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Regional Treaties

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Regional Treaties

Abstract
An investigation of trends in Australian treaty-making with countries in the region of South East Asia and the South West Pacific, projected forwards from the middle of 2006.

Keywords
Australia, Asia-Pacific, treaties, trends

Disciplines
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Appendix C - Transcript

Committee met at 9.03 am

Session 1: Reflections on a decade

CHAIR (Dr Andrew Southcott MP)—Good morning, ladies and gentlemen. I would like to welcome you to this seminar. Seminars do play a very important role in the work of the parliament. It is not an opportunity for navel gazing for us, to look back on what we have done, but it is really an opportunity to have an interaction with people who have an interest in treaties—people from overseas, people from academe, people from the state and territory parliaments, people from the diplomatic corps and other interested members of parliament. I have always found that they are very useful in enhancing the working of parliament in looking critically and reflectively on the work that we do.

A PowerPoint presentation was then given—

CHAIR (Dr Andrew Southcott MP)—This slide shows a scientific research balloon. Some of these balloons are inflated to the size of the MCG. The coating of this balloon is as about as thick as a piece of gladwrap and it carries a payload which is two to three tonnes. These balloons are launched from Alice Springs by NASA. They travel around the earth at 40 kilometres an hour. They usually make one circuit of the earth and then they are brought down, either by a radio control or by a pressure signal. When it becomes too low, they are brought down somewhere near Alice Springs.

The reason I raise this is just to give a taste of some of the issues that we get to consider in the Joint Standing Committee on Treaties. It is not all ANZUS, Triple Alliance, Triple Entente and that sort of thing. There is an enormous range of treaties that we consider. There is a bilateral agreement between

Australia and the United States governing the use of these balloons. The tests are conducted by NASA and they are used for research. NASA have made a number of observations from these scientific research balloons, which are much cheaper than launching satellites.

This slide gives a breakdown of the topics that the treaties committee has considered over the last 10 years. As you can see, it is a very broad range of things—transport, the environment, security issues, health and human services. This slide shows how we have broken it down. This information is in your materials. This also gives you an idea of the number of treaty actions that have been tabled and whether they are multilateral or bilateral. As you can see, it is a fairly regular workload month by month. We have been producing one to two reports per month. The next slide shows the number of treaties that have been reviewed year by year.

The idea of parliamentary scrutiny of treaties is not new. In the 1960s it was the convention that treaties be tabled for 12 days before any binding action was taken. There was no provision for debate. That convention fell into disuse and it became the practice that batches of treaties were tabled every six months, sometimes after they had already entered into binding action. There was a period in the 1990s when there were a number of treaties that Australia entered into that elicited a lot of public reaction and public comment. The Senate Legal and Constitutional References Committee produced a very important report, *Trick or treaty*, which led to a number of treaty reforms. The secretary of that committee, Anne Twomey, is here today and she will be speaking to us later.

There were two areas for those reforms. Firstly, there was a provision for greater consultation with the states, because, as we know, treaties can impose obligations on the states and territories and sometimes can require changes to state and territory legislation to enter into force. The principal body established for this was the Standing Committee on Treaties. We look forward to hearing from Petrice Judge from the standing committee on treaties a little later. Secondly, there was the parliamentary scrutiny of treaty actions. Since 1996, treaty actions have been tabled in both houses of parliament. Generally, bilateral treaties are tabled after signature and prior to binding treaty action being taken and multilateral treaties may be tabled at any stage before binding action is taken once the treaty text is finalised.

The treaties are divided into two categories. We have category 1 treaties, which are ones that are likely to have a lot of public interest, ones of major political, economic or social significance. They lie on the table for at least 20 sitting days. Then we have category 2 treaties, which for the most part are uncontroversial and routine and are tabled for 15 sitting days. All treaties are automatically referred to the Joint Standing Committee on Treaties. A key

document is the national interest analysis, which is prepared by the sponsoring department. This document sets out the reasons why Australia should enter into these treaties and what consultations have been carried out and so on.

