Organization regulations, which was to confer privileges and immunities on IDLO, although they no longer have an office in Australia. The explanatory statement says the regulations give effect to a memorandum of understanding, which is not available and was not attached to the explanatory statement. It gets slightly worse. An expression used in the regulations and in the memorandum of understanding has the same meaning in these regulations as it has in the memorandum of understanding. How you can know whether the same term is used in the memo and given the same meaning in the regulations is difficult if you do not have a copy of the memo available anywhere on the public record. That, after all, is why we have what is now known derivatively as the federal register of those sorts of documents.

'So what?' you might ask. 'Does it make a difference?' Well, sometimes it does. One example I found was a striking contrast between Australia and New Zealand in considering the very same type of agreement with the United States. I have already referred to the agreements in relation to combating crime which would enable both Australia and New Zealand citizens, or at least most of them, to continue to enjoy the Visa Waiver Program.

In Australia, as I said, it was enacted as a memorandum of understanding. The US-New Zealand agreement on the other hand was an arrangement of treaty status. If you read them, they are almost identical. The difference is a formal legal one of treaty-non-treaty status. In terms of practical impact, there is probably no difference. In Australia it was a non-binding instrument with the same content. It was not laid before parliament, it did not have a parliamentary review and, presumably, it had no statutory implementation that we know about. In New Zealand, it had the arrangement of treaty status with the same content but it was laid before parliament. There was a full national-interest analysis of the challenging provisions and a detailed review by the New Zealand Foreign Affairs, Defence and Trade Committee with a number of recommendations to the government, which were considered. They were mainly concerned about the reporting issue, and there were some legislative changes. Purely, there was the contingent and fortuitous decision to go with treaty status versus a memorandum of understanding – the same sort of agreement essentially. In Australia we had

nothing. In New Zealand they had a full and proper parliamentary review. It is fairly clear where I am going.

To summarise the answers to the questions that I set out at the beginning: how many are there? We do not know. What areas do they cover? Lots. I have mentioned some and they probably cover many similar areas to treaties. It may be that they cover every area of government international activity. Are they publicly available? Some are, some are not. There seems to be no rhyme or reason, even within different portfolios and even within the same section. There are those that are and those that are not. Do they raise significant policy issues, affect the rights of citizens or the interpretation of legislation? Some do and many do not, but we do not know the full extent. Are they regularly laid before parliamentary committees? No. Does parliament otherwise get the opportunity to review them? Possibly; if they come in attached to bills or delegated instruments or are considered by a portfolio committee or at estimates. But it is happen stats and it may happen a long time after the urgency of consideration has passed.

So what do we do? These are my suggestions: firstly, we need to do what we did 20 years ago with the Australian Treaties Library which is a documentation and a listing exercise. What is out there that is important? Some, perhaps, are confidential and cannot even be listed publicly. We need to adopt an approach in the negotiation of those instruments that makes it clear that publication will be the normal approach adopted by the Australian government, unless a compelling case is made about the subject matter or the nature of the relationship and that they should be kept confidential from the public. That does not mean that they should necessarily be kept confidential from the JSCOT. We need to develop a coherent publication policy and, with this presumption of openness, perhaps a new library in the Australian Treaties Library. I will disclose my interests here: AustLII, which hosts the Australian Treaties Library, is jointly run by my university and UTS. There needs to be a regular reporting to parliament of instruments of less than treaty status that have been concluded, that are being negotiated or that are being proposed. There needs to be an expansion of JSCOT's mandate, beyond what it already has, to ensure that all MOUs are brought to its attention. It can then decide which are of significance to consider. No all will be. JSCOT, as we have seen, already has a lot on its plate. I think thirty treaties a year since 1945 is the average of those that appear in the Australian Treaty Series. Clearly, some of those are quite significant.

So that is my prescription. In 1996, the 19th century approach to treaties was great. In 2016, I think we need to reflect on the complexity and our understanding of how international norms are generated, how international relationships are regulated and the important accountability and transparency issues from a democratic perspective. JSCOT seems to be the place to repose that expectation.

Prof. Saul: Thank you, Andrew. We have a bit of time for questions. Please state your name for the purposes of Hansard. Are there any questions?

Prof. Scully: Jim Killen, in his autobiography, expressed the fear that parliament's authority was being undermined by the parliamentary committee system. He did not give express reasons for why he had this fear, but I am assuming he was implying, essentially, that government members of parliamentary committees were afraid of bearding government policy because that was damaging to government members' careers and political ambitions; therefore, the government could campdraft parliamentary committees in a way that was not applicable to parliament as a whole. I surmise that may be why people describe JSCOT as just a process that involves window dressing.

In terms of constructive solution to what may or may not be a real problem, I was wondering has anyone thought about transforming JSCOT into a Senate standing committee on treaties and stipulating that any minister with responsibility for foreign affairs, including overseas development assistance, must be appointed from the lower house and therefore this apparent conflict of interest would be obviated? That is my question.

Prof. Saul: Any advantage to changing the status?

Prof. Matthew: It may well be a question for the politicians and getting their expert opinion on what they think about that. But it is an interesting suggestion, because I think there is a perception that, if you are dealing with a government controlled committee, the results are going to be fairly predictable. I note in the 10-year review of JSCOT that language was actually disputed. The idea that you had a government chair and a majority of government members meaning it was government controlled was actually disputed. But certainly, there is some merit in trying to think about a balanced representation to try and get away from those problems.

Prof. Byrnes: I think it is going to depend on the culture of the particular committee. My only real experience has been the Human Rights Committee, which was evenly divided between government and non-government members. If you have a Senate committee, obviously, you are going to have government and non-government members who will have responsibilities within their party frameworks in relation to particular policy. How that translates into the consideration of a report can be something different. There are probably quite striking differences across the parliament. Some committees divide regularly on political lines, others do not and others have different patterns. I think others, particularly those who have served on a range of committees or have appeared before them, would be able to give more on that.

Mr Campbell: I have a question for Andrew. Australia does not have something called a secret treaty but, on the other hand, there will be arrangements between countries that do contain highly confidential material. My question to you is: what

would you define as an instrument of less-than-treaty status, bearing in mind those factors?

Prof. Byrnes: It is defined in the DFAT treaty-making kit. I do not have the definition here, but it seems to me a formalised agreement. I am just opening up the discussion. I do not come with something which is going to cover all of those, but we have formal signature by heads of agency, by ministers, by ambassadors. It is relatively normative and a relative formality. I think that needs to be worked out in terms of what is out there and what government has been doing it. It is the old problem, isn't it, that the person outside does not know what is being done inside, so it makes it hard to comment on that. For example, in relation to confidential issues, I can accept that there may be some issues which should be kept confidential from the public. There are some, I know – I do not know what they are; people in this room would. That case has to be made. I think there is a difference between publication to the public and publication to a parliamentary committee. We see that the Joint Parliamentary Committee on Intelligence and Security gets an awful lot of stuff, as someone commented earlier. Why cannot the Joint Standing Committee on Treaties also be given privileged access? Whether there is a category to which no one should have access, other than the inner sanctums of government, I do not know – it may be that there is – but I think there is a nuanced approach that you can take, which would mirror what happens in other sensitive areas.

Mr Mason: Addressing Andrew's presentation, which I was very impressed by in terms of applying the logic of overcoming the democratic deficit in regard to treaties making. As a matter of logic, why do we not do that with MOUs?

Andrew made the point that we just simply do not know what those MOUs are out there – who has them, what they are for et cetera. Let me say, as someone who does deal with MOUs, we do not really know either. There is just a huge number of MOUs that are being done by a vast diversity of government agencies and they range from things as anodyne, if you like, as sister city relationships to very sensitive, highly classified defence relationships. Between that spectrum of anodyne to really highly sensitive, there is just everything out there. All government agencies are encouraged to lodge a copy of the MOUs with us, but there is no way that we could possibly follow up and do that precisely because they are not treaties and therefore they do not go before ExCo et cetera.

The MOUs are out there and they are really the equivalent of any other official government documents which are both classified and unclassified. They are being done by an entire range of government agencies and, for that matter, states and territories. As admirable as I think the concept is, we might need to try and get a handle on all that. Since no government agencies are required to reveal what it is they are doing, unless it is through FOIs or something, then, as a matter of practice, I do not quite know how we would get those MOUs together or how

JSCOT would then start to be able to look at them. Perhaps there is some way forward on that, but I am wondering whether Andrew might have some ideas about how his idea might be further implemented.

Prof. Byrnes: As I said, I have the disadvantage of not knowing what is going on and I am talking about it, to some extent, from ignorance. I think Penny also wants to make a comment. But there are different ways. The fact that we do not know – it is the exercise of public power across national boundaries affecting rights and the conduct or the exercise of executor statutory powers. That is why we have an information publications policy incumbent on each department under the FOI legislation. If you look at those pages, they are not published. All sorts of internal stuff gets published, but those do not. Why not? It should be addressed as a whole-of-government issue. One could start with departments and one could start small. It may be that you are right: it may be that there is so much cross there, in terms of the real big issues, that it is not worth doing. There are examples that I have just pulled out from Google, which is everyone's friend, but I had to work hard chasing stuff down. It is hard to find ones which are of moment.

Prof. Mathew: I just have a brief comment and perhaps a question for Bill. Are we saying that MOUs are not law and therefore the democratic deficit does not actually apply to them? Is that one of the issues that is lurking in the background here? I think Andrew has just put forward some powerful arguments about the fact that, even if they are not treated as binding, they are still important to publicise. As a refugee lawyer, some of the ones he talked about are close to my heart – the ones about offshore processing and resettlement – and I would be a bit surprised if our partners thought of them as non-binding, really. They would be a bit cross, if we did not come good on our commitment, so it is quite a powerful argument, I think, at the end of the day for publicising them.

Prof. Saul: Thanks, Pene. Unfortunately, we are out of time, so we are going to close off debate there and be very undemocratic. I have some gifts for our speakers. I think we have some organic chocolate and what I suspect is a parliamentary tea towel so you can wipe your dishes on our democracy! I just have a quick announcement before we break for lunch. I would like to invite Katrina Cooper, if she is still here somewhere, to formally open our exhibition called *Treaties and Australia: Reflections on 100 Years*. Unfortunately, we cannot have the opening in front of the exhibits today because of the chaos going on outside but we would encourage you to go there during the lunch break. It is on this floor towards, the marble foyer on the Senate side, which is on the left side.

Ms Cooper: Our original plan, as Ben has alluded to, was to actually do the opening in front of the images but, I think, perhaps this is a better place to do it because it is very noisy out there and the place where the exhibition is very narrow. When you leave, if you head down on the Senate side, just before you get to the Magna Carta on the right, along the wall you will see the exhibition.

I have to say, it is a really lovely exhibition. I think it is a fitting way for us to mark the 20th anniversary of Australia's treaty reforms and I am absolutely delighted that we get to keep some of those images afterwards. I look forward to putting them up in the department, because they really are very historic moments. They showcase several of the key historic moments and historic treaty texts that have helped to shape Australia and how we conduct our international relations.

We are flashing up the images in no apparent order just to give you a bit of a sense of the exhibition before you head down. I did want to quote Dean Acheson, President Truman's postwar Secretary of State, who called his memoirs, somewhat famously, *Present at the Creation*. What he meant by that was he had been really privileged to take part in shaping the postwar 20th century world order. He, as some of you may know, helped us sign the economic aid program to Europe that became known as the Marshall Plan and he was also the architect of the transatlantic security plans that would help create NATO.

Our little exhibition illustrates that Australia too was present at the creation of some of the 20th century's most historic and important treaties. As I said, it features some key treaties that had a significant impact on Australia's national interests but they have also redefined the way in which the world operates from the day they were signed, right up until the present day. In each of the cases that we have highlighted, Australia was not only there, present at the creation, but we were an active participant and active advocates in the treaty text.

There are eight treaties that we are featuring. One of them, for example, is the 1919 Treaty of Versailles, the Paris Peace Conference, and the then Prime Minister Billy Hughes, attended the negotiations of that. He reminded leaders, notably US President Woodrow Wilson, that he spoke on behalf of 60,000 Australian soldiers who lost their lives in the First World War. He signed the treaty. It was the first ever signed by the recently formed Commonwealth of Australia and, having no official wax seal, the delegation used a button from an Australian soldier's uniform to create a seal for the occasion. You can see the image of the seal there and you can see the treaty that is signed; it is the third one down the left and it is quite a lot bigger than the others and then extracted on a storyboard so you can see it a little bit closer up. That is really worth having a look at.

We have also got the Charter of the United Nations there – a very critical treaty signed by Doc Evatt, 26 June 1945, and of course he was a very active in that negotiation. He led Australia's delegation. It, to me, I think – and to many – epitomises the role that a small medium power can play in a really important treaty negotiation.

We also have the ANZUS treaty, which is the bedrock of Australia's security and defence relationship, of course, with the United States. That very much has shaped Australia's strategic environment since the fifties.

I could go on and on but I should stop there. There is also the Lombok Treaty and the FTA with China to illustrate our important bilateral treaties, and both of those treaties obviously have had, and will have, a lasting impact on how we conduct our foreign strategic and trade relations.

A lot of work has gone into this. The treaties are the originals that come out of archives. They are all very protected. I would like to thank the National Archives of Australia. I am told that I cannot whip them away to put in the Department of Foreign Affairs and Trade, although I would like very much to do that. Some of them are very fragile. I also thank the Department of Parliamentary Services for doing a really terrific job in putting the exhibition together for us, and of course our own treaties committee secretariat for all the hard work that they have done on that as well. I now invite you to proceed along the lines I have suggested and have a look at the exhibition.

Proceedings suspended from 12:30 to 13:45

Session 3

Prof. Stephens: Good afternoon everyone, and welcome back to this conference to celebrate the 20th anniversary of the establishment of the Joint Standing Committee on Treaties. It is a great pleasure to be invited to this special event. Several speakers today have highlighted the various benefits provided by JSCOT. One that I would like to highlight, which I think is underemphasised, is the educational role that JSCOT provides. Speaking purely self-interestedly, the national interest analyses JSCOT reports are indispensable teaching resources for me, when I teach my classes in international law, and explain the treaty-making process and the content of treaties that are negotiated and concluded.

In addition to teaching and researching at the University of Sydney in international law, I am also currently the President of the Australian and New Zealand Society of International Law, which brings together international law scholars and practitioners, especially in government in Australia and New Zealand. If you have enjoyed today, you are sure to find of interest ANZSIL and its many activities and events, including our annual conference, which will be held in Canberra in June this year. You would be very welcome, if you are not already a member of ANZSIL, to join our great society and participate in our activities.

In this third session today, the conference turns to consider an area of particular contention in treaty making, namely treaties concerning trade. We have heard today much commentary on the importance of treaties to Australia as a middle power that advances its interests through international law rather than via the projection of military or economic power. Treaties are perhaps sometimes regarded as arcane and remote from the ordinary lived experience of Australians, yet, as the committee chair noted in his opening address to the conference today, many treaties have an impact on ordinary life. Mr Hartsuyker gave the example of trade agreements, which are the subject of this session.

We have also heard today a good deal about the role, relevance and importance of JSCOT. It is especially appropriate that we are gathering here today to celebrate JSCOT, as it is, in my view, an institution that is sometimes taken for granted. Perhaps it has worked so efficiently and generally in such a bipartisan manner that it is regarded largely as a comfortable part of the furniture. However, that is not to say that JSCOT is, or should be, immune from criticism or suggestions for reform and improvement, and some of these have been advanced today. It is interesting to see that several of our political representatives are actively considering ways in which JSCOT could be improved. It is important and legitimate that such criticisms are made and considered in order to maintain the legitimacy of the treaty-making process.

As Senator Penny Wong noted in her remarks at the JSCOT dinner yesterday, before heading off to the Senate for the marathon debate on electoral changes, it is vital that there be public confidence in the treaty-making process, and JSCOT is a key vehicle for achieving this. Nowhere is this more acute an issue and question than in relation to trade treaties. This is very nicely illustrated in Report 160, contained in your show bag. The Sydney Royal Easter Show has come early to parliament here. I think if I took my children the show bags from here they would be a little bit disappointed, but for international law tragics like us they are hugely satisfying show bags. Report 160 is terrific. As you see from Report 160, and from the statistics that Lynley Ducker presented, trade treaties have excited the most interest and controversy compared to most other treaties considered by JSCOT. The TPP, currently under review by the committee, is clearly the elephant in the JSCOT email inbox.

Katrina Cooper, from the Department of Foreign Affairs and Trade, noted in her remarks that trade treaties are typically negotiated over a lengthy period of time, involve complex issues and are politically contentious precisely because they impact on citizens directly. The purpose of this session is to consider JSCOT practice as regards trade treaties, and to ask what is being done well and what might be done better in service of the overriding objective to maintain community trust and confidence in Australia's treaty-making process.

It is a great pleasure to introduce two speakers to you. First we have Anna George. Anna is currently an adjunct professor at Murdoch University, attached to the Sir Walter Murdoch School of Public Policy and International Affairs, and is also an associate fellow at Chatham House in London. Prior to taking up these positions, Anna was a career diplomat for almost 20 years with DFAT, with policy development responsibilities for disarmament, trade and social development agendas. She undertook overseas postings as a multilateral negotiator and ambassador. Since leaving DFAT, Anna has contributed to public policy agendas, including governance issues and global harmonisation policies. Welcome, Anna.

Ms George: We should all be very grateful to be here today, because we are having an insight into a very, very good institution that we should all treasure. Having both made submissions and appeared before the committee, I have to say that the work done here is of the highest professional standard.

What I will be doing is not so much looking at the individual trade treaties, because we have them in front of us in different ways, but thinking about these as newer trade treaties than the previous bilateral arrangements, which in many ways were quite benign and very focused. The trade treaties that have come to us since the Australia-US Free Trade Agreement are quite different in scope and in outcomes. They are massive – even if you just look at the number of pages – and if you can understand them from end to end you are much cleverer than most of us around this table. I have to say to Kevin, who has been working with us and reading the reports and being part of it: you deserve a medal.

I have taken the statement on the PowerPoint, which came out of the review of the Foreign Affairs, Defence and Trade References Committee, which really was looking at the issues because of the controversy about the treaties – and this is of course a quote from the Greens – because it gives you the sense of how the extent of the treaties is viewed: that they do not just stop at simple bilateral engagement; they go much further. The other side to that argument, of course, is: we already have obligations that we have to fulfil within the WTO and other treaties, so what is different about this? We are simply adding efficiencies, new agendas et cetera that are needed and are not necessarily working within the WTO. These two arguments can be valid in their own right, but I think with both of them you come to the conclusion, 'Let's look at the issue and see where it stands,' because they do go further and we really need to understand where those obligations take us.

Multilateral trade negotiations have always been much more manageable. As a middle power we can always negotiate more easily and better and work very hard to come up with outcomes that work for us. That is just because of the nature of multilateral negotiations – there are always those who want them more than others and you can balance that. They are also done on principles more than distinct obligations that you have to fulfil. But the major difference with those types of treaties is that you implement them yourself at the domestic level. You take away the obligations and you fix up your legislation and make it compliant, but it is in your terms that you do it. The big difference between that and what we have now in the bilateral treaties is the harmonisation agenda, which is basically saying that we should all go down the same track – ideally having the same rules, the same obligations, the same regulations – and we will have a better trade facilitation agenda. That is the ideal end to it – there are lots of pieces in between – but that harmonisation agenda is very important.

