

Assessing the 1996 Reforms in 2006

Introduction

- 3.1 The seminar provided an opportunity to examine the work of the Committee since its establishment as part of a package of reforms in 1996. However, as the work of the Committee is so closely tied to the 1996 Reforms, it is helpful to examine the wider reforms in the same way.
- 3.2 This chapter provides a closer look at some of the issues raised during the seminar. These issues are discussed within the framework of four of the five reforms introduced in 1996, as well as JSCOT. There were three recurring issues raised throughout the seminar: the adequacy of Commonwealth consultation with the States and Territories; the Treaties Council; and the role of JSCOT in the Parliamentary scrutiny of treaties.

The 1996 Reforms

- 3.3 In his Ministerial Statement, the Hon Alexander Downer MP, Minister for Foreign Affairs, identified five key changes to provide 'proper and effective procedures enabling parliament to scrutinise intended treaty

action'.¹ Broadly, the reforms focused on two areas: consultation between the Commonwealth and the States/Territories; and Parliamentary scrutiny of proposed treaty actions; and consisted of five key changes:

- the tabling of treaties in Parliament for a minimum of 15 sitting days before the Government takes binding treaty action;²
- the tabling of National Interest Analyses to explain the reasons for the government's decision to enter into the treaty and to detail the impact the treaty would have on Australia;
- the establishment of a Parliamentary Joint Standing Committee on Treaties to strengthen Parliament's role in treaty making;
- the establishment of a Treaties Council as an adjunct to the Council of Australian Governments (COAG) to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories. The Treaties Council comprises the Prime Minister and the Premiers and Chief Ministers of the States and Territories. Meetings of the Treaties Council were intended to coincide with COAG meetings; and
- the establishment of a treaties information database for individuals and interested people to easily and freely obtain information on any treaty.³

3.4 The Minister for Foreign Affairs and Trade regarded the reforms as overcoming

...what this government considers to have been a democratic deficit in the way treaty-making has been carried out in the past. The measures will ensure that State and Territory governments are effectively involved in the treaty-making process through the establishment of a Treaties Council. They will also ensure that every Australian individual and interest

1 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 231 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

2 Following an announcement by the Minister for Foreign Affairs and Trade, the Hon Alexander Downer MP, in August 2002 some treaty actions which are considered to be less routine or potentially controversial are now tabled for 20 sitting days.

3 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 231 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

group with a concern about treaty issues has the opportunity to make that concern known.⁴

- 3.5 SCOT existed prior to the 1996 Reforms and plays a significant role in consultations between the Commonwealth and the State and Territory governments.⁵ SCOT consists of senior Commonwealth and State and Territory officers. It meets twice a year, or more if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories. Specifically, its role is to:
- decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements;
 - monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories;
 - ensure that appropriate information is provided to the States and Territories; and
 - co-ordinate as required the process for nominating State and Territory representation on delegations where such representation is appropriate.⁶

The 1996 Reforms ten years later

- 3.6 The seminar provided a timely opportunity to assess the work of JSCOT as part of the package of reforms to the treaty making process.
- 3.7 The discussion below examines a number of matters raised during the seminar. The discussion is structured around four of the five reforms introduced in 1996: the Treaties Council; NIAs; the treaties database; and the Joint Standing Committee on Treaties; in addition to SCOT.

4 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 231 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

5 SCOT was established as a result of the Premiers' Conference July 1991, see Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Parliament House, Canberra, November 1995, p. 209.

6 Department of Foreign Affairs and Trade, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements*, Canberra, August 1994; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Parliament House, Canberra, November 1995, p. 209.