JSCOT consists of 16 members: nine members of the government and seven members from non-government parties, which is composed of six from the Labor Party and, currently, the Democrat senator Andrew Bartlett. This has been something of an issue. When the United States free trade agreement was announced, we thought, 'Great! We're going to be doing the inquiry.' And we did, but the then leader of the opposition thought that we needed a Senate committee to look at this as well. Originally he proposed a Senate committee with five non-government members and two government members. Then later the Senate committee had five non-government members and three government members. In the end the report which I think had the greater weight was the one from the Joint Standing Committee on Treaties. JSCOT has the power to call for witnesses to attend public hearings and for documents to be produced. Although we meet mostly in Canberra, the committee may meet anywhere in Australia—for example, on the Australia-US free trade agreement, we travelled to all capital cities over a period of two weeks to get a wide range of views.

Once the treaties are tabled, the clock starts ticking. The committee has only the specified 15 or 20 sitting days to complete its report. I should say that 20 sitting days often in practice works out to about three months in the calendar. Our first step is to advertise in the *Australian*, inviting submissions from anyone who may be interested in a particular treaty. Some of those making submissions may be invited to give oral evidence but, in all cases, officials from the sponsoring departments are called before the committee. We are always keen to receive further submissions. One thing that we do find, when the consultation has been done well by the departments and the stakeholders are satisfied with the result, is that most do not want to make a further submission to the treaty. But we do try to say, 'Can you give us your opinion? What do you think?' and so on. We try to elicit submissions through media releases, going on radio and writing to stakeholder groups, encouraging them to make a submission or to give their opinion on whether Australia should ratify the treaty.

A recent example is when we were looking at the exclusive economic zone between Australia and New Zealand. It seemed fairly straightforward. Australia and New Zealand had both agreed on it. 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. Our reports recommend that the government either take

or not take binding treaty action. The committee can also recommend that a treaty be entered into subject to certain conditions. It is open for dissenting members to write a report, which is tabled with the committee's report. Even so, most of the proceedings of the committee are conducted in a bipartisan spirit.

With the tabling of the report, the committee's involvement in the progress of the proposed treaty action ends, although it is open to us to look at any treaty which we are either proposing to enter into or are a party to. The government considers the committee's findings and, where the committee has recommended that binding treaty action be taken, moves towards ratifying and implementing the treaty. If the committee has made any other recommendations, the government responds formally to the committee's recommendations by tabling a government response in the House. It should be noted that the committee's recommendations are advisory. The government is not bound by them. But it is fair to say that the government has taken the committee's recommendations into account throughout the period from 1996.

Since 1996 the committee has tabled recommendations on 365 proposed treaty actions in 72 reports, which works out at one treaty every 10 days. The committee is currently in the process of reviewing a further 16 treaties. This year the inquiry that will probably have the most public interest is the treaty with East Timor on certain maritime arrangements in the Timor Sea. It was signed on 12 January this year, but has not yet been tabled.

I will give you an idea of the things we look at. I mentioned the scientific research balloons and agreement between Australia and the United States. There is an optical telescope at Siding Spring, which is the result of a bilateral agreement between Australia and the United Kingdom. We have recently considered an agreement with Singapore, extending another five-year term on the use of the Shoalwater Bay training area, which the Singapore defence force uses for training. The Treaties Committee has previously considered a similar treaty with Singapore on Oakey where they train with their helicopters. We have recently tabled a report on a prisoner transfer agreement with Hong Kong. We looked at the ASEAN Treaty of Amity and Cooperation, which was a condition of Australia becoming part of the East Asia Summit. We have looked at the WHO framework convention on tobacco control, the joint regulatory scheme for therapeutics with New Zealand, the issue of police and assistance to Nauru—Australian police and Australian finance officials going to Nauru. That gives you an idea of the spread of issues we consider.

When we were looking at the United States free trade agreement it was not unusual to go from considering intellectual property and copyright law to local content rules for broadcasting to the Pharmaceutical Benefits Scheme to

Australia's quarantine arrangements all in the one day. We would look at quotas—we considered the intricacies of quotas for beef, sugar and even peanuts. In that inquiry, we received over 200 submissions and we held public hearings in Sydney—for two days—Melbourne, Hobart, Adelaide, Perth and Brisbane. The draft text was tabled early to allow us to get the report done before the election that year. We had three months from the tabling of a draft text to tabling our report, and then parliament debate on the legislation came about.

As with the report on the International Criminal Court, having the report and all the public submissions available did help the subsequent process, which you might remember involved the Prime Minister and the Leader of the Opposition debating the intricacies of patent law, especially with respect to pharmaceuticals. We had some people visiting from overseas and they thought it was incredible to see the Prime Minister and the Leader of the Opposition getting really involved in the area of patent law. In the end that was the issue on which hung the Labor Party support for the legislation to pass through the parliament.