It is worthwhile just registering here that those who disagree with the treaties are not really doing it on the basis of the non-tariff barriers. It is not the trade issues

they are talking about; it is the other issues, what are called behind-the-border agendas, the obligations that come into our own policy space. There are especially the dispute provisions but there are also ISDS provisions, which I think you all know have been very contentious. What I have certainly come to the conclusion about is that JSCOT works fantastically well to bring out the areas of contention and the areas of agreement. It provides a space for those who wish to contribute to that, both from business, professional bodies and NGOs and individuals. But what does not happen, I believe, in this process is taking those outcomes into the future. What JSCOT allows us to do is listen, hear and read the evidence, particularly from the negotiators, who explain why something is not a problem, or why this person is saying this but really it is that. That is a very important set of information, because the negotiators know the meaning of the language and what they agreed on. Sometimes the language itself can be sitting there but there is agreement behind that, the meaning of which has been very clearly stated in the negotiations.

That type of information is really crucial. It is gold and it should be collected in some form into the future because all of these obligations have to be implemented, either through legislation or through guidelines. This will be more important in the future, because people change in DFAT and other agencies over time and they forget what happened from one agreement to the other. When you look at the series of agreements, quite frankly, I do not know how anyone knows what applies to whom, because they all have slightly different interpretations. Some do not have particular obligations in them; others do. Maybe DFAT has this – I do not know. You need some big document behind this with a matrix of obligations and how they fit with one another. That might be difficult to do, but I think it is essential.

But, more than that, I think JSCOT could ask that these interpretations be recorded in some way for the future. I think that would help the process within DFAT and other agencies because it would make them think: 'What does it mean? How are we to put it in place? What does it mean for future regulations? Why was it important?' The meaning gets lost over time.

I could tell you stories about how we negotiated different agreements. I did the OPCW – the Organisation for the Prohibition of Chemical Weapons. If you looked at that treaty you would say, 'Why on earth are you doing that?' but that was the outcome of a political negotiation that must be adhered to. So the subtleties should be recorded. What we tend to do in bureaucracies is work on incrementalism, which can be a safe way of doing things but can also lead you down a track that you might not have gone down if you had really thought of the consequences. So maybe a systematic recalibration is needed in this area.

The big difference with FTAs is actually the way the players are involved. Normally in multilateral negotiations there are only governments and

bureaucrats. They operate to bring the outcomes and negotiate on the part of Australians. In these FTAs, as we know there are stakeholder meetings et cetera. We will not even look at that process. What I want to do is look at the onward process, where there is a right for 'third parties', undefined, to come into the consultations, the dispute side and the ongoing dialogue that is set up in the various treaties.

In the US FTA, if we wanted to change our standards or our labelling, transparency would be the first thing. We have to tell the other party, which is fair enough. The government cannot, if it wishes, come in and discuss the issue with Australian officials – or Australian politicians, for that matter. But along with that, if we discuss that issue – and we always do talk with our industry, with our stakeholders, and say: 'Is this the right thing to do, to change this agreement?' – then they have the right to bring their third parties into that dialogue. That is an entirely different process to what we are used to, and that runs right way through the different obligations we have now. Quite frankly, I do not know how in how many places it happens, but you only have to look at one agreement and work through it and there are many instances where this happens. So bureaucrats are having to deal with that, both up-front within negotiations and, more than that, in the consideration of policy changes in the first place. To me this is one of the dangers I see in having this type of engagement.

If you know you are going to be hitting some problems with another country that does not like labelling this way but likes labelling that way, or likes only voluntary rather than mandatory labelling, you might look at having a policy solution that does not take you to that space where you are going to have to negotiate and maybe fight the case. That means that policy has been influenced before it even gets to the stage of deciding what you want. To me, that is one of the underlying problems here – having others outside of government and the bureaucracy in the negotiations. It is an issue that I do not think the Australian public would particularly like either.

Because of the rhetoric of trade, we always think that everyone is going to benefit. Trade agreements are basically not like that. There is balancing off: you win, you lose. Why does transparency appear as a one-way commitment? That is transparency with the other parties, not internally with the Australian parties. It is the same with harmonisation and unequal access. This is the problem that I come to this issue with. Global health issues are security issues now. There are non-communicable diseases – we all know about the obesity issue – and antimicrobial resistance. These are two very important health agendas that we must take care of. We will have to change our policy framework around labelling, standards, imports and exports et cetera, to deal with that. That will bump up against a lot of the trade agreements.

This language is now in the China free trade agreement. I am very pleased with this. It was put in because I talked to the committee and explained to them the real issue of why we must take care of public health policy. So they have recorded this. What I would like to know – I have been speaking with the new chair – is how we carry this conclusion from that last China free trade agreement report into the future. It does ask for that be done. So I leave that with the good people in this room who do all this work, and I look forward to the outcome.

I will give a couple of quick examples of where things went wrong with FTAs. There was a generic export industry that wanted to set up in Australia. It could not do this. It was decided that between the free trade agreement with the US and the way we implemented the TRIPS agenda that there was a problem. It could not be set up. But it could be set up in Canada, Israel and India. I am sure there was a lot of discussion. There are people around here who may have been part of that. This company was to produce generic drugs for export only, but they could not produce them here because we still had patents on those drugs. We have longer terms for patents than others, so that was one of the reasons. We lost an industry. That industry, with several millions, if not billions, of dollars, went to India. We lost a real opportunity for jobs, exports and security. We would have had a new industry here. That is a problem that we need to deal with.

The US free trade agreement is 10 years old. There are consultations coming out of DFAT. I think that is one issue that should be taken forward by those who should be taking this forward. I leave that there to be done.

The other example dates from quite a few years ago, when we were doing the patenting of genetic resources on breast cancer. One of the papers that looked at that, from ACIP, got the language wrong. This is the sort of thing that you or someone should be capturing. Steve Deady, the chief negotiator on the US FTA, stated to the committee, 'This is how the harmonisation agreement works.' You can see that he is saying that there is no obligation to harmonise. He is putting the subtlety in there. He is recording for all others to look at that best endeavours is simply that – no obligations.

Then what happened? ACIP, which is an expert body for IP, produced a paper. In the paper, on the left hand side you will see the language they put in. They put in 'must endeavour' and 'shall participate in international –'. It is totally different. The right hand side is the language. So you can see how misinterpretation takes place. What is happening there is they are saying, 'We have to agree and harmonise with the US, no matter what.' Whereas what it is is, 'We will work on collaboration in harmonised situations according to our needs and our own development structure.' It is quite different. This is national sovereignty. The other one is saying you must do it, which is not what we agreed to.

I hope that those who are working in and around JSCOT can find a way to record these very important pieces of information into the future.

Prof. Stephens: Thank you very much, Anna. Our next speaker is Patricia Holmes. Patricia is a career diplomat with the Australian Department of Foreign Affairs and Trade. She is currently the Assistant Secretary in the Trade and Investment Law Branch in the Office of Trade Negotiations, a position she has held since February 2015. Patricia was Australia's Ambassador to Argentina with concurrent non-resident accreditation to Paraguay and Uruguay from 2011 to 2014. Prior to her appointment to Argentina, Patricia was Assistant Secretary of the FTA Legal Counsel Branch, and has previously served in Geneva, in the WTO Branch, in Papua New Guinea and Vanuatu. She has also served as a WTO panellist, so she is a quasi-judge. Welcome, Patricia.

Ms Holmes: Thank you very much, Professor Stephens. Let me first acknowledge the chair and deputy chair of JSCOT. It is a great pleasure to be here and to recognise your work and the work of your colleagues and predecessors and of course, the secretariat including Lynley Ducker. I thought the statistics mentioned this morning were very interesting, which is not always the case with statistics. I was sorry to have to miss the middle session of the proceedings today, but I had to chair a meeting with a visiting Indonesian delegation who are interested in joining the TPP. It is interesting that the TPP has come up a lot today already and has been talked about in many different places and is getting a lot of attention from countries around the region. So I am very pleased to be back but sorry to have missed that session and very interesting presentation from Professor George. Can I also say, Professor Stephens, just to confirm your comments about how interesting ANZSIL was, I went over to Wellington last year and we had the inaugural Australia and New Zealand trade and investment law talks in conjunction. So it is a catalyst for greater consultation.

Consultation is the theme that I am talking about. Perhaps I talked a little too much before getting onto it, because I am a little worried that I cannot make consultation on trade agreements sufficiently fascinating for you all. It sounds a little dry, but hopefully I will provide sufficient background and engagement to keep you entertained or engaged.

I think it is important to go back 20 years to the start of JSCOT and imagine that I was talking to you about consultation on trade agreements at that time. Apart from us all being a lot younger and better looking, I do not think I would have much to say and you would not expect me to have much to say about the topic. Why would that be? Because 20 years ago there was not much in the way of consultations beyond immediate industry groups and very specific interests. We know that because 20 years ago the WTO was established, in 1995. We have heard that mentioned. Having spent much of my career in the WTO, I should say that I am a passionate supporter and believer in the WTO and multilateral institutions. I am a disputes lawyer, and the disputes are all in the WTO. Interestingly, we have not to date had a state-to-state dispute under a free trade agreement with Australia. I am sure it will come.

The WTO and JSCOT have that 20-year history in common. JSCOT followed closely on the heels of the establishment of the WTO and the conclusion of the Uruguay Round, which is really the last major multilateral trade negotiation. That was a really significant outcome for Australia. It brought agricultural trade under multilateral disciplines for the first time, brought services and intellectual property into the trade agenda, brought developing countries more fully into the global trading system and established a binding dispute settlement system. But the role of consultations in that was much more limited than we would expect today. So, as I mentioned, views were primarily sought from industry stakeholders, business groups and state and territory governments. There was the Trade Negotiations Advisory Group, which had representatives from trade unions, and that met with senior DFAT officers and the trade minister. In 1993, towards the end the Uruguay round, we established the Trade and Environment Working Group, which was open to NGOs with an interest in trade and environment issues, but that was right towards the end.

There were few opportunities for a broader range of stakeholders and the public to shape Australia's approach to the negotiation at that time and of course there was no internet or social media, which I think is quite an interesting sidebar, if you like, to today's discussion and consideration of this consultation and development of trade agreements over that 20 period. The same call for greater public participation in treaties that led to the creation of JSCOT also led to changes in the government's approach to consultation in trade negotiations. It is interesting also because, post the WTO, we moved to more bilateral and regional trade agreements, as I mentioned, as the multilateral route has proved more difficult. That said, the multilateral path is not completely blocked. We saw the trade facilitation agreement come through JSCOT and we saw ground-breaking agreement in Nairobi at the 10th ministerial conference late last year to prohibit export subsidies on agricultural products. So it can be done. There is progress at the multilateral level, but there is no doubt that it is very difficult and slow. That leads to the bilateral and regional approaches which we saw compared. JSCOT has seen a lot more activity on the trade front as a result of all these agreements.

Public submissions were first sought in the lead-up to the 1999 WTO Seattle conference. I think we were starting to see the role of social media then. There was the process of engaging with the public more through the trade agreements. We issued invitations for public submissions and hearings were heard for the first time in all capital cities and regional towns, but I have to admit that nobody knows what was said because our records are not that good. It would be interesting to consider what the concerns would have been in 1999 and what the consultations would have thrown up prior to the WTO if they had been held. I suspect they would have been much more narrow compared to the very broad range of interests that are engaged in trade agreements now, reflecting the coverage of those agreements, the interest that people have in those agreements

and the capacity to engage. It is quite interesting to look at not only what governments have done but also how society has responded to that engagement. Today we are much better off than those dark old days. We have social media, lots of consultations with all the relevant officials and very high-level record keeping. I should say, as we have heard before and to reiterate from the trade side, that consultations are important, are taken seriously and do influence outcomes. They are a critical part of the trade negotiation, before we even start negotiating, during the process, during the JSCOT process and, indeed, after the negotiation. Before we even make a decision to start negotiations we will have a consultation process. For the China agreement we started consultation in 2004 with a call for public submissions. More than 260 submissions were received throughout the process. We conducted direct consultations with 710 stakeholders, including business meetings open to the public and a very broad range of consultations. Just on that point, if we look to the TPP I think outcomes in relation to biologics and IP directly reflected community interest. The outcomes on the ISDS and the safeguards that have been included directly reflect the stakeholder comments and the input that was received.

One thing I want to just briefly turn to is what other countries do. That has come up particularly in the JSCOT process. In TPP and part of the Senate inquiry into the treaty-making process, this issue of what other countries do was raised. It is obviously a comparison where you look at what other countries do. The US and the EU do have different structures in terms of the treaty-making process. We heard a bit about that, and that obviously has an impact. The US congress has a congressional oversight group made up of members of various house and senate committees to provide advice to USTR – the US Trade Representative. The US congress also has a system of trade advisory committees and they have members from industry and culture services and state and local governments. They are provided access to confidential information on the trade negotiations on a confidential basis so that they cannot go out and share it. So it is not as if everybody has access in the US; there is a limited group that has access to negotiating text, but it is not this open system that you sometimes hear about. They are required to enter into confidentiality agreements.

There has been a lot of discussion in the EU on this issue of transparency and consultation. They have published in the TTIP – the Trans-Atlantic Trade and Investment Partnership between the US and EU – formal negotiating proposals on the rules part of TTIP that is shared with member states in parliament and publishes position papers which describe the general approach. But they do not make public market opening offers on tariff services and investment procurement. The US is not doing that either. I think that is the part former trade minister Robb was really focused on when he said that you cannot put all of your cards straight down on the table if you want to have a chance of winning the game. I think that

is an important element in considering the whole of consultation and transparency.

To then conclude, clearly the consultation process has evolved a lot over the last 20 years, and that has really been in line with community expectations. From the Uruguay Round in 1994 to the TPP in 2015, opportunities for stakeholder participation have significantly increased. There has also been the opportunity for parliamentarians to view the TPP negotiating text prior to the conclusion of the agreement, and the TPP text was released prior to signature. That was quite case specific, but it is an interesting fact in terms of how that was dealt with. We will continue to seek effective consultation processes that can be tailored to the circumstances of each negotiation and the relevant negotiating partner and ensure that our negotiators understand the broad range of interests and views across the community. I think that is quite important. There is also more work for JSCOT – India, Indonesia, the Regional Comprehensive Economic Partnership, the PACER Plus agreement with the Pacific and the scoping process we have just started with the EU. So I think we can be sure that there is a lot more coming on the trade agreement front.

Finally, we do see the consultations as a continuum from before we start, during the process, the JSCOT process and the decision to ratify, and then post-implementation, that they are working. We have had a recent outreach event on legal issues and points regarding implementation and compliance by our trading partners. It is my passion that we actually use those dispute mechanisms more to actually ensure compliance and that that is seen as part of the normal process of the implementation of those agreements – and we see that now in the WTO.

As Anna mentioned, we also have things like the joint committee meeting under AUSFTA, and we have called for expressions of views or any input into that. The EU we have just recently completed. Do not feel constrained by the time lines that sometimes appear on the DFAT website. Any submissions you make are of interest to us at any time. They will be read and they will be considered. I think that is quite an important point. You might feel that you are sending it off into the aether, but they are considered, they are read and they do influence them – particularly if they are very specific. There is a lot going on, and a lot will keep going on.

The final point on that: consultation does not mean agreement. We look, we read, we consider but we cannot agree with everybody. There will always be sections of the community which do not agree with an outcome and sections which are not satisfied with the compromises that are reached, because trade agreements are inherently compromises. It is really the government of the day advised by the negotiators and all the relevant parts of the government on the overall balance of the agreement. Thinking about that – what if we are not in? What if we are not in the TPP? What if we did not have the China agreement and were already behind

the eight ball with the New Zealand agreement? Where would we be without being in that game? I think that is fundamentally part of that equation. And we see the consultation process, particularly the role of JSCOT, as fundamental, and I am very confident that as we go forward many of you will be very fully engaged in that process. Thank you very much.

Prof. Stephens: We now have some time for questions, so here is your opportunity to put reform proposals to this group which may well get taken up, given we have got the chair and deputy chair of JSCOT here and given that trade is so contentious. Maybe people have bold ideas for reform and improvement to the system. The floor is open. There are mikes roaming around the room.

Mr Georgiadis: I run a film production company. In running our core business, my company deals with 14 to 15 trade agreements while navigating across the Asia Pacific. It is a bit of a nightmare. We are always having to relearn some elements of it when it adjusts and changes. It would be nice if DFAT ran information sessions or something that would actually keep us up to date with what is going on with the different activities that are current. I am just wondering whether you have a response to doing something like that.

Ms Holmes: There are two points in relation to that. I think that with the entry into force of the North Asia free trade agreements with Korea, China and Japan, there has been a really concerted effort by DFAT to get out and have these free trade agreement seminars, to put in place portals on the website and working with Austrade to try and ensure that industry businesses can use the FTAs, because that is the point. I think that there is a recognition that we need to do more, and we are stepping up to do more and to be as responsive as we can. I know we have got people that are responding to very specific queries about implementation and about how to use the agreements. I cannot speak to the specific issue of interest to you but there is a concern to do that and we are doing it. I know colleagues are travelling the country far and wide to do exactly that.

The above issue is about the differing agreements and how to ensure that you are complying with all the different obligations. I head up the area that has to consider the compliance issues, both Australian compliance and our trading partners compliance, and it is a challenge to consider all the different agreements. I think that is part of the motivation behind the more regional agreements, the TPP and also the RCEP – the regional comprehensive economic partnership. The objective, where we can, is to bring some of these issues back into the multilateral field. The trade in services, for example, is to try and raise the bar and try and bring consistency into the process. I think it is fair to say that it is something of a challenge, we are conscious of it and there are efforts to try and address that. I would say we would be very happy to put you in contact with people who can answer specific questions as well in relation to the areas of concern.

Ms Ross: Patricia, thank you very much for your talk. It was very engaging. I was interested to hear you speak about the position of the US where there is some limited access to negotiation text. I noted that you commented on the fact that, with the Trans-Pacific Partnership, there was some opportunity for parliamentarians to review the text subject to confidentiality agreements. I just wondered whether you would care to comment on the success, as far as you are aware, of any confidentiality agreements either in the Australian context or in the American context?

Ms Holmes: In relation to the Australian context, obviously it is a fairly limited experience. There were not very many parliamentarians or their staff who did actually come and take advantage to read the text so that was quite interesting. But as far as we are aware, that was fully respected. I could not give you a fully briefed response in relation to the United States but I am not aware of wide-ranging breaches of that confidentiality. There is a broad recognition that if you want to stay on these groups, you adhere to those confidentiality provisions and I think that is basically the way that it operates.

Obviously we do see leaks from time to time and it is hard to identify where leaks have come from. As you are negotiating and there are a lot of countries involved then that is going to be harder to identify. There may be leaks and they may have come from that these US cleared advisers but you would not necessarily know. I think that, broadly, it is considered to work from their point of view. But the context there is the role of Congress in the treaty-making process, which we heard about from Katrina Cooper this morning, and the way that that operates. I think that is another element in the consideration of how the US system functions.

Ms George: If I could just add to that, as someone who has been outside of DFAT and therefore much more tapped into some of the NGOs and the academics that have been following these treaties, over the last few years, academics have become very interested in the treaties since ACTA basically. Before then, they were practically missing from the agenda. But ACTA raised the agenda and made them much more aware.

There have been several leaks out of the US trade advisory committee, which is the very powerful committee that advises the US on this and drives most of the agenda I would say. That is how we found out most of what was happening – not because it ever came from DFAT. But you actually see the text that they put forward when it is leaked. You can trace it through and you will find it is in the treaty now, a lot of it is.

There have been leaks from there. I do not think they are meant to be leaks. I think they have dropped out and they have caught some problems, I am sure, because it has alerted those who want to understand what is happening with the treaties.