The Treaties Council

- 3.8 The Treaties Council was established as an adjunct to COAG meetings and was to meet at least annually. To date, the Treaties Council has met once, on 7 November 1997.⁷
- 3.9 The purpose of the Treaties Council, as provided for in the *Principles and Procedures for Commonwealth-State Consultation on Treaties*:
- ...is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories either of its own motion, or where a treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of COAG or by SCOT.⁸
- 3.10 As such, the Treaties Council is intended to provide an important consultative mechanism between the Commonwealth Government and the State and Territory governments. From a State and Territory government perspective, its failure to meet since 1997 represents the breakdown of a body intended to strengthen the process of consultation between the Commonwealth and the States and Territories. Mr Neil Roberts MP, from the Queensland Parliament, drew attention to:
- The problems posed by the government's unexplained refusal to convene the treaties council since its establishment, save on one occasion.⁹
- 3.11 In the opinion of one seminar participant, the absence of Treaties Council meetings since 1997 renders the process 'effectively useless'.¹⁰
- 3.12 Mrs Petrice Judge, a former SCOT representative from Western Australia, and speaking to the seminar as a representative of the Western Australian Department of Premier and Cabinet called for:
- Meaningful involvement of the Treaties Council and a more coordinated use of ministerial councils that have an interest in the subject matter of the treaty¹¹
- 3.13 However, it was suggested that Commonwealth consultation with the States and Territories has not suffered as result of the Treaties Council

7 See 'Treaties Council', Council of Australian Governments website (accessed 13 June 2006) <www.coag.gov.au/treaties_council.htm>;

8 Ms Anne Twomey, *Transcript of Proceedings*, Friday 30 March 2006, p. 83 RT, p. 30 OT.

9 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 59 RT, p. 11 OT.

10 Ms Anne Twomey, *Transcript of Proceedings*, Friday 30 March 2006, p. 84 RT, p. 30 OT.

11 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 78 RT, pp. 25-26 OT.

not having met. Rather, consultation on treaties between the Commonwealth and States and Territories takes place through other means, such as SCOT, the Committee, or through ad hoc consultative processes.¹²

- 3.14 This suggestion was supported by Ms Anne Twomey who commented that:

In some ways [the Joint Standing Committee on Treaties] seems to have taken over the functions of the Treaties Council to the extent that it is a public forum at which the states can make representations and matters can become public and discussed.¹³

- 3.15 For instance, consultation during the negotiations for the Australia-United States Free Trade Agreement still occurred even though the Treaties Council did not meet, instead, consultation took place outside the framework of the Treaties Council.¹⁴

- 3.16 It was also pointed out that as long as the Treaties Council continues to exist, even if it does not meet in practice, it has value in that it is a body which can be used if needed.¹⁵

The Standing Committee on Treaties (SCOT)

- 3.17 One of the key recommendations to come out of the *Trick or Treaty?* Report was that effective consultation processes should be developed between the Commonwealth and the States and Territories. Consequently, the Minister for Foreign Affairs, the Hon Alexander Downer MP stated, when introducing the package of reforms to Parliament in 1996, that:

Consultation will be the key word.¹⁶

- 3.18 As previously mentioned, SCOT existed prior to the 1996 Reforms. However, SCOT's role was expected to change as a result of the reforms. In particular, the creation of the Treaties Council was to provide for higher levels of consultation between the Commonwealth

12 See Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 76 RT, pp. 24-25 OT, citing the Prime Minister; and Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 83 RT, p. 30 OT.

13 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 30 OT.

14 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 30 OT.

15 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 30 OT.

16 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 231 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

and the States and Territories, between the Prime Minister and Ministers and Chief Ministers rather than between officials.¹⁷ It was envisioned that SCOT would now act as a secretariat to the Treaties Council.¹⁸ Following the 1996 Reforms, the *Principles and Procedures for Commonwealth-State Consultation on Treaties* was also revised.¹⁹

3.19 Seminar participants heard that SCOT was set up to:

- identify treaties of sensitivity and importance to the States;
- have regard to the potential to influence finances and future policy decisions of the States;
- recognise the need for State participation in implementation;
- facilitate information flow from the Commonwealth to the States; and
- coordinate State and Territory representation on delegations for important treaty negotiations.²⁰

3.20 Seminar participants indicated that consultation through the SCOT process has improved as a result of the 1996 Reforms but that it still has imperfections.