JSCOT has considered treaties which had enormous public interest and divided views in the community—the Multilateral Agreement on Investment and the International Criminal Court. It knocked back one treaty, the Agreement on Economic and Commercial Cooperation with Kazakhstan in 1997 and, six years later, reluctantly recommended binding treaty action be taken. The committee produced two reports on the Multilateral Agreement on Investment while it was being negotiated, and those reports were scathing. Eventually the negotiations on that broke down.

Last year, in considering the United Nations Convention against Corruption, the committee raised the interesting question as to whether this conferred additional jurisdiction on the Commonwealth. The committee considered, briefly, the scope of the external affairs power and how this was constrained by express or implied constitutional limitations—again a treaty which appeared fairly straightforward, something that everyone agreed with—and looked at whether there were any unintended consequences.

The committee can be quite critical of national interest analyses if they do not have enough information. We do criticise the introduction of legislation before our report has been tabled, and we are prepared to delay the consideration of a treaty if we require further information. We have made recommendations on the use of the national interest exemption to allow for an urgent briefing of the committee to be given in these cases. There have been a couple of treaties—the one with Nauru and the Enhanced Cooperation Program with Papua New Guinea, where the use of the national interest exemption has been used. We have asked in those circumstances for an urgent

briefing of the committee by the Minister for Foreign Affairs. It really is for others to determine what the impact and role of JSCOT have been.

In conclusion, what I have set out for you today is the way that Australia has chosen to make the treaty making process more open and transparent. However, a dedicated treaties committee is not the only way to go. All parliaments do it differently. Some parliaments refer treaties to their foreign affairs committees, others to specialist committees with expertise in relevant portfolio areas. Others ratify them through the parliament. We will have the opportunity this afternoon to gain some insights into the New Zealand approach to treaties scrutiny from the chairperson of the select committee of Foreign Affairs Defence and Trade, Diane Yates MP. We had hoped to hear about the Indonesian process from Theo Sambuaga but, unfortunately, his commitments as chair of the Foreign Affairs and Defence and Information Policy Committee of the DPR have prevented him from being here today.

I would like to thank the committee secretariat and the committee secretary, Gillian Gould, for their work in putting together the seminar, and also for the important work they do in making sure that our regular work program flows smoothly. It really is a logistic task. It is a matter of seeing all the treaties going through the different pipes all come out at the right time. Every month we have a new batch of treaties to be considered. The program before you today has been designed to set out some of the issues surrounding the review process and to stimulate thinking about future directions for the committee. How can processes be improved? Are there any evident faults? I look forward to the discussions and debate throughout that the day. Thank you.

We have three speakers on our panel and then we will have time for questions. I introduce the Hon. Dick Adams. We thought it would be good to hear from Dick today because he is the one with the corporate memory on this committee, having been a member from 1996 to 2006. As some of you heard last night, he has an interest in Tasmanian salmon and has never really accepted the fact that that case was lost. Dick was a member of the Tasmanian parliament before he was elected as the member for Lyons in 1993.

Mr Dick Adams MP—Thank you. It is great to be here and to be able to reflect on 10 years on a parliamentary committee. It was rather strange when I was approached to be on the committee, and I started to think about it. I started to get interested in treaties because of my experience in the Tasmanian parliament. I lost my seat, with four other cabinet ministers, over the Franklin Dam issue. The power came from a treaty through to the High Court. There was not a parliamentary committee of scrutiny so nobody understood this treaty, how it came about and where it fell from. It was interesting to get here 10 years later and then some time after that to take a role on this committee. It was good to be interested in and to scrutinise the making of treaties.

I accept the fact that the executive has the power and needs to have the power to make those treaties and to negotiate treaties but to have a scrutiny process is very important. Probing executives these days is half of what parliament should be about, whether it is state or federal.

There have been some interesting times going through this. I will mention the experience with state issues. The states need to be a little more conscious that treaties will continue to affect them and they will need to scrutinise the process a little more than they do now. I will be interested to hear what Neil has to say a little later. I have spent time in a state cabinet and then, over 10 years, I have listened to the treaty making process here. That is not a deliberate approach. While the nation states are looking for their own relevance in change, and states within states, powers can change and move away. That is something. The Victorian parliament had a committee that looked at federal-state relations, but I have not seen them for a while so I do not know whether they are still in existence. They used to play a role there.