Perhaps others will be able to say, but I heard that in terms of parliamentarians getting access the conditionality around that was very strict. I think it would have

held them back as well in their thinking – even for later. So I do not think it was just a combined if you see it now and then it comes out. But there were other things there which may not have been very helpful at all – because I did hear a couple of real complaints about it from other members.

The confidentiality thing is interesting. But if you look at the EU, the EU is much more open and transparent. If they can be open and transparent, given the groups they have – especially under ISDS provisions, you saw what happened there – then maybe it is really worthwhile thinking about. That is because you might not want to see every single part of the text or know the bottom line, but there is an awful lot of things in there that need discussing – including when there are totally new agendas there such as the cosmetics and all of those things and the regulatory side. That took a lot of people by surprise. They were never in trade treaties before. I think that is a side that you really have to be careful of. If you surprise people too much, they are going to be very critical about it so you have to make that judgement of what is normal trade, what is different and how you advise them.

Mr KELVIN THOMSON: There are two things: confidentiality and consultation. Confidentiality would cut more grass if we did not, as a committee, get the impression that some groups are given a great deal of access while treaties are being negotiated. In particular with trade treaties, if we asked various agribusiness groups what they thought about the consultation arrangements, they said: 'The consultation arrangements are excellent. We couldn't possibly fault them.' But if we asked trade unions and civil society, they said: 'We are kept in the dark. We don't know what is going on.' So it seems to me that there is an imbalance in relation to these things and that is one of the reasons there is the push for more consultation while the treaties are being negotiated.

The second thing goes to the content of trade treaties. In the past, they were about tariffs and quotas. Increasingly, they are about a whole range of government policy areas, including migration program, the impact of investor state disputes provisions, copyright, intellectual property and so on. I think it is this latter area that is controversial and different from what occurs in some other countries. I understand in the US there is a ban on trade agreements going to determining, in any shape or form, the country's migration policy. It is the way in which the trade treaties have expanded to embrace a broader agenda, which has made them the subject of more controversy.

Mr Whittle: Ms George, I was really interested in your presentation about the nuanced approach to the language of the treaty based on the negotiator's own approach to the language and the role the JSCOT proceedings could play in our understandings of what our obligations mean under these agreements. Do you have any thoughts on a more systemic approach by the government to publish selective negotiating records after a treaty has been concluded to improve our

ability to understand what the obligations mean or whether that is feasible or impractical?

Ms George: It is a very good question and I would have thought there could be some work done in that area. If you look at the dispute settlement process, there are interpretations there that you can read and know where you are going. These agreements are horrendous, I can tell you. You have to say DFAT and the other bureaucrats that work in that area – it is an amazingly difficult task and capturing any one piece of information is quite difficult.

The actual starting of text, I think that is the most important thing. You often find it is nothing to do with what you put in there. It comes to you and then you have to work with it. Even negotiations around the understanding of what each line of that means is not simple. Even for negotiators who are really used to that arcane and esoteric language it is not easy – and then to try to match it all through.

This is why I think there is a real need for a lot of research to make that understanding to the departments, let alone to the agencies that will work with it and to the businesses that will try to understand it. I think that the figures are very bad about who uses free trade agreements, really bad. That is a total failure really. If we have gone to this immense bother – an immense lot of resources on it and giving up our commitments in different areas and confining what we can do – we should have something out of it. The rules of origin, all of that is really complex. Work has been done, I know, and it takes time. But perhaps there are more resources needed to go into that to explain that – and not done simply in legal language.

I think really you could go through that treaty and you could see exactly – I will give you an example. There was a leaked text from the EU when the Anti-Counterfeiting Trade Agreement was almost negotiated. They took the language of the Anti-Counterfeiting Trade Agreement. Two members – one said 'Every area that went beyond the TRIPS Agreement or TRIPS-Plus,' and he explained it. The other member was 'Every part of that agreement where a geographic indications applied,' even though geographic indications did not appear in the treaty. It was not anywhere in the treaty; it was their interpretation. That is servicing and delivering in a transparent way to their member states. The fact that it was leaked was really interesting for everybody else because we understood then what had happened. You would not have understood that without that text. Maybe that is one of the reasons it actually fell over, not just in this country, but in many others – well, one of the reasons. I think transparency should be right up there and it will help everyone. It is not simply to critique it; it is actually to allow it be used properly and creatively.

Prof. Stephens: Thank you Anna. We will have to leave the questions there. It remains for me now to present a small gift to both of our terrific speakers and for

you to join with me in thanking them both for their presentations. then we will adjourn for afternoon tea.

Proceedings suspended from 14:42 to 15:14

Session 4

Mr Rowe: I think we will resume. It is a great pleasure to participate in this seminar. My name is Richard Rowe and I am a former officer of the Department of Foreign Affairs and Trade who has been involved in the treaty-making process over a number of years.

I would like to congratulate the Chair and deputy chair and all the members of JSCOT, past and present, on this significant commemoration of 20 years of JSCOT. It was one of the significant reforms made in 1996, and I think that the way the committee has conducted itself in fulfilling its mandate has been exemplary. I would also like to thank Lynley, Narelle and all the other members of the JSCOT secretariat for the excellent arrangements that they have made for today's seminar. I agree that the show bag is something that we should all comment on and take pride in, as Tim mentioned. For me, the particular treasure to be found in it is Report 160: *A history of the Joint Standing Committee on Treaties: 20 years*. I think this is a really valuable text and a document that I am sure we can all endorse without any amendments or dissenting views.

Before focusing on customary international law and treaties, which is the subject for this session, I wanted to make a few brief comments on two issues that have been mentioned during the course of the day. One is the consultation question, and whether there is a need for increased consultation with stakeholders and with other interested parties in civil society. The second is in relation to confidentiality.

On consultation, as you all know and as has been referred to, consultation with civil society and stakeholders was one of the principles underlying the 1996 reforms. I would suggest, based on my own experience and what we have heard today, that consultation is very well entrenched and well established as part of the modus operandi of government through officials in relation to the treaty process. We have heard a lot about the consultations in the trade agreements context, and Trish outlined those very fully. But do not forget that, as has been alluded to, the consultations occur in relation to lots of other treaties as well. In other words, the views of stakeholders and civil society are sought and are taken into account and valued. That is an aspect of the 1996 reforms that is now well entrenched, and I know it is something that government departments involved in negotiations attach a lot of significance to. Also in the consultation context, it is important that JSCOT has also engaged very extensively – as you know, and as is reflected in Report 160 – in consultations with civil society and through seeking submissions on particular proposed treaty actions. So JSCOT itself plays a very important role in consultations on proposed treaty actions.

In relation to confidentiality, I share the view that was expressed that confidentiality between states party to negotiations is essential and is an accepted part of international practice. It is vital to maintain confidentiality between the parties, above all to ensure that the negotiations are conducted from each side to the maximum advantage. I would suggest that there is really no advantage in having public disclosure of negotiation texts in detail, because that could be inimical, and the point has already been made, to attainment of a state's interests – in Australia's case, in terms of the objectives we are seeking. So detailed consideration and examination of negotiating texts or negotiating strategies is something that I would suggest would be inimical to our interests and would not be consistent with international practice. I think it would be of surprise to the other party if suddenly the details of the negotiation were being aired and debated publicly, outside the direct negotiating context.

The other aspect of confidentiality, of course, is in relation to briefings which have occurred, as has been mentioned, to JSCOT on negotiations. The treaty making system is flexible enough to enable those briefings to be given, and they are obviously important. JSCOT itself has already, through the deputy chair, indicated the significance they attach to those briefings. As I said, the flexibility of the system allows for those.

Turning to subject of this afternoon's session, the relationship between customary international law and treaties, I think it is fair to say that, over the last 20 or 30 years, there has in fact been a significant evolution in multilateral negotiations in particular, as well as in bilateral negotiations. That phenomenon has been referred to by a former Foreign and Commonwealth Office legal adviser, Sir Daniel Bethlehem, as 'the cascading evolution of international law'. That has been particularly reflected in the multilateral treaties that have been negotiated during the last 20 or 30 years, particularly those under, and mainly under, UN auspices.

As a result of work that has been undertaken in the International Law Commission, quite often the treaty texts have reflected very strongly the codification of customary international law – international law that has been in practice but has not been codified. That nexus, that connection, between customary international law and treaties is a very relevant aspect of the contemporary international legal scene. That will be the focus of our session this afternoon. Our first speaker is Bill Campbell QC, who is General Counsel (International Law) in the Office of International Law in the Attorney-General's Department. Bill has many, many years of experience working on treaty-related matters, both in Canberra and overseas, and he is going to be speaking on 'Beyond scrutiny: new developments in customary international law on treaty interpretation.'

Mr Campbell: A favourite parliamentary amendment of mine was that made to the Therapeutic Goods Act in 1997, when it said, 'Omit acceptable and substitute

not unacceptable.' I have a similar nuanced amendment to the title of my presentation – that is, to insert a question mark after the words 'beyond scrutiny', so it reads 'Beyond scrutiny? Developments in customary international law and treaty interpretation.' I do that to avoid coming to a conclusion in the title before I give the actual presentation. Lynley, I hope that is not unacceptable.

As a Commonwealth officer who appeared, I think, before the first public hearing of the treaties committee, and also on behalf of the Attorney-General's Department, I just wanted to congratulate the committee on the 20 years of its very valuable work and also on the dedication of its members and of the staff of the committee. I should probably first explain that the role of the Office of International Law is to advise the government on international law and to conduct international litigation on behalf of the Commonwealth. As Richard has said, we also participate in treaty negotiations. Of course, the views I express are mine.

Treaties are but one of the sources of international law referred to in article 38(1) of the Statute of the International Court of Justice, albeit a very important source. The other sources are customary international law, general principles of law, recognised by civilised nations, and the subsidiary means of judicial decisions and the teaching of highly qualified, I will say, public international lawyers instead of 'publicists'.

Today, I will mention two matters relating to customary international law and another relating to treaties. All of these matters concern the development of international law and its application to Australia in ways that in the final analysis are, essentially, beyond Australian control. In part, that lack of control is because they involve the practice of states, generally, and not just the practice of Australia. Those very factors may well make it difficult for JSCOT to consider the matters at hand. In addressing those three matters I did want to mention the current relevant work of the International Law Commission, which is the United Nations body charged with the progressive development of international law.

The first matter is the continuing importance of the timely development of customary international law to meet certain of the challenges of today's world. The second concerns the negotiation of a treaty in an area already the subject of well-developed and/or developing customary international law. The third is the use of disagreement and state practice subsequent to the adoption of a treaty in the interpretation of obligations under the treaty, that being referred to in article 31(3) of the Vienna Convention on the Law of Treaties. Noting the audience, this might not be necessary, but it might be useful by way of introduction to give a quick precis of the constituent elements of customary international law.

Customary international law is described in article 38 of the Statute of the International Court of Justice in a somewhat opaque manner as:

International custom, as evidence of a general practice accepted as law.

Classically, it has two elements and these were identified by the full federal court in its recent decision in the 'your' case. That involves twin inquiries. The first is into the existence of a general practice and the second is into whether the practice reflects obedience to a perceived rule of law – otherwise referred to as *opinio juris*. That is my first Latin for the day. I have a bit more coming up. Judge Crawford of the ICJ has put those questions a bit more simply: is there a general practice and is it accepted as international law? He soon concludes the problem with establishing customary international law is that it seems impossible. Very helpful.

To avoid ending this precis on that pessimistic note, let me give a couple of examples of longstanding rules of customary international law. The first is *pacta sunt servanda* – that is, the principle that treaties are binding and are to be implemented in good faith, that being reflected in article 26 of the Vienna convention. Also, much of the law of the sea, as reflected in the 1982 convention, is customary international law – for example, the right of innocent passage in the territorial sea and freedom of navigation on the high seas. While the content of many treaties is reflective of customary international law, as those two examples demonstrate, treaties themselves can amount to practice contributing to the development of international law, which are in part founded on treaty practice, and will bind states irrespective of whether they are parties to the relevant treaties.

Moving to the first of the two points I wanted to make about customary international law, customary international law is capable of developing reasonably quickly to respond to certain new challenges, on the international plane, in circumstances where it may be unlikely that a treaty could be developed in the time necessary to meet those challenges. I'll give an example, and it is a topical one. It concerns the legal basis for responding to the threat posed by well-organised non-state actors operating out of one country and carrying out armed attacks within the borders of another country. Ironically, it was just that circumstance that led to the seminal exchange of correspondence between the US and the UK following the *Caroline* incident in 1837. However, the law of self-defence as it had developed subsequently focused on attacks or imminent threats of attack by one state upon another state. The position of Australia and that of a number of other countries is that the customary international law of self-defence has developed so as to enable action in self-defence to be taken not only against states but also against non-state actors, provided certain criteria are met. Indeed, it is on that basis that Australia and a number of other countries are conducting air operations against ISIS in Syria, in the collective self-defence of Iraq.

In addition to the standard criteria underpinning an action in collective self-defence, self-defence against non-state actors requires that the state in which they are based is either unable or unwilling to control the actions of the relevant non-state actors located within its borders. In terms of state practice, application of that criterion is part reflected in the notifications to the UN Security Council by a

number of countries, including Australia, under article 51 of the UN Charter, in relation to their actions of collective self-defence of Iraq against ISIS in Syria.

There is no doubt that development in customary international law of self-defence may not be uniformly accepted, least of all by Syria, if its letters to the UN Security Council are anything to go by, or, for that matter, if the academic debate is anything to go by. There is a good deal of academic debate on that in the *American Journal of International Law*. Here it might be relevant to mention the distinction in international law between *lex lata*, the law as it is, and *de lege ferenda*, the law as it should be if it were to accord with good policy. States may genuinely differ as to whether a particular principle – for example, the unable or unwilling principle – has moved from being *de lege ferenda* to *lex lata*, and perhaps that is in part reflective of the impossibility that James Crawford was referring to.

Be that as it may, there was an undoubted need for the development of the law in that area. I do not think that the development of a treaty in a timely manner was a realistic proposition. One only has to recall the stalled negotiations on the comprehensive convention on terrorism to understand why the timely negotiation and entry into force of a treaty regime dealing with self-defence against non-state actors was not a viable option. Nor, for obvious reasons, could it be assumed that there will be a UN Security Council resolution authorising such action in many circumstances.

Other areas in which there has been or there may be timely developments in customary international law include countering cyberthreats, where the law seems to be going down the path of adopting principles analogous to the law of armed conflict. A second would be the law relating to the hot pursuit of vessels, which is sorely in need of a change to take account of changes in technology – which I think was mentioned by the deputy chair this morning. A third would be the controversial area of humanitarian intervention. Of course, there are some areas of the law which are more suited than others to development through custom – for example, the burgeoning area of the law relating to international trade seems more suited to development through bilateral and multilateral treaties than custom. I should mention that the International Law Commission currently has a reference on the formation of customary international law and the rapporteur on that reference is a former FCO legal adviser, Sir Michael Wood. It is a very good piece of work and I recommend it to anybody interested in the area.

Developments in customary international law can of course be overridden by a treaty – at least between parties to the treaty – unless the relevant rule of customary international law is a so-called pre-emptory rule of international law, such as the prohibition on torture or the prohibition on genocide.

This leads on to the second matter – or, more accurately, the second 'thought' – that I wish to raise: the international community should exercise a degree of caution in attempting the negotiation of a comprehensive multilateral treaty on a

topic where that topic is already the subject of well-developed rules of customary international law or where the development of those rules is proceeding in an orderly way.

In making that point, I have one particular and very important area of international law in mind – that is, the body of international law which determines the circumstances in which a state will be held responsible for its internationally wrongful acts – or, put more shortly, the rules relating to state responsibility. Pursuant to the charter I mentioned earlier, the international law commission adopted comprehensive articles on the responsibility of states for internationally wrongful acts on 31 May 2001. They were subsequently annexed to a UN General Assembly resolution of the same year and presented to states as being, 'without prejudice to the question of their future adoption'. The articles have been referred to and relied upon on innumerable occasions by international courts and tribunals, and domestic courts as well as by government. A collection of all those materials has been catalogued by the United Nations.

Individual articles are widely regarded as either reflective of international customary law or likely to develop into customary international law. Notwithstanding this, a live debate is in play as to whether a diplomatic conference should be convened to examine the draft articles with a view to concluding a convention on the topic. The matter is coming to a head as the UN General Assembly has decided to include the matter of state responsibility on its agenda for its meeting later this year with a view to taking a decision, 'on the question of a convention on responsibility of states for internationally wrongful acts'. That move has its supporters and has its detractors, and it was the subject of a lively debate in the margins of the UN Sixth Committee on legal questions last year.

Personally I do not favour attempting to translate the ILC articles on state responsibility into a treaty. My reasons are no better encapsulated than in views expressed by the UK to the UN. They stated:

... there is a real risk that in moving towards the adoption of a convention based on the draft articles old issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing. ...

Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles. ... If few States were to ratify a convention, that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterized by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect, may serve to undermine the current status of the draft articles ...

One of the topics under current consideration by the international law commission is that of subsequent agreements and subsequent practice in relation to the

interpretation of treaties, and that is the third matter, to which I will now turn in somewhat shorter measures.

I mention it for three reasons. The first is that such agreements and practice will almost inevitably arise after the treaty in question has been considered by JSCOT and may give rise to an interpretation which was not within the contemplation of the committee when it considered the treaty.

Secondly, I again wanted to draw attention to the work of the International Law Commission on this topic. Finally, if I have time – and I do not think I will – I wanted to mention two recent instances where the matter of subsequent agreements and practice has arisen in two cases involving the Commonwealth, one international and one domestic.

On the first point, I note that there are instances where the joint standing committee has considered subsequent agreements between parties to a treaty which have the effect of altering the treaty. However, such changes normally flow from a formal mechanism recognised in the treaty itself under which the constituent organisation created by the treaty can adopt amendments to the treaty. For example, the committee has considered amendments to the schedule of the International Convention on the Regulation of Whaling adopted by a two-thirds majority of members of the International Whaling Commission. But I think the committee is far less likely to consider changes to interpretation of the treaty resulting from informal agreement or subsequent practice of the parties.

The most quoted example of interpretation by subsequent practice is that concerning the interpretation of article 27(3) of the UN charter, which provides that decisions of the Security Council on non-procedural matters 'shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'. As you all know, the interpretation that has been given to this provision through the practice of the Security Council is that if a permanent member wishes to block a decision it is not enough for it to abstain or even to be absent; it must cast a negative vote – known as 'the veto'.

I realise that the practice that gave rise to that interpretation preceded the creation of the joint standing committee. Nevertheless, I think it illustrates that issues of great importance can be dealt with through subsequent interpretation. It also illustrates that not all states will necessarily be involved as part of the state practice giving rise to the interpretation.

In the context of examining the use of subsequent agreement and practice in the interpretation of treaties and in his text on modern law and treaty practice, Aust, a former deputy Foreign and Commonwealth Office legal adviser, states that:

Foreign ministry legal advisers are familiar with the question: how can we modify a treaty without amending it? Even if the treaty does have a built-in amendment procedure, the process can be lengthy and uncertain, especially if it is a multilateral treaty and any amendment is subject to ratification.

Sometimes a modification can be urgent and a formal amendment impractical, given that urgency. For example, the United Nations Convention on the Law of the Sea originally required a state intending to establish a continental shelf beyond 200 nautical miles to lodge a submission with the Commission on the Limits of the Continental Shelf within 10 years of entry into force of the convention for that state. When it became apparent that most states with an extended continental shelf would miss the deadline, the states' parties to the convention adopted an understanding at one of their annual meetings effectively extending the deadline. I doubt whether that extension was considered by the joint standing committee, even though it altered a right of Australia under the convention. As it turned out, the Australian government was determined to meet the original deadline, given the uncertain legal status of the understanding adopted by the meeting of the parties.