3.21 On this point, Mrs Petrice Judge recognises that SCOT has established an 'information flow' but also points to some of the problems in the process. Principally, she questions the adequacy and effectiveness of some of the consultation undertaken through SCOT and comments that 'merely mentioning in the NIA that States have been provided with a treaty schedule ... does not equal consultation.'²¹

We really want to have the opportunity to become involved earlier and to have sufficient time to develop positions and let the Commonwealth negotiators know there are issues of concern to the States.²²

3.22 Mr Neil Roberts supported these comments when he stated:

Numerous Commonwealth departments state in the NIA that the Queensland government has been consulted by virtue of

17 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 76 RT, p. 24 OT.

18 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 78 RT, p. 26 OT.

19 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 76 RT, p. 24 OT.

20 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, pp 76-77 RT, p. 25 OT.

21 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77 RT, p. 25 OT.

22 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 77-78 RT, p. 25 OT.

listing the treaty in the schedules provided to members of the Standing Committee on Treaties. While schedules do provide an opportunity for states and territories to seek further information, this does not guarantee that such information or copies of draft texts will be provided.²³

- 3.23 Over the course of the seminar, the word ‘consultation’ was often prefaced with words such as ‘meaningful’ and ‘active’,²⁴ and it was also pointed out that the meaning of the verb ‘to consult’ is ‘to have regard for when making plans’.²⁵ It was suggested that consultation should involve a ‘true exchange of information between the Commonwealth and the States’, with the States given an opportunity to say, ‘these are our concerns, these are our difficulties, this is where it is going to impact on us’.²⁶
- 3.24 Earlier consultation would also allow States and Territories to contribute to treaty negotiations and ensure that concerns were identified while there is still an opportunity to have them addressed.²⁷ Earlier consultation would also assist in the implementation of treaty obligations where a State or Territory is required to implement or amend legislation to give effect to a treaty.²⁸
- 3.25 Mr Richard Herr observed that State parliaments have a tendency to become involved during the implementation stage of the treaty making process. This is a practical and potentially desirable practice as it creates a simpler basis for negotiation with other countries.²⁹ One seminar participant pointed out that there ‘needs to be unified national voice in treaty negotiations’.³⁰ However, in order to facilitate a unified national voice, State and Territory involvement needs to be sought at a stage of negotiations where it is most effective.³¹
- 3.26 Mr Neil Roberts MP, from the Queensland Parliament, described the recent consultation for the United Arab Emirates Free Trade

23 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 16 OT.

24 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 65 RT, p. 15 OT.

25 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, pp 78-79 RT, p. 26 OT.

26 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 81 RT, p. 28 OT.

27 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 31 OT.

28 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 31 OT; Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 23 OT.

29 Assoc. Professor Richard Herr, *Transcript of Proceedings*, Friday 31 March 2006, p. 87 RT, p. 33 OT.

30 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 23 OT.

31 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 23 OT.

Agreement as ‘exemplary...well coordinated and genuine’.³² In this instance, the Federal Minister for Trade wrote to the Queensland Premier outlining the proposed agreement and inviting Queensland’s views. This allowed Queensland to respond with a whole-of-government response, outlining its interests and preferred representative for ongoing consultation. Queensland officials have been briefed after each round of negotiations and in December 2005, Queensland representatives joined the Australian delegation and were able to provide information to the United Arab Emirates on State procurement arrangements, a key aspect of negotiations.³³

The tabling of NIAs

- 3.27 Tabling of NIAs, with the treaty text in the Parliament, was fundamental to the creation of a more transparent treaty making process. The Minister for Foreign Affairs stated that NIAs
- ...will facilitate parliamentary and community scrutiny of treaties, and demonstrate the reasons for the government’s decision that Australia should enter into legally binding obligations under the treaty. The analysis will be designed to meet the need identified both by the Senate committee and the States and Territories in 1995, namely that no treaty should be ratified without an analysis of the impact the treaty would have on Australia.³⁴
- 3.28 The tabling of treaties with NIAs was effectively a response to the State and Territory submission which among other things, had called for ‘treaty impact statements’.³⁵ NIAs contribute to the information relating to treaties which is publicly available and provide a public justification of the reasons why Australia should enter into a treaty.
- 3.29 Seminar participants generally acknowledged the continuing importance of rigorous, timely and detailed NIAs, as well as the contribution NIAs have made to the improved quality of consultation. However at least one area was identified where NIAs could be improved.³⁶

32 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 66 RT, p. 16 OT.