Mention was made earlier today of the JSCOT inquiry into the Convention on the Rights of the Child. That was an inquiry that took place well after Australia became a party to the convention. If that sort of inquiry takes place, then obviously interpretations that have subsequently been given to the convention could be examined by the committee.

Finally, for those interested in this issue of subsequent agreement and practice, I would again commend to them the current work of the International Law Commission, which is led by Mr Georg Nolte of Germany. To date, the ILC has provisionally adopted 11 conclusions, including on matters such as the definition and identification of subsequent agreement and subsequent practice and the weight it is to be given as a means of interpretation and the relevance of the practice of international organisations in the interpretation of treaties. I was going to mention two cases, the whaling case before the International Court of Justice and *Macoun v. Commissioner of Taxation*, which was before the High Court of Australia late last year. In both those cases, subsequent practice and interpretation were used as a means to interpret the convention which was at the heart of those cases. I will now vacate the floor and allow my colleague to answer the question mark. Thank you.

Mr Rowe: Thank you, Bill. Our next speaker is Dr Edwin Bikundo, who is a senior lecturer at Griffith University Law School. He will be speaking on 'Could there be more parliamentary oversight in the area of customary international law's relationship with treaty law?'

Dr Bikundo: Thank you, Richard. Thank you, JSCOT and Lynley, for this very kind invitation to participate in the 20th anniversary of JSCOT. I will be speaking on the question of whether there could be more parliamentary oversight in the area of customary international law's relationship with treaty law. Bill Campbell was so generous as to add a question mark subsequently to his own presentation

so there is a little bit of equality of arms and so I do not have such a difficult task ahead of me.

I took the approach of answering three questions that need to be answered, before getting to an answer of the current one. The first is: is customary international law important? Second, is there a gap in parliamentary oversight? And third, what would parliamentary oversight provide? To put it another way: what has parliamentary scrutiny ever done for us? Apologies to Monty Python.

It is fairly uncontroversial – it has been mentioned several times already – and I am going to bore you with this again. Apart from ratified conventions, customary international law can apply in Australia as a matter of common law after being recognised as such by a court. It would therefore be something of a challenge to look at the implementation of treaties in isolation from customary law and have a complete picture of the whole of international law applicable. It is simply not possible. In fact, it can be said without too much exaggeration that, while a coherent picture may be made of international law exclusively through customary rules, the same may not be said for treaty law on its own. What is more, custom – where relevant – is usually generally applicable while, strictly speaking, treaty obligations are only binding on the parties alone.

It is not particularly difficult to illustrate this point. If you go back to the *Trick or treaty?* report, you will find that it noted that, under customary international law, treaties are legal agreements, which as such must be obeyed – it sounded more profound in the Latin that they used: *pacta sunt servanda*. So in order to emphasise the importance of treaties, the report cited a customary international-law rule that demonstrates the binding nature of treaties! They relied on customary international law in *Trick or treaty?*. Furthermore, as Bill has already mentioned, in laying down the sources of international law, Article 38 of the ICJ statute includes not just treaties but custom and general principles of law as well. On the face of it, it may seem curious to refer to a treaty to affirm the importance of customary international law. Perhaps, but this is no more curious than referring to customary international law to affirm the binding nature of treaties, as *Trick or treaty?* did. We can make a provisional conclusion at least that the two are not separate as such but are in many ways mutually constitutive.

So if I were to use a metaphor and stretch it a little bit: they are like conjoined twins. If surgically separated, the customary international law twin would have a stronger chance of survival – of ability – leaving its other twin as a donor – perhaps of organs or something like that. So yes, customary international law really is important. Is there a gap in the parliamentary oversight – all that boosterism notwithstanding?

Customary international law barely rated a mention in JSCOT's 10 year anniversary report. Ten years before that – so over two decades ago now – Hilary Charlesworth and others noted that the relationship between domestic law and

customary international law has been neglected. If we turn back to the *Trick or treaty?* report, which famously sought to repair the democratic deficit in relation to treaty:

There is criticism that current practices have led to a 'democratic deficit' or a lack of accountability in those practices. The concern is that the practice, whereby treaties are entered into by the Executive (ie the Government) without significant Parliamentary involvement, is 'undemocratic', as treaties can have a range of significant effects and the Australian legal and administrative systems; the Australian economy and indeed the way Australians live.

To be sure, this criticism can be levelled at customary international law as well – actually even more so, especially now – because JSCOT having a role in treaties means that the parliament is involved, the executive is involved and the judiciary is involved as well. But in customary international law parliament is completely bypassed, with only the courts and the executive having a role. So I think there definitely is a gap in parliamentary oversight.

But this is not surprising to anyone because, despite customary international law being discussed in the body of the *Trick or treaty?* report, it did not appear in the recommendations for change. Consequently, it found no role in the proposals for reform. So in this instance at least, the relationship between domestic law and international law could be scrutinised further, particularly where Australian practice could be evidence of international custom being accepted as law, although – to be fair – the report also reviewed customary international law and duplicated what Bill Campbell has already said as to what it is. But they went on to say, and this was noted in *Trick or treaty?*:

Provisions in a treaty may become customary international law and therefore become binding even on nations which are not parties to the treaty.

This may happen where customary international law develops to embrace new norms included in the treaty. That is where the great majority of states enter into the treaty and abide by the provisions. Of course, where a treaty merely quantifies existing customary international law, these rules will already be binding on states not party to the treaty. The report cited the Hon. Elizabeth Evatt, former Chief Justice of the Family Court, who said that some parts of international law can, as a matter of common law, apply in Australia, and as such can be overruled by legislation.

Having a 'joint parliamentary committee on treaties, international custom and general principles of law' does not quite roll off the tongue. I am going to make a suggestion that Sir Humphrey Appleby would call 'courageous', or even 'noble'! Perhaps the time has come for a joint standing committee on public international law. What would be a more appropriate forum to clarify the reach and the scope of legal rules than a joint parliamentary select committee? We do not need to wait until the diamond jubilee – the 60th anniversary of JSCOT – to note that

parliamentary scrutiny would lend clarity, weight and precision to Australian state practice and its view of the legality of that practice.

And there is more that parliament can contribute beside that. Of course, the question arises: how would parliament do this? It seems exceedingly difficult for something that is as grey as customary international law. My answer to that is that here we are celebrating the 20th anniversary of an entity whose life ends with each parliament. If parliamentary process can overcome mortality, it would seem that this one would be an easier challenge to address.

The third part of my question is: what would parliamentary oversight provide? I think it is transparency and consultation to the process. There is perhaps no clearer contemporary international example of this than the current goings on in the South China Sea. Kelvin Thomson, in his speech, talked about the international rule of law, which he explained to mean that countries are expected to behave in a certain way according to the rules. It sounded very similar to what the foreign minister spoke about when she was talking about an international rules-based order – not correcting the international rule of law but the international rules-based order. This was echoed, I think, by the shadow minister for Defence, Senator Conroy, where he talked about an international rules-based order, so it is bipartisan in terms of its acceptance. It has been formatted differently in the recent Defence white paper, where they talked about a rules-based global order, which appears dozens of times in the white paper. The point I want to make here is that the very idea of an international rule of law, an international rules-based order or a global rules-based order – whatever you want to call it – can only be a customary international-law rule. It cannot be a treaty rule. The best working definition we have of that is from the white paper:

A rules-based global order means a shared commitment by all countries to conduct their activities in accordance with agreed rules which evolve over time, such as international law and regional security arrangements.

Clearly, on the face of it, that would include not just trade and investment or human rights but also refugee law and environmental law and, in the context within which we speak, the law of the sea. Not everyone involved in the South China Sea is party to the Convention on the Law of the Sea, but just about everyone accepts that bits of it are customary international law; so, again, customary international law shows up there. I think I will leave it there. Thank you very much.

Mr Rowe: Thank you, Edwin. We have time for questions now.

Prof. Byrnes: Thanks to both of you for very interesting discussions. I suppose the question, particularly to Edwin, is – and Bill, I am sure, will have thoughts on this – what would it look like and what particular structures would you assume? Would it be something like an annual report on the sorts of themes that are up for the sixth committee, which, obviously, would only be part of the story? Would it

be a discussion or a debate around the state practice for the year? What form would it take? As you said, it is so amorphous and very difficult to crystallise in the same way that a concluded instrument is. How would you focus it? You have the whole issue, of course, of the evidentiary issues as to whether there is an emergent rule, what your standard is and how much you are being pre-emptive against how contingent the risk is. How would you see it unfolding practically to make it digestible for parliamentarians to make a measured response to it?

Dr Bikundo: I would think all of those suggestions that you have made and, in addition, those that could provide a platform for the minister, for instance, to come up and say, 'This is Australian state practice for the year. This is what we think is in accordance with the customary rules.' That would be a more appropriate forum than, say, press conferences with foreign counterparts or that sort of thing. It adds additional weight and clarity as well. This is the context of parliament. It will provide an additional forum for the expression of customary international law, as Australia participates in the creation and modification of custom, and so all of those and more besides.

Mr Campbell: I agree with you. I might have used the word myself, that customary international law can be amorphous. Particularly, the point at which something which is not customary international law actually becomes customary international law can be very difficult to identify. This has been set out in a number of texts. It is very difficult to identify where customary international law is being created, in one sense, and by whom. Sorry to hark on about the International Law Commission, but a start could well be to look at the topics – which are very important topics – that are the subject of concrete examination by the International Law Commission, such as the ones I mentioned today, but there are about six of them at the moment. Perhaps the committee could be given an explanation of what is happening there and make its views known on the developments that are taking place there.

Mr Johnson: We have spoken today about a lot of different instruments that are and are not submitted and scrutinised by JSCOT – treaties are scrutinised; MOUs are not; amendments to treaties and annexes adopted by treaty bodies are; and subsequent practice and custom are not.

I have a question about another type of instrument, which is binding decisions adopted by treaty bodies – a bit of an open question about the extent to which they should or should not be scrutinised by JSCOT. I have a couple of examples in mind are: measures adopted under the Antarctic Treaty Consultative Meeting, by and large, are admitted to JSCOT, in my understanding; and then we have conservation and management measures under RFMOs, which generally are not submitted to JSCOT. A bit of an open-ended question: should these types of instruments be submitted to JSCOT; and, to what degree is there a pragmatic

problem with the bulk that happens every year just at RFMO meetings, let alone the other treaty bodies that adopt these decisions?

Mr Campbell: I think you have broken the No. 1 rule of the Office of International Law – that is, do not ask a colleague a question. It is true that some of these decisions are considered by JSCOT. I could be wrong, but they might well be the decisions where a country has an opportunity, such as they do with, say, the decisions of International Whaling Commission. They have three months or six months in which to object to the amendment and, if they object to the amendment, the amendment does not apply to them. I can also see a problem, if you are also talking about regional fisheries management organisations and the proliferation of those, about how many decisions there might be and whether it is really practical to bring all those to the committee. That is my comment.

Prof. Scully: My question is to Bill. Do you think the ILC articles on state responsibility for international wrongs is a hot potato, because it prescribes the criteria by which states can take countermeasures against other states for international wrongs? If those countermeasures were justified by reference to the ILC articles as customary international law, you would then have these massive donnybrooks where people are continually opposing the articles as not being representative of customary international law, so the whole thing would fall over like a pack of cards. Or do you think it is beyond just the issue of countermeasures?.

Mr Campbell: Maybe we ought to explain what a countermeasure is, and forgive me if I get it wrong. Where a country perceives that, for example, a treaty partner is not giving effect to the treaty, then it can also take action in violation of its obligations in order to try and bring the other party back into compliance with its obligations. It could lead to a bit of toing and froing. It is true that Australia in the past has considered countermeasures as a means of bringing other countries – not very often – into compliance with their international obligations. The other thing I would say is that it is my understanding that countermeasures are one of the very issues that has led to a number of countries favouring the negotiation of a convention on state responsibility, because that is one of the elements of the current rules that they would wish to alter.

Mr Rowe: I would like you to join me in thanking Bill and Edwin for their presentations. I now hand back to the chair.

CHAIR: Thank you, Richard. I thank all contributors for attending and giving us their time and their expertise in what has been a very interesting day. I also thank all our attendees for joining us to not only celebrate 20 years of the Joint Standing Committee on Treaties but discuss issues with regard to the future of the committee. I certainly think that today's discussion has provided some food for thought for myself, the deputy chair and future members of the committee with regard to the way in which the treaties committee will do its work over the years

ahead. I would certainly like to thank our last presenters, who handled the graveyard shift very well. As a politician, you always hate to be the last speaker on the list. Edwin certainly provided us with a bit of food for thought. In fact, the creation of a new committee is, as you would say, very courageous. The committee has, I believe, achieved a great deal. The workload of the committee is very heavy and it puts a lot of burden on the time of participating members. We certainly thank you for the contribution that you have made to our work going forward. There are evaluation forms in your packs. The secretariat would certainly like to receive those so that we can incorporate any suggestions in forums going forward. Thanks once again. It has been an interesting forum. I look forward to catching up with all of you as the committee continues its work. Thank you very much. Well done.

Committee adjourned at 16:08



Appendix D—Reflections

The Hon Santo Santoro

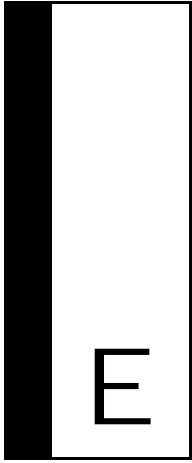
My experience as a member of the Joint Standing Committee on Treaties confirmed something that I had long believed in – this being that Australia as a middle ranking country – punched well above its weight within the international arena.

Irrespective of what Treaty was being considered or negotiated, the involvement and the imprimatur of Australia was strongly sought by other nations who viewed the respectability that Australia brought to the negotiating table as a very credible component of any final agreement.

I particularly enjoyed the relatively strong bipartisan spirit and modus operandi that all committee members brought to the table of the committee during the time that I was a member of the Committee.

The Hon Santo Santoro

Member 2002–2004



Appendix E—Papers

Statistical data

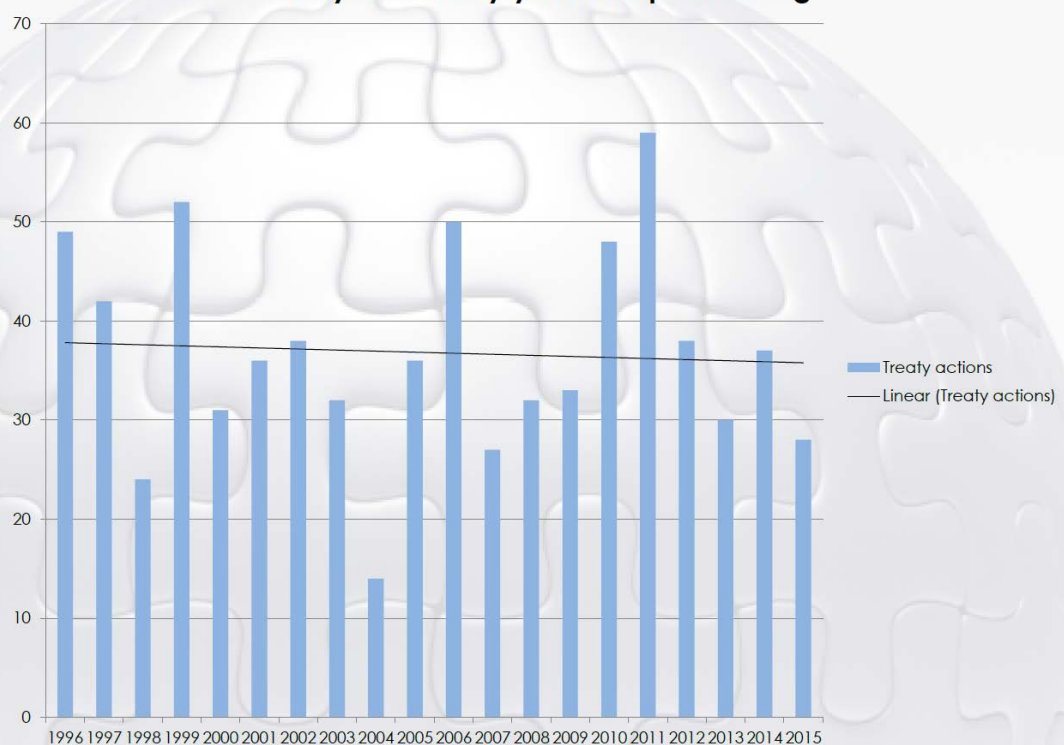
Professor Andrew Byrnes

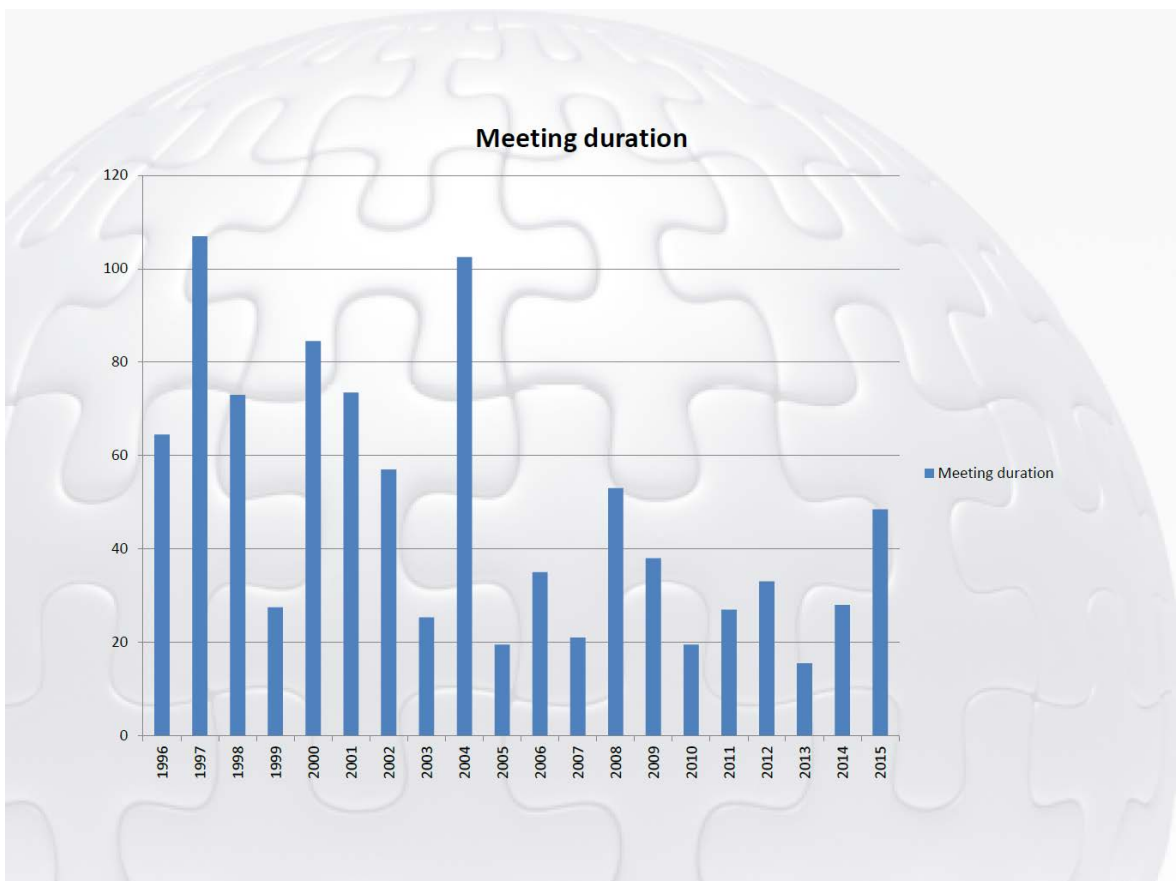
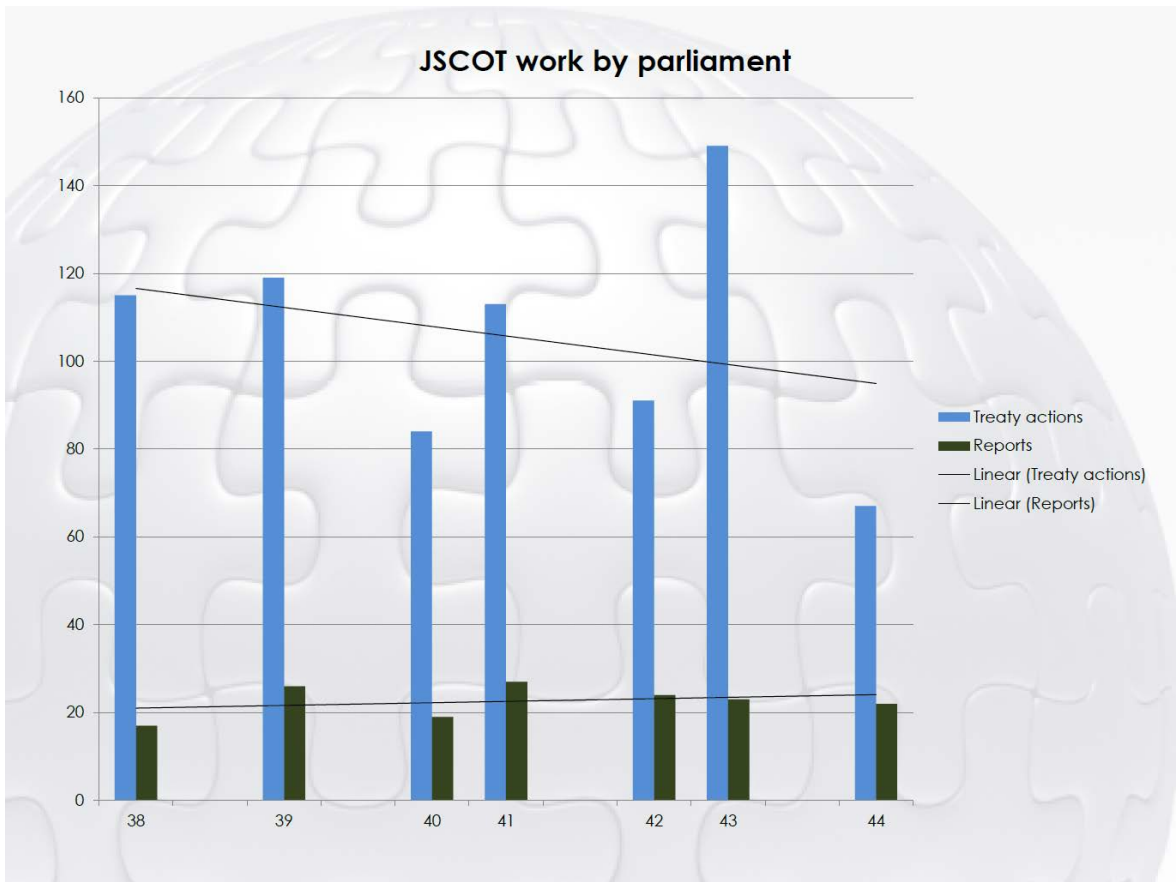
Mr Bill Campbell, QC

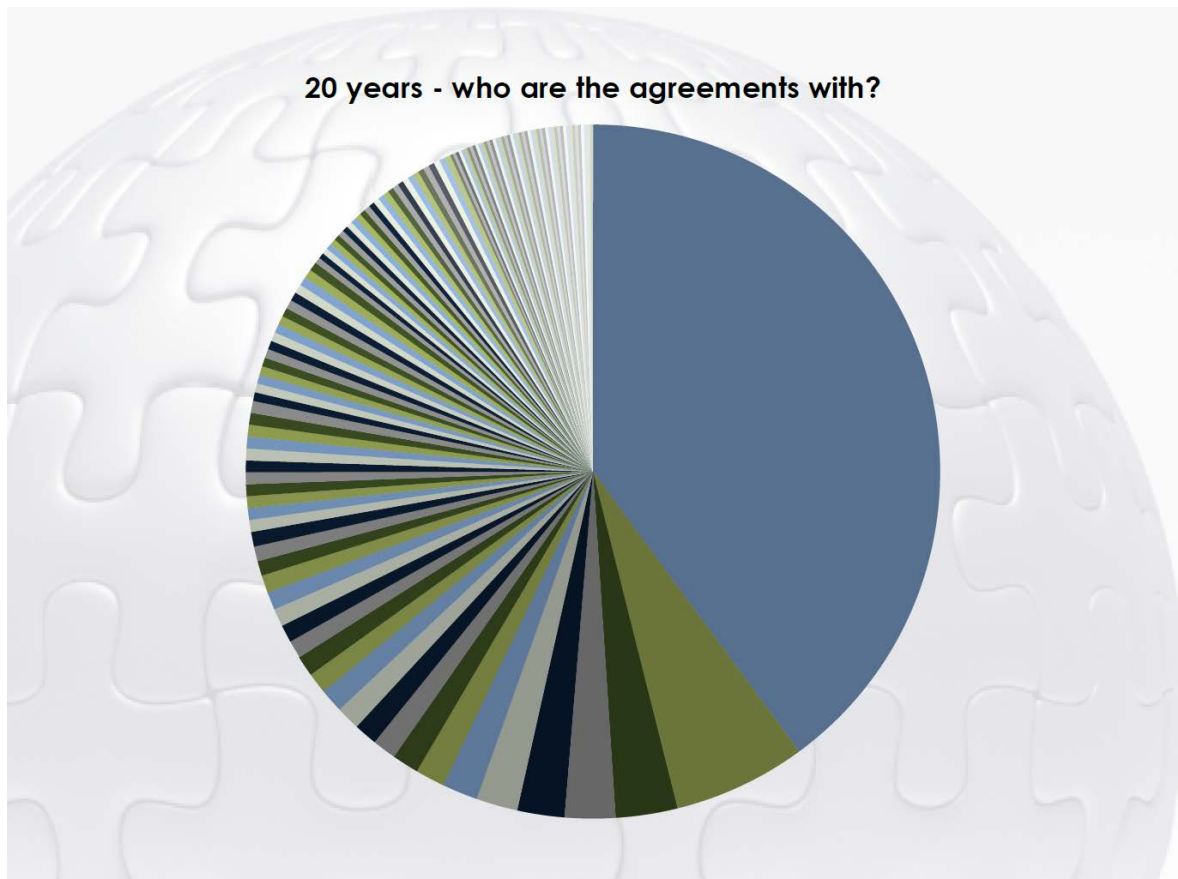
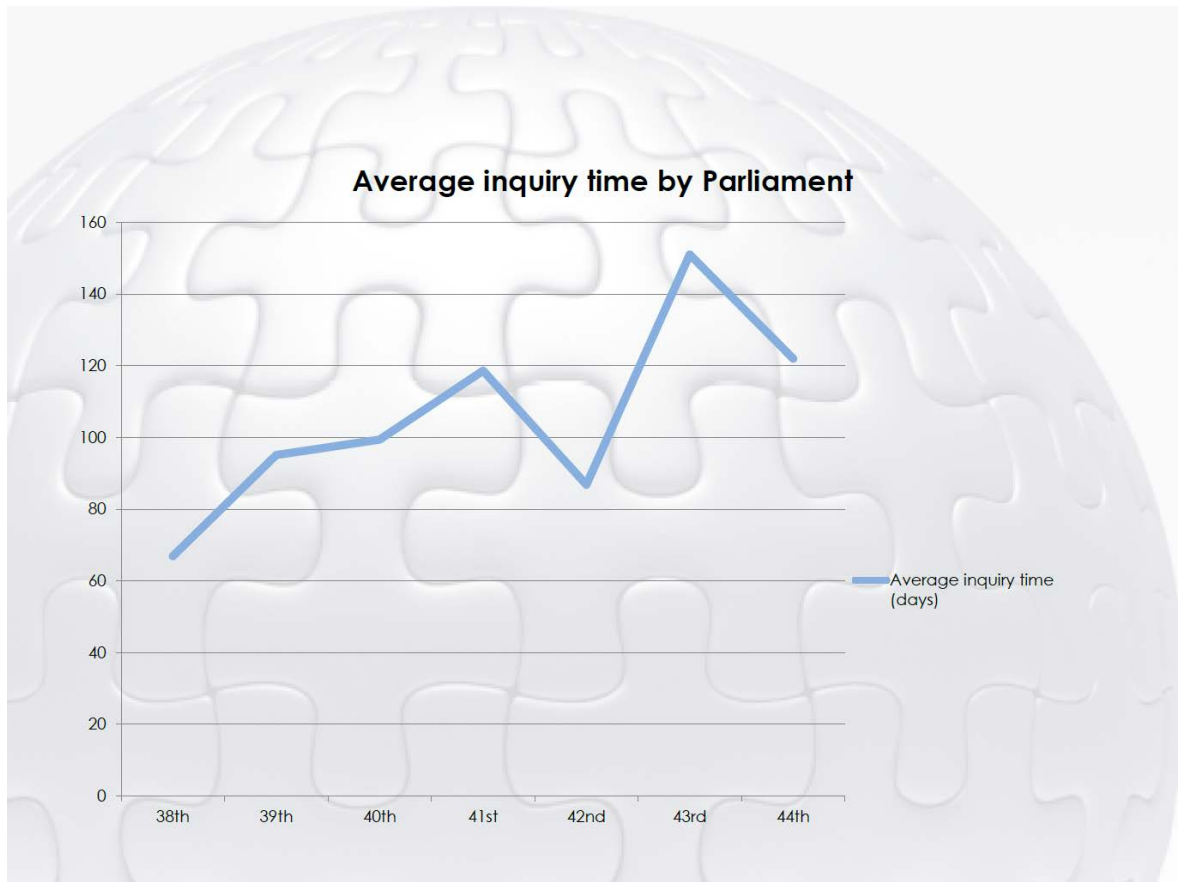
JSCOT Secretariat Statistical overview

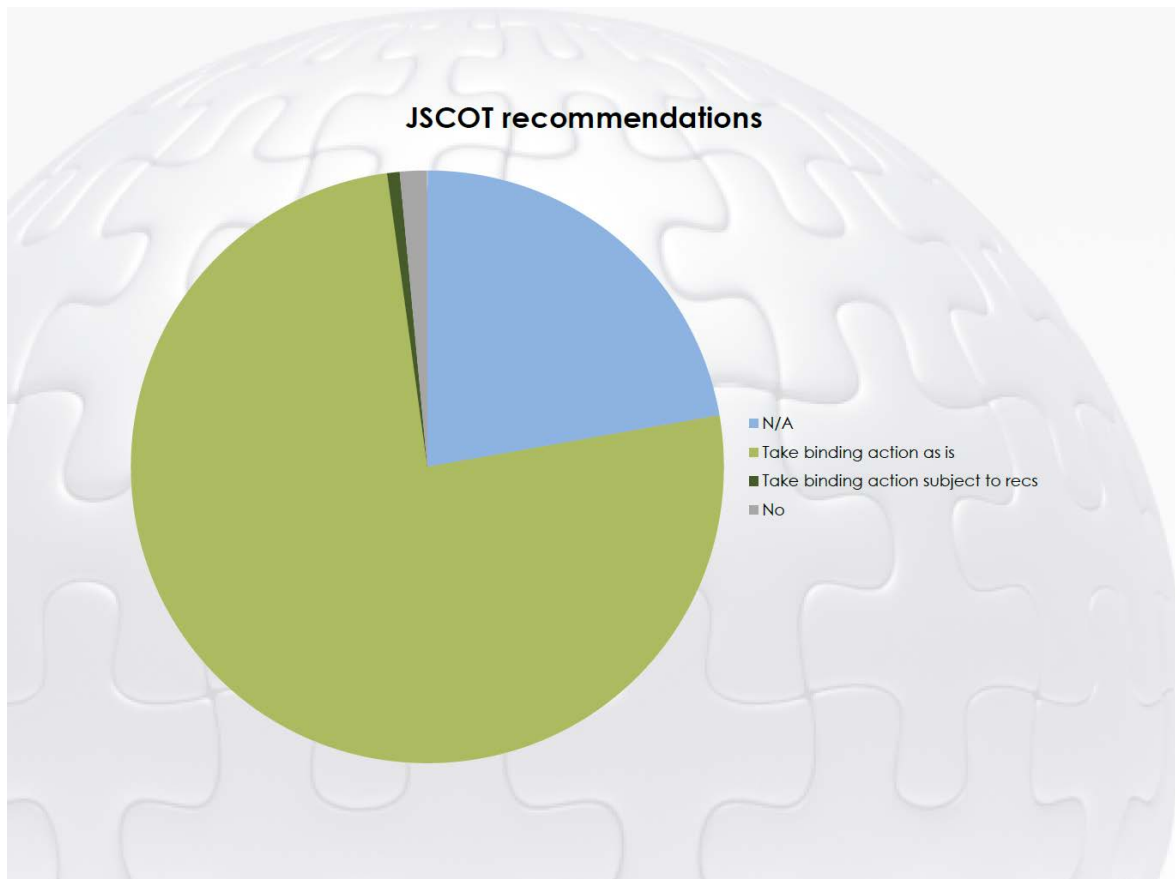
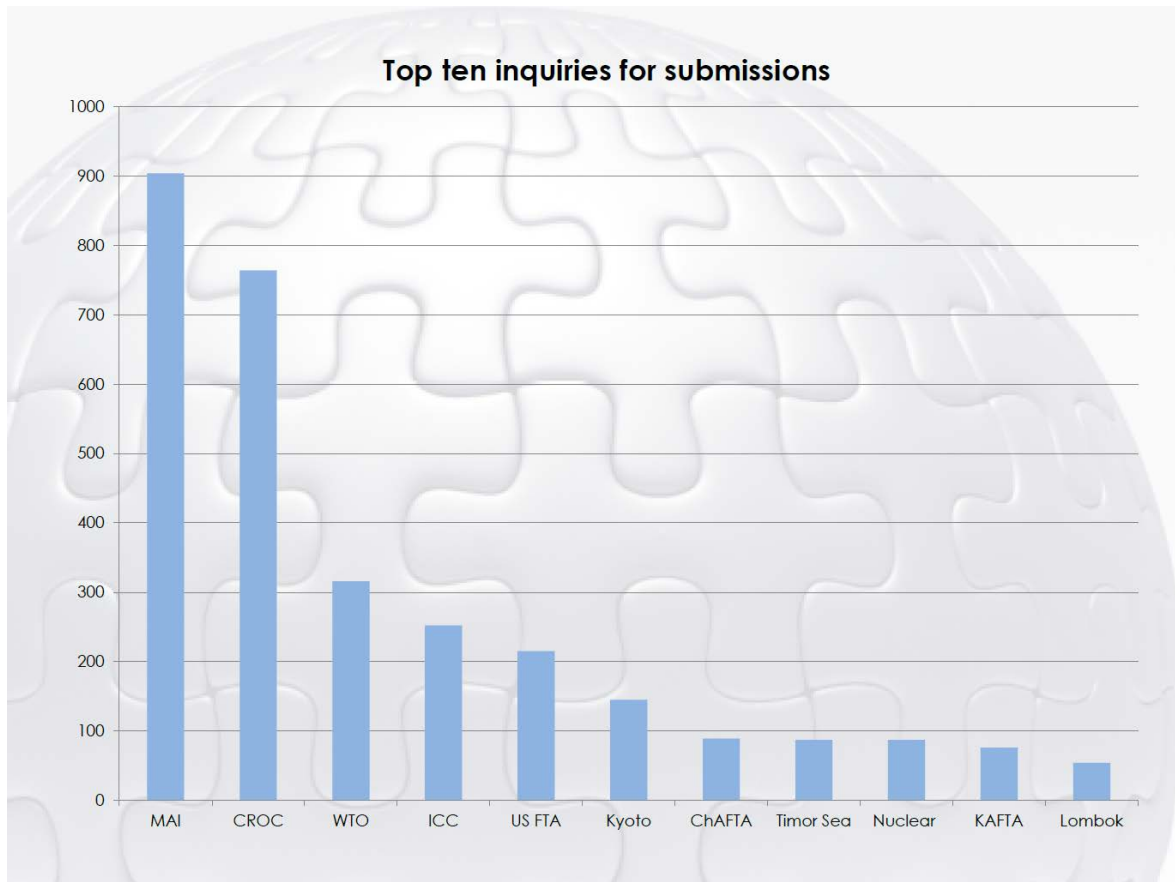


Treaty actions by year of report tabling









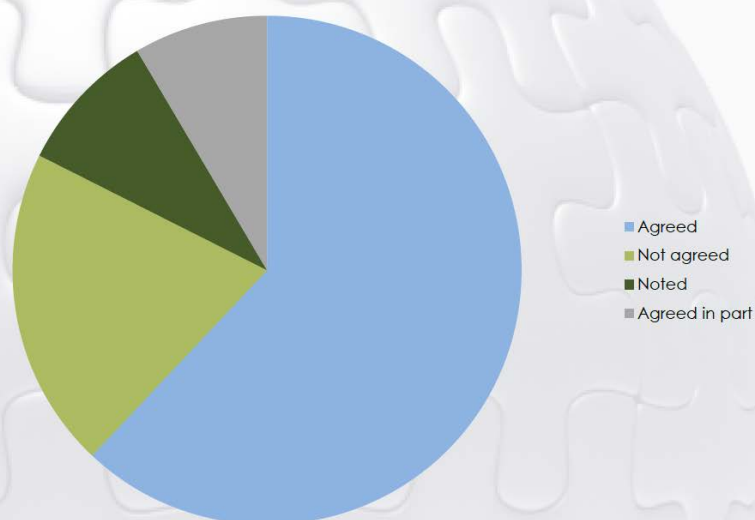
Recommendation not to take binding treaty action

Parliament	Report Number	Date of Report	Subject matter	Agreement with
38th	3	18/11/1996	Tuna long-line fishing	Japan
38th	3	18/11/1996	Indian Ocean Tuna Commission	Multilateral
38th	11	24/11/1997	Economic Cooperation	Kazakhstan
38th	14	1/06/1998	Multilateral agreement on investment	Multilateral
38th	15	2/07/1998	Promotion of investments	Pakistan
40th	46	24/06/2002	Double taxation	USA
40th	58	23/03/2004	Optional Protocol to the Convention against Torture	Multilateral
42nd	94	18/09/2008	Cooperation in the Use of Nuclear Energy for Peaceful Purposes	Russia
43rd	126	27/06/2012	Anti-counterfeiting trade agreement	Multilateral

Recommendation stats:

- 17%
- 56 – 1651
- 404 days

Government response to recommendations



Recommendation 5

The Committee recommends that the Australian Government include consideration of environment protection, protection of human rights and labour standards in all future negotiation mandates for free trade agreements.