33 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 66 RT, p. 16 OT.

34 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 232 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

35 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 82-83 RT, p. 29 OT.

36 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 83 RT, p. 29 OT.

- 3.30 Mr Neil Roberts MP recommended that the Commonwealth Government should provide NIAs earlier, as they are currently not made available until treaties are tabled in Parliament.³⁷
- Earlier receipt of drafts may promote a more rigorous analysis of issues and provide scope for greater consultation.³⁸
- 3.31 This was supported by Ms Anne Twomey who noted that the NIA comes 'too late in the piece for the states'. A draft version could be provided earlier so that the States could take it into account when 'assessing their own positions and feeding back to the Commonwealth before you get to the point of fronting up to the Parliament with this material'.³⁹
- 3.32 As NIAs broadly provide the reasons for the Australian Government to take binding treaty action, the information they contain must be available in one form or another, in advance of Australia signing a treaty action.⁴⁰ There is frequently a delay between the signing of a treaty and the tabling of the treaty text and NIA in Parliament. There may be good reasons for this delay but, particularly with bilateral treaties which are confidential until signature, information should be publicly available as soon as possible after signature. One way to address this problem would be to release the NIA, or a provisional NIA, at the time of signing a treaty or shortly thereafter.
- 3.33 One of the objectives of the 1996 Reforms was to ensure that the treaty making process was more transparent. It is implicit that information relating to treaties must be freely available in a timely manner.

The Treaties Database

- 3.34 The treaties database was launched as part of the Department of Foreign Affairs and Trade website in 2002.⁴¹ The treaties database

37 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 16 OT.

38 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 16 OT.

39 Ms Anne Twomey, *Transcript of Proceedings*, Friday 31 March 2006, p. 84 RT, p. 31 OT.

40 NIAs provide a discussion of the economic, environmental, social and cultural effects of the treaty; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty and whether the treaty provides for withdrawal or denunciation: Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 233 (The Hon Alexander Downer MP, Minister for Foreign Affairs). NIAs also provide discussion under the heading 'Reasons for Australia to take the proposed treaty action'.

41 The treaties database is available from: <www.dfat.gov.au/treaties/index.html>

provides access to the text of treaties Australia has signed or where Australia has taken other treaty action. Prior to 2002, the Australian Treaties Library operated through the Australasian Legal Information Institute (Austlii) website.⁴² It was developed and is maintained by Austlii with funding and material provided by the Department of Foreign Affairs and Trade.⁴³ The Austlii Australian Treaties Library provides a searchable, hypertext-linked resource that includes the treaty text itself, Joint Standing Committee on Treaties reports, explanatory material, status lists and indexes.⁴⁴ Both the Department of Foreign Affairs and Trade treaties database and the Austlii Treaties Library are available freely through the internet.

- 3.35 The provision of Committee reports on the Austlii database is a recent occurrence. Professor Andrew Mowbray, from Austlii, was present at the seminar to launch the 'JSCOT library' section of the database and provided participants with a brief background of the long history of collaboration between Austlii and the Department of Foreign Affairs and Trade. Professor Mowbray also pointed out the unique status of the treaties library, as he believes that 'the Treaties Library is...the largest national treaties system anywhere in the world. What is more, it is free'.⁴⁵
- 3.36 Since the launch of the Department of Foreign Affairs and Trade treaties database, the NIAs for bilateral treaties include a list of countries with which Australia has similar treaties and a list of all the other treaties Australia has with the country in question. These lists are generated by the treaties database.
- 3.37 The Committee considers both the treaties database and the treaties library to be invaluable in contributing to a more transparent treaty making process by ensuring that information relating to treaties in force and treaty making is publicly available and readily accessible. The information provided by the Committee on its own website, which includes Committee reports, treaty texts, NIAs, submissions, media releases and public hearing transcripts has contributed

42 The Australian treaties library is available from: <www.austlii.edu.au/au/other/dfat/>

43 Austlii website, 'About the Australian treaties library', accessed 4 July 2006: <www.austlii.edu.au/au/other/dfat/ab_tlib.html>