Government response

The Government will explore the inclusion of environmental protection and labour standards issues in FTA negotiations, on a case by case basis.

Recommendation 1: The Department of Defence consult with the local business community during the preparation of future agreements with the Republic of Singapore and other countries on the use of Shoalwater Bay Training Area to ensure that its interests are incorporated to the maximum extent practicable (paragraph 2.148).

Defence Corporate Support staff at Rockhampton and Enoggera will continue to develop appropriate links with the local business community to ensure its interests are incorporated to the maximum extent practicable.

**Not enough statistics? Wait
for the next report...**



JOINT STANDING COMMITTEE ON TREATIES**TWENTIETH ANNIVERSARY SEMINAR****Parliament House, Canberra****18 March 2016****Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover 'instruments of less than treaty status'?**

**Andrew Byrnes
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Summary

Many significant agreements between Australia and other countries are contained in instruments which are neither designated as nor intended to be treaties binding as a matter of international law. While some of these agreements may in fact be treaties, most are arrangements that are binding only as a matter of political or moral obligation, and their efficacy results from the shared interests of the countries which have concluded them.

This paper addresses the current state of Parliamentary and public access to the texts of formal arrangements between Australia and other countries that are of 'less than treaty status'.^{*} It argues that many of these arrangements are of considerable practical and political significance to the relations between Australia and the other countries which are parties to those agreements. At present the publication of such documents is sporadic and unsystematic, and the text of many such instruments is not available to the public on government websites. The paper argues that some of the reasons that led to the systematic approach to the publication of treaties and related information and to enhanced Parliamentary consideration of treaties also apply in relation to many of these instruments.

^{*} This paper draws on my submission to the *Inquiry into the Commonwealth's Treaty-making process* conducted by the Senate Standing Committee on Foreign Affairs, Defence and Trade in 2015 ([Submission No 77](#)).

The paper recommends that a review of the practice of (non-)publication of instruments of less than treaty status be undertaken, with a view to the adoption of a more systematic approach to the collection and publication of such instruments, with a presumption in favour of publication. It also proposes that the conclusion of such instruments should be reported on a regular basis to JSCOT and that the Committee should have the mandate to consider those instruments as it thinks fit.

[Andrew Byrnes](#) is Professor of Law, Faculty of Law, University of New South Wales. He has served as the President of the Australian and New Zealand Society of International Law (2009-2013) and as external legal adviser to the Parliamentary Joint Committee on Human Rights (2012-2014). He is chair of the Steering Committee of the Australian Human Rights Centre at UNSW. He teaches and writes in the fields of international law, and human rights.

Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover 'instruments of less than treaty status'?*

Andrew Byrnes

A. Background

International cooperation in combatting international terrorism: the use of the memorandum of understanding

1. In the years following the September 11 attacks, Australia entered into a number of arrangements with countries in our immediate region and beyond to enhance cooperation in efforts to combat international terrorism. Each agreement was embodied in a document entitled 'Memorandum of Understanding' between Australia and the other government, and the conclusion of the MOUs was announced in a series of ministerial press releases.¹ By the end of 2005 Australia had entered into twelve counter-terrorism MOUs with countries in the region including Indonesia, Malaysia, Thailand, the Philippines, Fiji, Cambodia, East Timor, India, Papua New Guinea, Brunei, Pakistan, and Afghanistan.² MOUs have since been concluded with a further five countries: Turkey, Bangladesh, the United Arab Emirates, Saudi Arabia and France.³

2. Based on the relevant press releases and the few MOUs that have become available, it appears that these agreements set out a framework for cooperation

* This is a revised version of a paper prepared for the 20th anniversary seminar of the JSCOT held on 18 March 2016, upon which my presentation at that event was based. For a webcast of the seminar, see http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/20th_Anniversary (visited 19 March 2016).

¹ See, eg, Media Release, FA143 - 3 October 2002, 'Australia and Thailand Sign MOU on Counter-Terrorism', http://www.foreignminister.gov.au/releases/2002/fa143_02.html (visited 16 March 2016); Media Release, FA161 - 20 December 2005, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding', http://foreignminister.gov.au/releases/2005/fa161_05.html (visited 16 March 2016).

² Media Release, FA161 - 20 December 2005, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding', http://foreignminister.gov.au/releases/2005/fa161_05.html (visited 16 March 2016).

³ DFAT, 'Australia's international counter-terrorism efforts', <http://www.dfat.gov.au/international-relations/security/counter-terrorism/our-role/Pages/australia-s-international-counter-terrorism-efforts.aspx> (visited 16 March 2016). There are no links to the texts of any of these MOUs provided on the webpage.

between Australia and the other government;⁴ the designation of the agreements as MOUs indicated that they were not intended to create binding obligations and were thus not to be viewed as ‘treaties’ under international law.

3. The MOUs were not published by the Australian government following their conclusion (nor, it appears, by the other governments). The Department of Foreign Affairs and Trade declined requests for copies of the documents, stating that to make copies available to the public would be inconsistent with the expectations of the other parties to the agreement. Nor did the government take up suggestions that it might approach the other governments concerned to see if they had any objections to release of the documents.⁵

4. To the best of my knowledge, these MOUs have never been made public by the Australian government – or, if they have, they are not readily retrievable on any Australian government website. Yet it appears that all of these are still in force, as they are listed on the website of the Department of Foreign Affairs and Trade as among the ‘key elements of Australia’s international counter-terrorism effort.’⁶ Some of them are also referred to on the relevant Country brief webpages on the DFAT website.⁷

5. These MOUs are in fact fairly anodyne documents, containing general expressions of willingness to collaborate across a number of areas in relation to counter-terrorism efforts. There appears to be nothing in them which, if disclosed, would prejudice the national security of Australia or of other countries, or which would have an adverse impact on operational matters. Yet they were significant documents so far as Australia’s cooperation with these other governments in the field of counter-terrorism was concerned, and deserved public scrutiny. At the time when the first tranche of these counter-terrorism MOUs was negotiated, one of the concerns of civil society and academic commentators was whether these agreements contained adequate safeguards to ensure that human rights would be observed as part of any activities undertaken under the MOUs. The refusal of government to make public the text of the MOUs made such an assessment extremely difficult,

⁴ See the extracts from a number of press releases in ‘Australian Practice in International Law 2003: Terrorism – Counter-Terrorism Agreements’ (2005) 24 *Australian Yearbook of International Law* 434-436.

⁵ In fact, I obtained copies of a number of the MOUs by writing directly to the diplomatic missions of the countries concerned in Australia.

⁶ DFAT, ‘Australia’s international counter-terrorism efforts’, <http://www.dfat.gov.au/international-relations/security/counter-terrorism/our-role/Pages/australia-s-international-counter-terrorism-efforts.aspx> (visited 16 March 2016).

⁷ While four of the seventeen DFAT Country briefs refer explicitly to the individual MOUs (India, Malaysia, the Philippines, and Brunei), none of the seventeen Country briefs contains the text of the MOU or provides a link to it (DFAT website, visited 16 March 2016).

though specific references to the need to comply with human rights in responding to terrorism do not appear in those MOUs that have become available.⁸

6. These counter-terrorism MOUs are but one example of the way in which the Australian government and its agencies enters into arrangements with foreign governments and agencies which, although not necessarily creating international legal obligations, nonetheless give rise to expectations on both sides and can significantly affect the way in which Australian government agencies work with their international counterparts and may have an impact on the rights of Australian citizens and residents. As these documents are not classified as ‘treaties’, they do not have to be tabled in Parliament and brought to the attention of the Parliament’s Joint Standing Committee on Treaties,⁹ nor is there any formal requirement of general application that they be made available to the public. If they require legislative implementation, they may come to the attention of the Parliament, but in many cases legislation is not required to give effect to them, so Parliament may not get to see them at all.

7. The counter-terrorism MOUs involved the deliberate refusal by government to publish MOUs on matters of public interest and importance. However, such MOUs are only one subcategory of the large number of MOUs and similar agreements concluded by Australia across many fields of government activity. While the non-publication of MOUs relating to counter-terrorism cooperation gives rise to particular concerns, a related and equally important matter is the unsystematic approach adopted more generally to the publication of formal agreements of ‘less than treaty status’, some of which are designated as MOUs, others of which bear different titles.

8. There appears to be no consistent policy or practice in relation to the publication of such documents – whether they are published at all, when they are published, where they are published, or whether all documents of a particular type are published or are published in the same place.¹⁰ The consequence is that whether these documents are available for public scrutiny seems to be a matter of chance.

⁸ See, eg, *Memorandum of Understanding between the Government of Australia and the Government of the Republic of the Philippines on co-operation to combat international terrorism*, 4 March 2003 (on file with author).

⁹ For example, the primary focus of the JSCOT is on ‘treaties’, although it has the power ‘to inquire into and report on ... any question relating to a treaty or other international instrument, whether or not negotiated to completion’ which is referred to it by either House of Parliament or a Minister, or ‘such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.’ Joint Standing Committee on Treaties, [Resolution of appointment \(2013\)](#) (visited 16 March 2016).

¹⁰ For example, while the DFAT Freedom of Information pages on the Departmental website lists a variety of operational documents regularly made public under the Information Publications Scheme (including treaties), it contains no reference to MOUs or other instruments of less than treaty status: Department of Foreign Affairs and Trade, ‘Information publications scheme’,

9. This paper is not based on a comprehensive survey of the myriad forms and subjects of MOUs entered into by the Commonwealth; one of the issues is that we simply do not know how many there are concluded by government and its agencies. I argue that, given the increasing importance of non-treaty arrangements in regulating relations between Australia and other countries, the failure to have a systematic policy for the publication of non-treaty arrangements is cause for concern, in particular because this failure limits or makes impossible proper public and Parliamentary scrutiny of Australia's international actions in areas of importance.

B. The importance of non-treaty arrangements in international relations

10. While bilateral and multilateral treaties are an important method by which nation-States regulate their interactions with each other and other actors, they are by no means the only way in which States do this. For a variety of reasons, States have increasingly resorted to other formats: these include so-called 'soft law' instruments which are not themselves treaties but which may contain norms, guidelines or standards intended to influence behaviour; bilateral 'political' agreements to cooperate in particular areas; and political undertakings embodied in joint declarations or similar documents. In many cases these documents are intended to avoid the creation of international legal obligations, are non-binding in form, and therefore do not qualify as a 'treaty' for the purposes of international law and national law.¹¹ Accordingly, these instrument and arrangements may not be subject to legislative or other review processes at the national level that apply only to 'treaties'. Such non-treaty instruments thus bring with them the advantages of convenience and flexibility (and the possibility of confidentiality in appropriate cases),¹² but also the consequence (intended or unintended) that they may escape the level of public and Parliamentary scrutiny accorded to treaties.

11. Scholars have pointed to the growth in 'informal international law making' in international relations, pointing to the increasing use being made by States of non-

<http://dfat.gov.au/about-us/corporate/freedom-of-information/Pages/information-publications-scheme.aspx> (visited 16 March 2016).

¹¹ Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969 defines a 'treaty' for the purposes of the Convention as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation...'

¹² 'MOUs', Chapter 3 in Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed 2013) 28, 40-44. Rothwell et al comment: 'Because of the informality associated with MOUs, they are capable of relatively speedy conclusion, and are flexible enough to deal with fast-developing situations where time does not permit the negotiation and conclusion of a formal treaty, including the processes associated with entry into force.' Don Rothwell, Stuart Kaye, Afshin Akhtarkhavari and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2nd ed 2014) 135.

treaty instruments in many areas of transnational or global governance.¹³ Arrangements are entered into, and 'non-binding standards' adopted, sometimes on an agency to agency basis, that can significantly influence the way in which national agencies carry out their functions. Commentators have noted that the use of such informal techniques can give rise to issues of democratic legitimacy and accountability as the agreements and instruments involved, even if available to the public, may not be subject to scrutiny by a legislature in the same way that an agreement of treaty status or ordinary legislation might be.¹⁴

12. The 'relentless rise of the MOU'¹⁵ is one dimension of this approach to regulating relations between States. Australia, like other countries, makes frequent use of agreements which are said to be of less than treaty status. As the *DFAT Treaty Making Kit* explains:¹⁶

4. Arrangements of less than treaty status - Most countries, including Australia, in dealings between states, governments and agencies of government and international organisations use instruments in which the parties do not intend to create, of their own force, legal rights or obligations, or a legal relationship, between themselves. Such instruments, whether in the name of the government or agencies, are termed 'arrangements of less than treaty status'. The most appropriate form for an arrangement of less than treaty status is often a memorandum of understanding, although records of discussion, joint communiques and exchanges of notes or letters recording understanding are common.

13. While the designation of an agreement as a 'memorandum of understanding' does not mean that it cannot be a treaty,¹⁷ it is generally to be taken as a clear indication that the parties to the memorandum (or at least one of them) does not intend that the document give rise to binding obligations under international law. However, to determine whether an agreement is a treaty or an agreement of less than treaty status requires examination of the terms and context; indeed there are documents which may well be treaties even though designated by a term normally

¹³ See, eg, Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When structures become shackles: stagnation and dynamics in International lawmaking' (2014) 25(3) *European Journal of International Law*, 733-763; Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, *Informal International Lawmaking* (Oxford University Press, 2012); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

¹⁴ See the sources cited in n 13 above.

¹⁵ See Aust, *Modern Treaty Law and Practice*, above n 12, 28.

¹⁶ Australia International Treaty Making Information Kit, www.austlii.edu.au/au/other/dfat/reports/infokit.html (visited 16 March 2016).

¹⁷ See Aust, *Modern Treaty Law and Practice*, above n 12, 29-39.

associated with non-binding documents. It is also possible that even non-binding MOUs can nonetheless generate legal consequences for the parties.¹⁸

C. The post-*Trick or Treaty?* reforms

14. The purposes of the treaty reforms adopted in the mid-1990s included: making more transparent the process by which the Commonwealth government undertook international commitments on behalf of Australia; informing the Parliament, the States and the public of the justification for assuming international obligations; and providing greater opportunity for providing input into that process and to scrutinise the results of treaty negotiations. While the JSCOT process has provided increased transparency, it affords almost no opportunity to influence the content of treaties (since the treaties examined are already concluded by the time the JSCOT reviews them). On the other hand, it provides a limited opportunity to influence the text of any declarations or reservations that Australia might enter to the treaty upon ratification, and to influence the content of domestic legislation implementing the treaty.

15. One of the important outcomes of the review was the establishment of the official *Australian Treaties Library*¹⁹ hosted on the website of the Australasian Legal Information Institute.²⁰ That website contains detailed information about Australia's treaties and treaty actions, including the text of treaties to which Australia is a party and have entered into force, the national interest analysis for treaties to which Australia proposes to become party, minor treaty actions (generally involving minor technical amendment to existing treaties), a list of treaties that are not yet in force for Australia, a list of multilateral treaty actions under negotiation or consideration, and other information. This material makes accessible to the public in comprehensive and systematic way the details of Australia's treaty obligations and related material.

D. Lack of a systematic approach to the publication of MOUs

16. Because they involve formal arrangements for the exercise of public power the text of MOUs and other arrangements of less than treaty status should as a matter of principle be made public. MOUs often concern important areas of international cooperation and should be open to public and Parliamentary scrutiny as is every other area of government activity. While there may be reasons for some

¹⁸ Ibid 50-52.

¹⁹ <http://www.austlii.edu.au/au/other/dfat/> (visited 16 March 2016).

²⁰ www.austlii.org. AUSTLII is a joint project of the University of Technology Sydney and the Faculty of Law at my own institution, the University of New South Wales. The *Australian Treaties Library* on AUSTLII has been significantly supported institutionally and financially since its inception by the Department of Foreign Affairs and Trade.

MOUs to be confidential, the presumption should be one of openness and publication.²¹

17. However, in contrast to the position with regards to treaties, there appears to be no comprehensive list available of the MOUs which Australia and Australian agencies have entered into with other countries or with international organisations (even of those that are still in force). There is no website where Australia's MOUs are brought together in one place so that they are readily accessible to members of the public.²²

18. Nor does there appear to be systematic approach to the publication of MOUs. Sometimes they appear on the DFAT website under a thematic page²³ or country/regional page, but not always. Sometimes they appear on a Ministerial website as part of a news item, which may be archived and thus unavailable or not readily available when there is a change of Minister or government. Some appear not to be made publically available at all. In some cases one can find the text only on non-governmental websites; in others it is only to be found on a government website in another country. Examples of the inconsistent practice are provided below.

Some further examples of inconsistent and unsatisfactory practice in relation to the availability of MOUs and other agreements of less than treaty status

19. DFAT Country Brief webpages frequently refer to MOUs with the country in question. However, mention of a MOU on a Country page does not necessarily mean that the text of the MOU will be available on that page or linked from it. For example, the Australian-Philippines terrorism cooperation MOU is mentioned on the Philippines Country brief webpage on the DFAT website, but the text is not available on or through that page (or anywhere else, it seems). Similarly, an MOU between Cambodia and Australia relating to investment cooperation concluded in 2006 is

²¹ Compare the recommendation by the Australian Law Reform Commission in relation to MOUs between domestic agencies in relation to the sharing of information as well as between Australian agencies and the agencies of other countries that 'Australian Government agencies should make such MOUs publicly available save in certain exceptional cases where this would be unreasonable or impractical.' ALRC, *Secrecy Laws and Open Government in Australia* (ALRC Report 112) (2010), Recommendation 14–4. I have been unable to find a formal government response to this recommendation.

²² My focus here is on arrangements entered into by the Commonwealth or Commonwealth agencies, and I do not consider the topic of arrangements entered into by State or Territory agencies with their foreign counterparts.

²³ See, eg, the MOUs relating to development cooperation the text of which is made available at <http://www.dfat.gov.au/aid/who-we-work-with/bilateral-partnerships/Pages/australias-development-partnerships-with-other-bilateral-donors.aspx> (visited 16 March 2016).

referred to on the Cambodia Country brief webpage,²⁴ but the text does not appear to be available on or from that page (or elsewhere on a government website).²⁵

20. The practice of publication of MOUs has also been inconsistent even in the same broad policy area or portfolio. For example, the MOUs relating to the processing of refugee applications by persons sent to Nauru and Papua New Guinea have been made available on the DFAT website under both the thematic page on 'People smuggling and trafficking' and the respective Country brief webpages.²⁶ However, the similar *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia 2014*, appears only on the DFAT People 'Smuggling and trafficking' webpage²⁷ but not on the Cambodia Country page.²⁸

21. In some cases the publication of the text of an MOU appears to be the result of external pressure. For example, the *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants 2009*²⁹ does appear on the website of the Attorney-General's Department. However, this was apparently the result of a successful FOI application rather than an example of publication of the MOU as a matter of course, and the document – made available over three years after its

²⁴ www.dfat.gov.au/geo/cambodia/Pages/cambodia-country-brief.aspx (visited 16 March 2016).

²⁵ A further example is an MOU between Australia and the UAE in relation to cooperation in the field of education: 'UAE signs education MOU to strengthen bilateral relations with Australia', 02 Jun 2014, <http://www.austrade.gov.au/Australian/Education/News/Austrade-update/uae-signs-education-mou-to-strengthen-bilateral-relations-with-australia> and <http://dfat.gov.au/geo/united-arab-emirates/pages/united-arab-emirates-country-brief.aspx> (14 March 2016) (no link to text). Yet another MOU with the UAE in the field of education was published: *Memorandum of Cooperation between Tertiary Education Quality and Standards Agency, Australia and University Quality International Board of the Knowledge and Human Development Authority, United Arab Emirates*, January 2015, <http://www.teqsa.gov.au/sites/default/files/MoUwithUQA1.pdf> (visited 14 March 2016).