44 Austlii website, 'About the Australian treaties library', accessed 4 July 2006: <www.austlii.edu.au/au/other/dfat/ab_tlib.html>

45 Professor Andrew Mowbray, *Transcript of Proceedings*, Friday 31 March 2006, p. 68 RT, p. 18 OT.

significantly to improvements in transparency and information sharing.⁴⁶

The Joint Standing Committee on Treaties

- 3.38 To improve Parliamentary involvement in the treaty making and scrutiny process, the *Trick or Treaty?* Report envisioned that a Parliamentary committee for the scrutiny of treaties could
- ...play an invaluable role in keeping Parliament informed about the implications of treaties and allowing members of the public and other interested groups an opportunity to express their views on treaties.⁴⁷
- 3.39 When announcing the reforms to the treaty making process the Minister for Foreign Affairs and Trade envisioned that the Committee would
- ...provide detailed scrutiny and examination of these treaties that are of particular interest to Australians.⁴⁸
- 3.40 The seminar heard comments from both ends of the spectrum as to how successful the Committee has been in the performance of its functions. On the one hand, the Committee was praised for making the treaty scrutiny process more transparent⁴⁹ and as a means through which 'public consultation and full democratic scrutiny can be enhanced'.⁵⁰ On the other, it was felt that the Committee 'has not proven to be the vehicle for analysis, or even robust criticism, of government action about treaties that some might have hoped'.⁵¹
- 3.41 In many respects, the Committee is one of the strongest performers of the 1996 Reforms. Ms Anne Twomey commented that the Committee 'is obviously a very successful body'. Dr Palitha Kohona commented

46 The Joint Standing Committee on Treaties website is available from: <http://www.aph.gov.au/house/committee/jsct/index.htm>

47 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Parliament House, Canberra, November 1995, p. 15.

48 Commonwealth, *Parliamentary Debates*, House of Representatives 2 May 1996, 233 (The Hon Alexander Downer MP, Minister for Foreign Affairs).

49 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 58 RT, p. 10 OT; Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 68 RT, p. 17 OT; Assoc. Prof. Richard Herr, *Transcript of Proceedings*, Friday 31 March 2006, p. 87 RT, p. 32 OT.

50 Mr Michael L'Estrange, *Transcript of Proceedings*, Friday 31 March 2006, p. 96 RT, p. 40 OT.

51 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 59 RT, p. 11 OT.

that ‘bodies like JSCOT play a vital role’ in affording an opportunity for individuals to provide input into the treaty process.⁵² Mr Richard Herr described the Committee as performing a ‘marvellous job in carving out a role for a more democratic treaty making process’.⁵³

3.42 The Committee, as envisioned by the 1996 Reforms, has a dual role in providing for the parliamentary scrutiny of treaties and in increasing transparency. As part of its role in providing a more transparent treaty making process, the Committee also functions as a check that adequate consultation has taken place. Ideally, consultation, particularly with State and Territory governments, will have taken place before a treaty is tabled in Parliament, although the Committee is free to commence its own consultation and often does so.

3.43 The Committee often confirms with key stakeholders that they are satisfied with the treaty. The Committee Chair, Dr Andrew Southcott MP provided the example of the Committee’s correspondence with Norfolk Island in relation to the *Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries*⁵⁴:

We were told that Norfolk Island was generally satisfied but we still wrote to the Chief Minister and the Norfolk Island Legislative Assembly trying to get their views. We held up the report until we had heard from them and made sure that we had got all the evidence we could.⁵⁵

3.44 The Committee is concerned that, in some instances, consultation only occurs after a treaty has been tabled in Parliament. Consultation at this stage would appear contrary to the intention of the 1996 Reforms which assigned two other bodies – the Treaties Council and SCOT – the primary responsibility for consultation with the States and Territories. Mr Neil Roberts MP spoke of an example where Queensland was only able to access the text and NIA for a treaty through JSCOT, and not the SCOT process:

Queensland was notified in August 2005 via the treaties schedule of Australia’s intention to negotiate amendments to the double taxation treaty with New Zealand. It was

52 Dr Palitha Kohona, *Transcript of Proceedings*, Friday 31 March 2006, p. 117 RT, p. 58 OT.

53 Assoc. Professor Richard Herr, *Transcript of Proceedings*, Friday 31 March 2006, p. 89 RT, p. 34 OT.

54 JSCOT Report 66

55 Dr Andrew Southcott, *Transcript of Proceedings*, Friday 31 March 2006, p. 49 RT, p. 3 OT.

suggested in the treaties schedule that consultation with state and territory governments was not required because the treaty only applied to federal taxes. It was not until the treaty was concluded and the NIA was provided by JSCOT that it became evident that the amendments prescribed an exchange of certain information with New Zealand. In the very short time frame available under the JSCOT process it has emerged that the treaty may be inconsistent with the secrecy provisions of Queensland's revenue laws. It would have been helpful to have worked through these long before the tabling stage.⁵⁶

- 3.45 The Committee was intended to act as a check that adequate State and Territory consultation has taken place rather than it be the first point of consultation. It is therefore concerning that States and Territories are not always adequately consulted prior to the tabling of the treaty in Parliament.
- 3.46 Although recognising that the Committee contributes to a more transparent treaty making process, Ms Devika Hovell, Director of the International Law Project at the Gilbert and Tobin Centre of Public Law, contends that there are still significant shortcomings to the treaty making and scrutiny process that the 1996 Reforms did not address.⁵⁷ Her primary criticism is that the Committee does not provide genuine scrutiny or criticism of treaty action.
- 3.47 In her view, there are a number of reasons for the failure of the Committee to act as a 'real check' on executive power.⁵⁸ The first is that the Committee is government controlled and is therefore unlikely to make recommendations that go against government policy.⁵⁹ The second is that the Committee is reluctant to examine the substance of a treaty and has only been willing to criticise in relation to procedural issues.⁶⁰ Related to this final point, she also argues that the stage at which the Committee becomes involved is too late to allow it to have input on the terms of the treaty.⁶¹
- 3.48 It is arguable whether the 1996 Reforms have wholly overcome the 'democratic deficit' which commentators regarded as characterising

56 Mr Neil Roberts MP, *Transcript of Proceedings*, Friday 31 March 2006, p. 67 RT, p. 17 OT.

57 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 59 RT, p. 11 OT.

58 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 61 RT, p. 12 OT.

59 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 60 RT p. 11 OT.

60 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 60 RT, p. 11 OT.

61 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, p. 58 RT, p. 10 OT.

the treaty making process prior to 1996. However, the Committee has contributed significantly towards addressing the particular concerns voiced prior to 1996.

- 3.49 First, it is interesting to note that the Senate Legal and Constitutional Reference Committee which produced the *Trick or Treaty?* Report in 1995 did not regard the treaty making process as un-democratic.

This decision [to enter into a treaty] is made by a government which has been democratically elected by the Australian people and is accountable to them. Any action taken to change the law in order to implement the treaty must be taken by the Commonwealth Parliament, or the parliaments of the States or Territories. Hence, the process of entering into and implementing treaties is democratic, but the process could be improved, for example, by improving consultation on treaties.⁶²

- 3.50 The Committee was established to provide Parliamentary scrutiny of treaty actions and to provide a forum for interested individuals or organisations to contribute their views. Other reforms were designed to ensure that adequate consultation with the States and Territories had occurred prior to the Committee's inquiry into the treaty.

- 3.51 From the discussion at the seminar, it is apparent that in the ten years since it was established, the Committee contributes more to the treaty scrutiny process than was originally envisioned. In addition to providing Parliamentary scrutiny of treaties and providing a public forum for opinions to be heard, the Committee contributes to a more transparent treaty making process, such as through the publication of Committee reports, treaty texts and NIAs, calling for submissions, holding public hearings and releasing media alerts in relation to inquiries. The Committee also acts as a check that adequate consultation has taken place by writing to the Premiers and Chief Ministers of each State and Territory as well as the Presiding Officers of each house of the State and Territory Parliaments, inviting comment on each treaty upon its tabling in the Parliament and by providing a copy of the Committee's report when it is tabled.