²⁶ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 29 August 2012, <http://www.dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf> (visited 16 March 2016); *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, 6 August 2013, <http://www.dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.pdf> (visited 16 March 2016).

²⁷ <http://www.dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Pages/people-smuggling-and-trafficking.aspx> (visited 16 March 2016)).

²⁸ <http://www.dfat.gov.au/geo/cambodia/Pages/cambodia.aspx> (visited 16 March 2016).

²⁹ http://www.ag.gov.au/RightsAndProtections/FOI/Documents/MOU_with_Sri_Lanka_on_the_Smuggling_of_Migrants.PDF (visited 16 March 2016).

conclusion --is accessible via the Department's FOI disclosure log rather than through a thematic or country link.³⁰

22. Australia and New Zealand have entered into a number of MOUs on the exchange of criminal history information for vetting purposes: an MOU relating to a trial period was published in an assessment of its operation,³¹ but a subsequent MOU signed in February 2015 does not appear to have been published.³²

23. By contrast in other cases there appears to have been publication of an MOU at the time it was signed. For example, on 16 November 2011 the Australian and United States governments concluded an MOU on enhancing cooperation in preventing and combatting crime.³³ Unlike many other such MOUs this one was made available publically by both sides when the Australian Prime Minister³⁴ and the US President³⁵ issued a press statement. The agreement entered into force upon signature.

³⁰ 'Documents concerning legal cooperation on people smuggling and mutual assistance with Sri Lanka', 9 April 2013, <http://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureLog/DocumentsconcerninglegalcooperationonpeoplesmugglingandmutualassistancewithSriLanka.aspx> (visited 16 March 2016).

³¹ See Attorney-General's Department, *Privacy Impact Assessment: Trial exchange between the Government of New Zealand and the Government of Australia of criminal history information for vetting purposes*, 29 May 2012, Annexure A, <https://www.ag.gov.au/Publications/Documents/ExchangeofcriminalhistoryinformationwithNZforvettingpurposes/PIAonthesixmonthtrialwithNZfortheexchangeofcriminalhistoryinformationforvettingpurposes.pdf> (visited 16 March 2016).

³² Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, The Hon Michael Keenan, and New Zealand Minister of Justice, The Hon Amy Adams MP, 'Australia and New Zealand sign MoU for criminal history checks', Joint media release, 28 February 2015, <https://www.ministerjustice.gov.au/Mediareleases/Pages/2015/FirstQuarter/28-February-2015-Australia-and-New-Zealand-sign-MoU-for-criminal-history-checks.aspx> (visited 16 March 2016).

³³ *Memorandum of Understanding between the Government of the United States of America and the Government of Australia on Enhancing Cooperation in Preventing and Combating Crime*, signed 16 November 2011.

³⁴ The document appears to have been made available on 16 November 2011 on the then Prime Minister's website but that link no longer functions (<https://pmtranscripts.dpmc.gov.au/release/transcript-18275>, visited 14 March 2016). It was made available on 5 July 2012 through the Freedom of Information Register of the Commonwealth Attorney-General's Department, <https://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureLog/theMemorandumofUnderstandingbetweentheGovernmentoftheUnitedStatesofAmericaandtheGovernmentofAustraliaonE.aspx> (visited 16 March 2016).

³⁵ The document was available on the White House website on 16 November 2011, <https://www.whitehouse.gov/the-press-office/2011/11/16/fact-sheet-memorandum-understanding-between-us-and-australia-enhancing-c> (text at https://www.whitehouse.gov/sites/default/files/MOU_US_Australia.pdf, visited 14 March 2016).

24. Another example of a MOU between two government agencies that has been published on both agencies' websites is the 2008 cooperation agreement between United States Securities and Exchange Commission and Australian Securities and Investments Commission.³⁶ Indeed, ASIC appears to represent best practice in this area, reproducing the text of the MOUs and 'other international agreements' that it has entered into with over 50 partners, on its website.³⁷

25. Resort to a foreign government's website appears to be the only way to easily access the text of some other MOUs. For example,³⁸ the Australia-Indonesian *Memorandum of Understanding on Cooperation in Education and Training between the Department of Education, Science and Training of Australia and the Department of National Education of the Republic of Indonesia 2003* is referred to on the DFAT country page for Indonesia but without further details or a link to the text.³⁹ The only place where the text of the agreement is readily available appears to be the Indonesian government's international treaty database.⁴⁰

Unpublished MOUs referred to in or relevant to the interpretation of primary or delegated legislation

26. On occasion the content of an MOU may be relevant to the meaning of an Australian statute or a piece of delegated legislation. For example, the *International*

³⁶ *Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Enforcement of Securities Laws*, 25 August 2008, available at https://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/enhanced_enforcement_mou.pdf and <http://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/> (visited 16 March 2016). Other MOUs, in the field of development cooperation, that have been published include the *Joint Declaration of Principles Guiding Relations Between Australia and Papua New Guinea 1987, as amended by exchange of letters 1992*, <http://dfat.gov.au/geo/papua-new-guinea/Pages/joint-declaration-of-principles-guiding-relations-between-australia-and-papua-new-guinea.aspx>; and the *Memorandum of Understanding (MOU) on International Development Cooperation between Australia and Japan*, 12 December 2011, text at <http://dfat.gov.au/about-us/publications/Documents/japan-ausaid-mou.pdf> (visited 16 March 2016).

³⁷ 'Memoranda of understanding and other international agreements', <http://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/> (visited 14 March 2016).

³⁸ Other examples (as of 23 March 2016) are the *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability 2009* (available only on a New Zealand government website) and the *Agreement between Ukraine and Australia on deploying Australian personnel to Ukraine in connection with MH17 Malaysia Airlines plane crash 2014* (available only on the website of the Ukrainian Parliament). Both are discussed below.

³⁹ <http://www.dfat.gov.au/geo/indonesia/Pages/indonesia-country-brief.aspx> (visited 16 March 2016)

⁴⁰ http://treaty.kemlu.go.id/uploads-pub/1866_AUS-2003-0145.pdf (visited 16 March 2016).

Development Law Organization (Privileges and Immunities) Regulations 2007 conferred on the International Development Law Organisation (IDLO) and its staff a range of immunities consistent with the status of IDLO as an intergovernmental organisation. The Explanatory Statement read:

The Regulations give effect to a Memorandum of Understanding between the Australian Government and IDLO, signed on 28 June 2005, on the establishment and operation of IDLO's Asia Pacific Regional Center (APRC) in Australia ... Under the MoU, Australia committed to provide limited, non-financial, privileges and immunities to IDLO.⁴¹

27. The text of the Memorandum of Understanding was not annexed to the Regulations⁴² nor was it attached to the Explanatory Statement. Yet regulation 3(2) provided:

3 Definitions

(2) An expression used in these Regulations and in the Memorandum of Understanding has the same meaning in these Regulations as it has in the Memorandum of Understanding.

28. Accordingly, in this instance the meaning of a term in the Regulations could have been influenced by the meaning of the term in the MOU; at the very least anyone seeking to interpret the Regulations would have needed to consult the MOU in order to determine whether any issue did arise. However, at the relevant time, the text of the MOU did not appear to be publically available through Australian government sources; it is not currently available and does not appear to be available anywhere on the web. (IDLO no longer maintains a regional centre in Australia.)

29. By contrast, the text of the *Arrangement between the Government of Australia and the Asian Development Bank regarding the Pacific Liaison and Coordination Office of the Asian Development Bank 2005* which was similar in purpose was included as a schedule to the relevant regulations⁴³ and was thus available for public scrutiny.

30. A similar approach was adopted in relation to the conferral of similar privileges and immunities on the ICRC Regional Delegation in 2013 pursuant to the *Arrangement between the Government of Australia and the International Committee of the Red Cross ("ICRC") on a regional headquarters in Australia*. While the *Arrangement* was not included as a schedule to the relevant enabling bill and was

⁴¹ See *International Development Law Organization (Privileges and Immunities) Regulations 2007* (SLI No 85 of 2007), Explanatory Statement, Select Legislative Instrument 2007 No 85.

⁴² *International Development Law Organization (Privileges and Immunities) Regulations 2007*.

⁴³ *Asian Development Bank (Privileges and Immunities) Regulations 1967*, schedule 3.

thus not available for scrutiny by Parliament when that was considered,⁴⁴ it was included as an annex to the relevant regulations (which were laid before Parliament in the usual way).⁴⁵

31. None of the arrangements with the ADB, IDLO or the ICRC to confer privileges and immunities on an international entity appears in the *Australian Treaty Series*, thus indicating that the Australian government considered them to be instruments of less than treaty status – in other words, of similar legal status to the many arrangements designated as MOUs. Yet each had an impact on Australian law and potentially the rights of Australian citizens and residents.

32. Another case in which an arrangement of less than treaty status is referred to in Australian legislation but is not annexed to it and does not appear to be available on an Australian government website is the *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability 2009*. The Arrangement is referred to in the *Superannuation Legislation Amendment (New Zealand Arrangement) Act 2012*, but does not appear to be available on an Australian government website. It is, however, to be found on the website of New Zealand Inland Revenue.⁴⁶

The lack (or adhocery) of Parliamentary scrutiny

33. As a general rule, MOUs entered into with foreign countries or their agencies will not be presented to Parliament before or after they are entered into, unless they happen to be included as a schedule to a statute or delegated legislation, or come before a portfolio committee when the subject matter of the MOUs is being considered. While most MOUs may not raise significant issues deserving of attention by the Parliament, some do (especially perhaps those that government wishes to keep confidential). My argument is that there is a need to table such MOUs and to provide JSCOT with the opportunity to review them preferably before they are finalised or enter into force.

34. The opportunity for scrutiny of significant issues may otherwise turn on the contingent decisions to embody particular arrangements in an MOU rather than in a treaty. A striking example of this is the different treatment and level of Parliamentary scrutiny afforded to agreements on preventing and combatting crime entered into by

⁴⁴ See the comments of the Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, 229.

⁴⁵ *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*, Select Legislative Instrument No. 237, 2013.

⁴⁶ *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability, July 2009*, available on NZ IRD Department website: <http://taxpolicy.ird.govt.nz/sites/default/files/2009-other-nz-australia-retirement-savings-portability-agreement.pdf> (visited 16 March 2016).

the United States with Australia and New Zealand that permitted the citizens of those two countries to continue to take advantage of the Visa Waiver Program.

35. As noted above, the 2011 Australian and United States MOU on enhancing cooperation in preventing and combatting crime⁴⁷ was, unlike many other such MOUs, one that was made available publically by both sides when it was signed. The agreement entered into force upon signature. It was not presented to the Australian Parliament for scrutiny.

36. On the other hand, the agreement between the US and New Zealand governments, which was signed on 20 March 2013, took the form of a treaty. The provisions of that Agreement are in essence the same as those of the Australia-USA MOU (apart from the legally non-binding nature of the latter agreement). The New Zealand government submitted the Agreement to the New Zealand Parliament⁴⁸ under its procedure for review of significant treaties by the legislature.⁴⁹ The Agreement was accompanied by a detailed National Interest Analysis.⁵⁰ The Foreign Affairs, Defence and Trade Committee of the New Zealand Parliament undertook an examination of the Arrangement and reported on 31 January 2014,⁵¹ making one recommendation, namely regular reporting to Parliament to ensure monitoring of the operation of the Agreement. On 18 March 2014 the Government agreed in principle to this recommendation,⁵² and the entry into force of the Agreement

⁴⁷ *Memorandum of Understanding between the Government of the United States of America and the Government of Australia on Enhancing Cooperation in Preventing and Combating Crime*, signed 16 November 2011.

⁴⁸ See <http://www.justice.govt.nz/policy/criminal-justice/organised-crime/agreement-on-enhancing-cooperation-in-preventing-and-combating-crime> (visited 16 March 2016).

⁴⁹ New Zealand Ministry of Foreign Affairs and Trade, *The Treaty making process in New Zealand*, updated 12 January 2015, www.parliament.nz/resource/0000177495 and *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2014, <https://www.mfat.govt.nz/assets/securedfiles/International-Treaty-Making-Guide-2014.pdf>.

⁵⁰ <http://www.justice.govt.nz/publications/global-publications/n/national-interest-analysis> (visited 16 March 2016).

⁵¹ New Zealand Parliament, *International treaty examination of the Agreement between the Government of New Zealand and the Government of the United States on Enhancing Cooperation in Preventing and Combating Crime*, Report of the Foreign Affairs, Defence and Trade Committee, 31 January 2014, http://www.parliament.nz/resource/en-NZ/50DBSCH_SCR6065_1/1cb424ca88b333fad66dc60cc94ace59c333b74f (visited 16 March 2016).

⁵² Government Response to the Report of the Foreign Affairs, Defence and Trade Committee on International treaty examination of the Agreement between the Government of New Zealand and the Government of the United States on Enhancing Cooperation in Preventing and Combating Crime, 18 March 2014, <http://www.justice.govt.nz/publications/global-publications/g/government-response-nz-us-preventing-and-combating-crime-agreement> (visited 16 March 2016).

awaits the enactment of the necessary implementing legislation and the exchange of letters in that regard.⁵³

37. A slightly unusual example was presented by the bilateral arrangements that Australia entered into with the Netherlands and Ukraine to allow Australian personnel to assist, on Dutch and Ukrainian territory respectively, in the investigation into the downing of Malaysia Airlines flight MH17 in 2014. The arrangement with the Netherlands⁵⁴ was of treaty status, something which the Netherlands government stipulated was necessary as a matter of Dutch law.⁵⁵ The Australia-Netherlands Treaty, which entered into force on the day it was signed (1 August 2014), was tabled in the Australian Parliament by the Foreign Minister on 30 September 2014⁵⁶ and is published in the *Australian Treaties Library*.⁵⁷ Although that treaty did not go before JSCOT prior to its entry into force, it did so afterwards; the national interest exemption to the usual procedure was invoked because of the need for speedy action.⁵⁸

38. The position in relation to the status of the arrangement between Australia and Ukraine appears less clear. According to the official website of the Ukrainian Parliament (the *Verkhovna Rada*), at an extraordinary plenary closed meeting on 31 July 2014, that body ratified both the *Agreement between Ukraine and Australia on deploying Australian personnel to Ukraine in connection with MH17 Malaysia Airlines plane crash* and the *Agreement between Ukraine and the Kingdom of the*

⁵³ New Zealand Treaties Online, www.treaties.mfat.govt.nz/search/details/t/3773 (visited 16 March 2016).

⁵⁴ *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines flight MH17* (The Hague, 1 August 2014), [2014] ATS 30.

⁵⁵ Ms Julie Bishop MP, Minister for Foreign Affairs, 'Ukraine Air Disaster', Ministerial Statement, House of Representatives, Hansard, 30 September 2014, p 10715.

⁵⁶ *Ibid.*

⁵⁷ In its preamble the treaty also makes reference to another unpublished bilateral arrangement, the *Memorandum of Understanding between the Australia Federal Police and the National Police of the Netherlands on Combating Transnational Crime and Developing Police Cooperation*, 2 June 2014.

⁵⁸ Joint Standing Committee on Treaties, *A history of the Joint Standing Committee on Treaties*, Report 160 [JSCOT History], March 2016, p 57, paras 4.177-4.179. This treaty, which was to be in force for one year, was subsequently extended by the *Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines flight MH17*, which was tabled in Parliament on 12 May 2015, signed on 16 July 2015, and took effect on 1 August 2015. It extended the 2014 treaty for an additional year. *Ibid.*, pp 57-58, paras 4.181-4.182. See [2015] ATS 5 and *Verdrag tussen het Koninkrijk der Nederlanden en Australië inzake de aanwezigheid van Australisch overheids personeel in Nederland ten behoeve van de reactie op het neerhalen van vlucht MH17 van Malaysia Airlines*, *Tractatenblad van het Koninkrijk der Nederlanden*, 29 July 2015, 2015, No 119, <https://zoek.officielebekendmakingen.nl/trb-2015-119.html> (visited 19 March 2016).

*Netherlands on international investigation mission protection.*⁵⁹ The Netherlands-Ukraine agreement was published (in English) by the Netherlands government,⁶⁰ and was considered a treaty by both parties.

39. The Australia-Ukraine arrangement also appears to have been considered as a treaty by Ukraine, at least so far as subjecting it to the normal parliamentary procedures for the ratification of binding international agreements. The adoption of a law ratifying the agreement⁶¹ which referred to the provisions of the Ukrainian Constitution requiring parliamentary ratification of the acceptance of binding international agreements⁶² and the Law on International Agreements of Ukraine, which requires ratification of international treaties,⁶³ were both cited in the preamble of the Law.⁶⁴

40. Yet the arrangement with Ukraine does not appear to have been considered by Australia to be of treaty status, as it was not laid before Parliament or referred to JSCOT (as was the Australian-Netherlands agreement), and it was not published in the *Australian Treaty Series*. The English text of the arrangement is available on the website of the Ukrainian Parliament,⁶⁵ but the full text does not appear to have been published anywhere on an Australian government website. Although the clause sometimes found in Australian arrangements of less than treaty status -- clearly stating that the arrangement does not give rise to binding legal obligations⁶⁶ -- was not included in the 'arrangement', the language used makes it possible for Australia to argue persuasively that it is not a treaty as a matter of international law, even

⁵⁹ <http://rada.gov.ua/en/news/News%202/96548.html> (visited 19 March 2016).

⁶⁰ *Verdrag tussen het Koninkrijk der Nederlanden en Oekraïne inzake de internationale missie tot bescherming van onderzoek*, Kiev, 28 July 2014, *Tractatenblad van het Koninkrijk der Nederlanden*, 28 July 2014, 2014, No 135, <https://zoek.officielebekendmakingen.nl/trb-2014-135.html> (visited 19 March 2016).

⁶¹ *On Ratification of the Agreement between Ukraine on [sic] Australia on Deployment of Australian Personnel in Ukraine in Connection with the Crash of the Malaysia Airlines Flight MH17*, Law 2014 No 1619-VII, 31 July 2014, <http://zakon4.rada.gov.ua/laws/annot/en/1619-18> (visited 19 March 2016). The law entered into force on 12 August 2014

⁶² Constitution of Ukraine, article 85(32). This provision confers on the Ukrainian legislature the power of 'granting consent – by adopting a law – to the binding character of treaties of Ukraine and denouncing international treaties'. European Commission for Democracy through Law, Constitution of Ukraine, text provided by the Ukrainian authorities on 13 March 2014, CDL-REF(2014)012, <http://www.refworld.org/pdfid/44a280124.pdf> (visited 19 March 2016).

⁶³ On International Agreements of Ukraine, Law 2014 No 1906-IV, article 9, <http://zakon4.rada.gov.ua/laws/annot/en/1906-15> (English summary) (visited 19 March 2016).

⁶⁴ Law No 1619-VII, above n 61.

⁶⁵ <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=51824&pf35401=309354> (visited 23 March 2016). I am grateful to the Ukrainian Embassy in Canberra for providing me with this reference.

⁶⁶ See, eg, *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants* 2009, article 2.

though Ukraine dealt with the arrangement through its domestic procedures for the ratification of treaties.⁶⁷

41. While the status of an agreement which one party appears to treat as a treaty and the other does not is an interesting question, the relevant point in this context is the anomalous situation that arises from the perspective of JSCOT review of analogous agreements. In the case of the Australia-Netherlands agreement, the matter came before the Committee; in the case of the Australia-Ukraine agreement, it did not. The text of the former is publically available through official Australian government sources, the text of latter available only on the website of the Ukrainian Parliament.

42. Among other provisions, the Australia-Ukraine arrangement contains provisions setting out ‘understandings’ about the powers to be exercised by Australian forces on the territory of another State (including authorising the use of force ‘as may be reasonably necessary to achieve the purposes of the Activity, including the use of lethal force in self-defence’⁶⁸), states that those forces ‘will be accorded the status equivalent to that accorded to the administrative and technical staff of a diplomatic mission’⁶⁹), provides for the use of Ukrainian public facilities by Australian personnel,⁷⁰ and also stipulates that Australia would pay for certain services provided to it by Ukraine.⁷¹

43. The provisions are substantially similar to those contained in the Ukraine-Netherlands treaty, and involve significant issues that are deserving of Parliamentary review and are at least as important as those contained in the Australian-Netherlands treaty relating to MH17. The fortuitous choice of the status of the instruments – in one case a treaty (in response to the needs of the Netherlands), the other an arrangement involving constructive ambiguity which served the needs of both sides (Ukraine and Australia) – meant that in one instance JSCOT reviewed the agreement, while in the other it did not.

⁶⁷ The Australian-Ukraine arrangement refers in its preamble to the ‘agreement’ with the Netherlands but denotes itself as an ‘arrangement’; Australia and Ukraine are referred to as ‘Participants’ who have reached ‘understandings’, as compared with the Netherlands-Ukraine agreement (‘Parties’ who ‘have agreed’); the Australian arrangement tends to use the word ‘will’, while the Netherlands agreement tends to use the word ‘shall’; the Australian arrangement ‘will take effect’ while the Netherlands agreement ‘shall enter into force’; and the Australian arrangement is ‘signed’, while the Netherlands agreement is ‘done’. All of these contrasts indicate an intention in the case of the Australia-Ukraine agreement to avoid the language normally associated with a binding instrument.

⁶⁸ Ibid [3.1].

⁶⁹ Ibid [2.3].

⁷⁰ Ibid [4.2].

⁷¹ Ibid [4.1].

E. Conclusion

44. This paper has sought to draw attention to the current state of Parliamentary and public access to the texts of formal arrangements between Australia and other countries that are of 'less than treaty status', in particular those designated as MOUs. I have argued that MOUs can be of considerable practical and political significance to the relations between Australia and the other countries which are parties to those agreements, and can have an impact on the way in which Australian and foreign agencies deal with information about and affect the rights and interests of Australian citizens and residents. Because they involve formal arrangements for the exercise of public power, their texts should as a matter of principle be made public and thus subject to Parliamentary and public scrutiny, unless a compelling case can be made that particular instruments or categories of instruments should not be released. In such a case, however, providing briefings to Parliament (in particular JSCOT), as is done in other sensitive areas), should be the fall-back position.

45. Based on selected examples, I have argued that at present the availability of such documents is patchy, and the practice of publication inconsistent and unsystematic. As a result, the text of many such instruments is not available to the public on government websites when they should be. The concerns that led to the mid-1990s reforms to the treaty process, in particular the need for adoption of a systematic approach to the publication of treaties and related information as a means of ensuring transparency and accountability, apply to many of these instruments.

46. The time has come to give greater recognition to the complexity and importance of international law making and international cooperation between States that takes place outside the framework of formal treaty relations. At least three steps should be considered:

- A government-wide audit and preparation of a comprehensive list of current instruments of less than treaty status (starting with bilateral instruments) and the publication of that list on the web in one place.
- The adoption of an approach to the negotiation of such instruments that makes it clear to the other party that MOUs will in the ordinary course of events be made public unless a compelling case is made to the contrary.
- The adoption of a coherent government publications policy based on a presumption of publication of the full text, perhaps in the form of a new library in the Australian Treaties Library – the equivalent of a Federal Register for (bilateral) instruments of less than treaty status.
- The regular reporting to Parliament of instruments of less than treaty status that have been concluded, are being negotiated or are being proposed.
- The expansion of JSCOT's mandate to ensure that all MOUs are brought to its attention, for such examination as it considers appropriate.

[23 March 2016]

Joint Standing Committee on Treaties 20th Anniversary Seminar:**'In our best interest: treaty scrutiny in a connected world'****18 March 2016****Beyond scrutiny? - New developments in customary international law and treaty interpretation.****Bill Campbell QC¹**

Treaties are but one of the sources of international law referred to in Article 38 (1) of the Statute of the International Court of Justice, albeit a very important source. The other sources are customary international law, general principles of law recognised by civilised nations and, the subsidiary means of judicial decisions and the teachings of highly qualified public international lawyers.²

2. Today I will mention two matters relating to customary international law and another relating to treaties. All of these matters concern the development of international law and its application to Australia in ways that in the final analysis essentially are beyond Australian control. In part, this lack of control is because the matters involve the practice of States generally and not of Australia in particular. These factors may render consideration by the Joint Standing Committee difficult. In addressing these three matters I will mention the current relevant work of the International Law Commission (ILC), the United Nations body charged with the progressive development of international law³.

3. The first matter is the continuing importance of the timely development of customary international law to meet certain of the challenges of today's world. The second concerns the negotiation of a treaty in an area already the subject of well-developed and/or developing customary international law. The third is the use of agreement and State practice subsequent to the adoption of a treaty in the interpretation of obligations under

¹ General Counsel (International Law), Office of International Law, Attorney-General's Department. The views expressed in this paper are my own and do not necessarily represent those of the Australian Government.

² These three sources have been considered by the Full Federal Court in *Ure v. Commonwealth* in a decision handed down in January of this year. The decision of the Full Federal Court is the subject of a special leave application to the High Court. The case concerns a claim to private rights to areas of land on Elizabeth and Middleton Reefs adjacent to New South Wales.

³ Australia, together with New Zealand and Canada, has nominated Professor Chester Brown of the University of Sydney for the elections to the ILC that are to take place later this year.

that treaty - that being a matter referred to in Article 31 (3) of the Vienna Convention on the Law of Treaties.

4. It might be useful by way of introduction to give a quick précis of the constituent elements of customary international law. It is described in Article 38 of the Statute of the International Court of Justice in a somewhat opaque manner as “international custom, as evidence of general practice accepted as law”. Classically it has two elements and these were identified by the Full Federal Court in its recent decision in the *Ure Case*⁴ as involving twin inquiries – the first “into the existence of an ‘a general practice’ and [secondly] whether the practice reflects obedience to a perceived rule of law... [the latter] referred to as *opinio juris*”. Judge Crawford of the ICJ has put those questions more simply: “is there a general practice” and “is it accepted as international law?” though he concludes: “The problem with establishing customary international law is that it seems impossible.”⁵

5. To avoid ending this précis on that somewhat pessimistic note let me give a couple of examples of rules of longstanding customary international law. The first is *pacta sunt servanda* - that is, the principle that treaties are binding and are to be implemented in good faith - this principle now being reflected in Article 26 of the Vienna Convention. Also, much of the law of the sea as reflected in the 1982 UN Convention on the Law of the Sea is customary international law - for example, the right of innocent passage in the territorial sea and freedom of the high seas. While the content of many treaties is reflective of customary international law as these two examples demonstrate, treaties can themselves amount to practice contributing to the development of rules of customary international law – and rules of customary international law which are in part founded on treaty practice will bind States irrespective of whether they are parties to the relevant treaties.

6. Moving to the first of the two points I would make about customary international law - it is that customary international law is capable of developing reasonably quickly to respond to certain new challenges on the international plane, in circumstances where it may be unlikely that a treaty could be developed in the time necessary to meet those challenges.

⁴ At paragraph 29

⁵ Crawford, *Brownlie's Principles of Public International Law*, (8th Ed. OUP 2012) p 23; *Chance, Order, Change: The Course of International Law*, (Martinus Nijhoff 2013) p to 49

Let me give a recent example. It concerns the legal basis for responding to the threat posed by well organised non-state actors operating out of one country and carrying out armed attacks within the borders of another country. Ironically, it was just that circumstance that led to the seminal exchange of correspondence on the limits of self-defence between the US (Secretary of State Webster) and the UK (Lord Ashburton) following *The Caroline* incident in 1837. However, the law of self-defence as it had developed subsequently focussed on attacks, or an imminent threat of attack by one State upon another State. The position of Australia and that of a number of other countries is that the customary international law of self-defence has developed so as to enable action in self-defence to be taken not only against States but also against non-state actors provided certain criteria are met. Indeed, it is on this basis that Australia and a number other countries are conducting air operations against ISIS (Daesh) in Syria in the collective self-defence of Iraq.⁶

7. In addition to the standard criteria underpinning an action in collective self-defence⁷, self-defence against non-state actors requires that the State in which they are based is either unable or unwilling to control the actions of the relevant non-state actors located within its borders.⁸ In terms of State practice, application of that criterion is in part reflected in the notifications to the UN Security Council by a number of countries (including Australia) under Article 51 of the UN Charter in relation to their actions of collective self-defence of Iraq against ISIS (Daesh) in Syria.⁹ No doubt this development in the customary international law of self-defence may not be uniformly accepted - least of all by Syria if its letters to the UN Security Council in response to the notifications I just mentioned is anything to go by¹⁰ – or for that matter, if the academic debate is anything to go by.¹¹

⁶ This position of Australia is reflected in an article by the Attorney-General Senator the Hon George Brandis QC - 'It's a war of self-defence', *The Australian* 10 September 2015 p 12.

⁷ An actual or imminent armed attack, no effective means to address the attack other than the use of force and a request for assistance from the state under threat. In addition, the right of self-defence once established is not unconstrained. The force used must be necessary to address the threat and be proportionate to it.

⁸ An earlier enunciation of this criterion is to be found in the Chatham House *Principles of International Law on the Use of Force by States in Self-Defence*, Principle 6 (October 2005, ILP WP 05/01).

⁹ See for example, letters to the President of the Security Council from Australia (9 September 2015, UN Doc. S/2015/693); the United States of America (23 September 2014, UN Doc. S/2014/695); and Canada (31 March 2015, UN Doc. S/2015/221).

¹⁰ Letter dated 21 September 2015 from the Permanent Representative of Syria to the UN Secretary-General and the President of the Security Council.

8. Here it may be relevant to mention the distinction in international law between *lex lata* (that is, the law as it is) and *de lege ferenda* (that is, the law as it should be if it were to accord with good policy). States may differ genuinely as to whether a particular principle – for example, the unable or unwilling principle – has moved from being *de lege ferenda* to *lex lata* and perhaps this is in part reflective of the “impossibility” that Professor Crawford was referring to.

9. Be that as it may, there was an undoubted need for the development of the law in this area. The development of a treaty in a timely manner was not a realistic proposition. One only has to recall the stalled negotiations on the Comprehensive Convention on International Terrorism to understand why the timely negotiation and entry into force of a treaty regime dealing with self-defence against non-state actors was not a viable option. Nor, for obvious reasons, could it be assumed that there will be a UN Security Council Resolution authorising such action in many circumstances.

10. Other areas in which there either has been, or may be timely developments in customary international law include countering cyber-threats where the developing law seems to be going down the path of adopting principles analogous to the law of armed conflict; a second would be the law relating to the hot pursuit of vessels which is sorely in need of change to take account of developments in technology; and a third would be humanitarian intervention. Of course, there are some areas of international law which are more suited to development through custom than others. For example, the burgeoning area of the law relating to international trade seems more suited to development through bilateral and multilateral treaties than by custom.

11. The International Law Commission currently is considering the topic of the formation of customary international law and the rapporteur on that topic is Sir Michael Wood, a former Foreign and Commonwealth Office Legal Adviser. I would commend the work of the ILC on the topic.

¹¹ See Daniel Bethlehem QC, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AJIL 769 (2012) and responses to that article by Akande, Lieflander, Tladi and Hamoud and a further brief response by Daniel Bethlehem QC in 107 AJIL (2013) 563-584.

13. Developments in customary international law can of course be overridden by a treaty at least as between parties to the treaty - unless the relevant rule of customary international law being overridden is a so-called peremptory rule of international law (or *jus cogens*) such as the prohibition on torture or the prohibition on genocide. This leads on to the second matter or, more accurately thought I wish to raise - it is, that the international community should exercise a degree of caution in attempting the negotiation of a comprehensive multilateral treaty on a topic where that topic already is the subject of well-developed rules of customary international law or where the development of those rules is proceeding in an orderly way.

14. In making this point, I have one particular and very important area of international law in mind. That is, the body of international law which determines the circumstances in which a State will be held responsible for its internationally wrongful acts – or, put more shortly, the rules relating to state responsibility. Pursuant to its charter, the International Law Commission adopted its comprehensive Articles on the Responsibility of the States for Internationally Wrongful Acts on the 31 May 2001. These draft articles were annexed to UN General Assembly Resolution 56/83 on 12 December of the same year and presented to States as being “without prejudice to the question of their future adoption.” The Articles have been referred to and relied upon on innumerable occasions by international courts and tribunals as well as by Governments and the UN has catalogued these instances.¹² Individual articles are widely regarded as either reflective of customary international law or as likely to develop into customary international law.

15. Notwithstanding this, a live debate is in play as to whether a diplomatic conference should be convened to examine the draft articles with a view to concluding a convention on the topic. The matter is coming to a head with the UN General Assembly having decided to include the matter of state responsibility on its agenda for its meeting later this year with a view to taking a decision on “the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles [on

¹² The UN has collected information, though not comprehensive, on references to the ILC Articles on State Responsibility in case law. For example, between 1 February 2010 and 31 January 2013 they collected references to 56 cases referring to the Articles – UN Doc A/68/72.

State responsibility].”¹³ The move has its supporters and detractors and was the subject of a lively debate in the margins of the UN 6th (Legal) Committee last year.

16. Personally, I do not favour attempting to translate the ILC Articles on State Responsibility into a treaty. My reasons for this are no better encapsulated than in views expressed by the UK to the UN:

[T]here is a real risk that in moving towards the adoption of a convention based on the draft articles issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing... Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles... If few States were to ratify a convention that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterised by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect [and] may serve to undermine the current status of the draft articles.

17. One of the topics under current consideration by the International Law Commission is that of subsequent agreements and subsequent practice in relation to the interpretation of treaties and that is the third matter to which I will now turn in somewhat shorter measure.

18. I mention subsequent agreements and subsequent practice for three reasons. First, such agreements and practice will almost inevitably arise after the treaty in question has been considered by the Joint Standing Committee and may give rise to an interpretation which was not within the contemplation of the Committee. Secondly, I wanted to draw attention to the work of the International Law Commission on this topic. Finally, if there is time, I wanted to mention two recent instances where the matter of subsequent agreements and practice has arisen in two cases involving the Commonwealth, one international and one domestic.

¹³ UNGA Resolution A/RES/68/104

19. On the first point, I note that there are instances where the Joint Standing Committee has considered subsequent agreements between the parties to a treaty which have the effect of altering the treaty. However, such changes normally flow from a formal mechanism recognised in the treaty itself under which the constituent organisation created by the treaty can adopt amendments to the treaty. For example, the Committee has considered amendments to the Schedule of the International Convention on the Regulation of Whaling adopted by a two thirds majority of the members of the International Whaling Commission.¹⁴

20. I suspect that the Committee is much less likely to consider changes to the interpretation of the treaty resulting from an informal agreement or the subsequent practice of the parties. The most quoted example of interpretation by subsequent practice is that concerning the interpretation of Article 27 (3) of the UN Charter which provides that decisions by the Security Council on non-procedural matters “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...”. The interpretation that has been given to this provision through the practice of the Security Council is that ‘if a permanent member wishes to block a decision it is not enough for it to abstain, or even be absent; it must cast a negative vote (known colloquially as “the veto”)’.¹⁵ I realise that the practice giving rise to this interpretation arose well before the creation of the Joint Standing Committee. Nevertheless it does illustrate that issues of great importance can be dealt with through subsequent interpretation. It also illustrates that not all States will necessarily be involved as part of the State practice giving rise to the interpretation.

21. In the context of examining the use of subsequent agreement and practice in the interpretation of treaties Aust, in his text on *Modern Treaty Law and Practice*, states that:

“Foreign ministry legal advisers are familiar with the question: how can we modify the treaty without amending it? Even if the treaty does have a built-in amendment

¹⁴ JSCOT Report 23, August 1999

¹⁵ Aust, *Modern Treaty Law and Practice*, (3rd Ed. OUP 2013) p215

procedure, the process can be lengthy and uncertain, especially if it is a multilateral treaty and any amendment is subject to ratification.”¹⁶

22. Sometimes a modification can be urgent, and a formal amendment impractical given that urgency. For example, the United Nations Convention on the Law of the Sea originally required a State intending to establish a continental shelf beyond 200 nautical miles to lodge a submission with the Commission on the Limits of the Continental Shelf within 10 years of the entry into force of the Convention for that State.¹⁷ When it became apparent that most States with an extended continental shelf would miss that deadline, the States Parties to the Convention adopted an understanding at one of their annual meetings effectively extending the deadline. I doubt whether this extension was considered by the Joint Standing Committee even though it altered a right of Australia under the Convention. As it turned out, the Australian Government was determined to meet the original deadline given the uncertain legal effect of the understanding adopted by the Meeting of States Parties.

23. If JSCOT were to hold inquiries into treaties to which Australia already is a party – as it did in the case of the Convention on the Rights of the Child – then it would have the opportunity to examine subsequent interpretations of the relevant treaty.

24. For those interested in this issue of subsequent agreement and practice, I would commend again the current work of the International Law Commission which is led by Mr Georg Nolte of Germany. To date, the ILC has provisionally adopted 11 conclusions including on matters such as the definition and identification of subsequent agreement and subsequent practice, the weight it is to be given as a means of interpretation and the relevance of the practice of international organisations in the interpretation of treaties.

25. Finally, let me turn to the two cases mentioned earlier. The first is the *Whaling Case* taken by Australia in the International Court of Justice. In that case Australia relied upon the subsequent practice of the Parties to the International Convention for the Regulation of the Whaling, particularly in the forum of the International Whaling Commission. We argued that that practice confirmed that Article VIII of the Convention concerning whaling for scientific

¹⁶ Aust, p 214.

¹⁷ Annex II, Article 4

purposes – the very Article relied upon by Japan to support its whaling activities - was to be interpreted very much as an exception and only able to be relied upon in very limited circumstances. This argument based on subsequent practice was partially accepted by the Court in its finding that when recommendations of the International Whaling Commission are “adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.”¹⁸

26. The second case, *Macoun v. Commissioner for Taxation*, was a case considered by the High Court late last year.¹⁹ The Appellant was a former sanitary engineer with the International Bank for Reconstruction and Development which is part of the World Bank. For the purposes of his employment he was entitled to privileges and immunities under the Convention on the Privileges and Immunities of the Specialized Agencies. The question before the Court was whether the immunities under the Specialized Agencies Convention and under implementing Australian law rendered the pension that the Appellant received from the IBRD Retirement Fund immune from taxation in Australia.

27. The Court held that the income derived from the pension was not immune. In coming to that conclusion the Court applied the principles of interpretation set out in the Vienna Convention on the Law of Treaties, including that relating to subsequent practice. The practice referred to by the Court included decisions of the Administrative Tribunal of the United Nations, decisions of domestic courts in France and the Netherlands, an international arbitration and a statement by the UN Secretary-General. The Court concluded that while the State practice was not consistent ‘there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation’. Accordingly it found that the Specialised Agencies Convention did not require Australia not to tax the Mr Macoun’s pension.²⁰

¹⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* Judgment of 31 March 2014, para 46

¹⁹ (2015) 326 ALR 452

²⁰ *Ibid* at 468-9.