- 3.52 Analysis and assessment of the Committee's performance, and in particular, the adequacy of the scrutiny it provides, is always welcome. There are a number of matters raised throughout the

62 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Parliament House, Canberra, November 1995, p. 13.

seminar that the Committee has taken particular note of. However, there are also a number of matters relating to the operation of the Committee that it would first like to clarify.

- 3.53 When inquiring into a treaty action, the Committee's primary consideration is whether it is in the national interest. In relation to most treaty actions tabled in Parliament, the Committee must ask itself whether the Australian Government should move towards ratification. This often involves a detailed examination of the treaty text or issues that are raised by particular provisions or articles. The Committee's reports endeavour to provide an analysis of a treaty action and a consideration of public submissions commensurate with the significance and potential impact of the treaty. In reality, the rarity of contentious recommendations and dissenting reports from the Committee is indicative of the routine nature of most treaty actions and evidence of broad political agreement on the subject of most treaty actions taken by the Australian government.
- 3.54 The Minister for Foreign Affairs, the Hon Alexander Downer MP, has commented that although JSCOT's role is only advisory, 'any government would need to think very carefully of the political consequences before it ignored a unanimous JSCOT recommendation.'⁶³
- 3.55 The Committee typically reviews a treaty after it has been signed and tabled in Parliament. Although it is arguable that this occurs too late to allow it have input into the terms of a treaty, the treaty negotiation process often requires some degree of confidentiality and this can make it inappropriate to consult too widely or at too early a point in the drafting and negotiation of a treaty.
- 3.56 Moreover, it open to discussion whether it is desirable for the Committee to intervene in the negotiation of a treaty text when treaty negotiations at an international level already incorporate a range of views. In addition to relevant Commonwealth departments and agencies, State and Territory involvement is sought and facilitated where it is necessary in the negotiation of the treaty. Mrs Petrice Judge commented that 'there is no question that there needs to be a unified national voice in treaty negotiations' and that 'it is crucial that this accommodates a range of disparate concerns'.⁶⁴

63 The Hon Alexander Downer MP, 'Treaties and Community Debate: Towards Informed Consent', Speech at the Launch of the Treaties Database, Canberra, 20 August 2002.

64 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 23 OT.

Before JSCOT considers a treaty process, the states have to use SCOT as their pre-eminent means of highlighting the concerns that they wish brought to the attention of the Commonwealth in pursuing the final negotiating positions.⁶⁵

- 3.57 One seminar participant called for recognition of the difficulties involved in the negotiation process.⁶⁶ Ideally, and to assist in reducing some of these difficulties, treaty negotiators require something 'that is clear, that has identifiable bottom lines and that actually gives us a mandate to negotiate'.⁶⁷
- 3.58 Ministers and government officers responsible for the drafting and negotiation of a treaty know that they will be publicly called to account for the results of their work before JSCOT. While the effect of the accountability is difficult to measure, the potential for the Committee to make an unfavourable finding or recommendation is another stimulus to achieve the best possible treaty outcome for Australia.
- 3.59 It is inaccurate to describe a Committee with a majority of government members as government controlled.⁶⁸ The Committee has members from government and non-government parties representing four different political parties: The Liberal Party of Australia, the Australian Labor Party, the National Party of Australia and the Australian Democrats. The Committee, as a Joint Committee, has both Members and Senators and undertakes work on behalf of the *Parliament*, not the government.
- 3.60 The Committee acknowledges that there are shortcomings evident in the treaty scrutiny process. However, it is also apparent that the 1996 Reforms have contributed to a more transparent and involved process for the Commonwealth Parliament, States and Territory governments, organisations and industry groups as well as individuals.

65 Mrs Petrice Judge, *Transcript of Proceedings*, Friday 31 March 2006, p. 75 RT, p. 24 OT.

66 Mr Michael Bliss, *Transcript of Proceedings*, Friday 31 March 2006, p. 93 RT, p. 37 OT.

67 Mr Michael Bliss, *Transcript of Proceedings*, Friday 31 March 2006, p. 93 RT, p. 37 OT.

68 Ms Devika Hovell, *Transcript of Proceedings*, Friday 31 March 2006, pp 59-60 RT, p. 11 OT.

Dr Andrew Southcott MP
Committee Chair