Things can go from scrutinising treaties to other issues. For example, in my work as a member of parliament in my electorate this week I came across the case of an Australian citizen whose eligibility as a New Zealand citizen appears to have been inconsistent with a bilateral social security agreement that we have just done, and it has changed the status of this person. He thought he was an Australian citizen, and he is a permanent resident for the purposes of the Australian Citizenship Act, but he failed to apply for a determination to protect his status by a deadline set in the social security arrangements of that treaty. The citizen was never advised, written to or whatever, so how was he ever going to know that he had to apply for something? This isolated an Australian resident who arrived in Australia when he was six and always thought he was an Australian resident with dual citizenship. Now he has a complex situation and is asking me to sort it out. This is one of the issues that can happen.

However, overall the treaties committee is a good committee to be a part of, because it deals with an enormous number of issues—and the chair went over some of those, from the balloon that was in the PowerPoint presentation to social security issues with New Zealand. I guess the most boring one is double taxation. I think the tax department has somebody down in an office who they pull out and bring before the committee to talk to us about double taxation. He is a very boring speaker. He speaks in a monotone way, and it is very hard to extract what the treaty is about. You know it is about double taxation, but is somebody going to get an advantage? It is always difficult. So we go from fun issues to sometimes a little boring issues. In the early days of the committee, the Public Service and those who were starting to be scrutinised, and who had never been scrutinised before, found that a little difficult. I think they still do at times, but I think some of that has broken

down over the years, and the responsibility and role of the committee has been accepted.

The Pine Gap treaty with the US was an interesting issue. My role as a member elected to the Australian parliament and sitting on the treaties committee was to scrutinise this treaty and say that this treaty was good for Australia, but I was not able to be briefed about what this treaty was about. We highlighted a few issues there that needed to come forward. The main issue was that an American senator or congressman can fly into Australia, go to Pine Gap and get totally briefed on what the installation does, but an Australian member of parliament on the treaties committee cannot get briefed on what actually occurs at Pine Gap. I probably know what occurs at Pine Gap and probably would not have a problem with it, but it is an issue that still has not been resolved. Some of us on the Labor side brought down a minority report to highlight that issue. It is still one we need to come to grips with as a parliament.

Regarding other issues of complexity, we have the new family law bill in the parliament now. That is complex enough, and enough issues come out of that—child maintenance issues and everything else—but when you start dealing with overseas issues things get even more complex. Unless you get agreements that can really hold and unless two people make an agreement that their kids are going to live in one country for so many months and in Australia for the rest of the time, that is even more complex than one parent living in Brisbane and the other in Hobart. Those issues are not easy, and you need agreements that each country really holds to, otherwise things are just going to fall away.

Extradition is a very interesting subject that came up. The committee did a report on that and the issue of civil law versus common law. The Attorney-General's Department was before us just recently, and they are doing a report on extradition to try and find methods to come through. We expect some evidence to be given before an Australian citizen is taken out of Australia, but that process is more difficult with countries that have civil law, where they actually build up a case as they go along, and a magistrate runs those sorts of cases.

I also sat on a very interesting subcommittee inquiry into some legislation dealing with bribery in overseas countries. That was a very interesting thing to be a part of, and again there were great complexities. Businesspeople come before us to talk about how you cannot get the phone on unless you pay somebody and how we were going to make legislation so that an Australian company could not do that. It usually occurs by joint ventures and all sorts of other ways are found. We did get legislation out of that. I think Australia now

prohibits anybody bribing a politician or an official of another country to get a contract or two.

We did a report on the World Trade Organisation called *Who's afraid of the WTO?* Well, a lot of people were afraid of the WTO, and probably some people still are, but it was a way of opening up that debate a bit. I think the treaties committee played a very good role in that. We took a lot of evidence from a very diverse group of the Australian community.

In the early days, when the chair was Bill Taylor and there had been 13 years of Labor government, one of the concerns that brought this committee was to do with the rights of the child, and there were a heck of a lot of myths out there. This committee went round Australia taking some of that on board, listening to some very interesting debate and discussion about what the Convention on the Rights of the Child was really about. Of course it is really about protecting children, but in a lot of people's minds it was about a lot of other things. The committee was able to absorb that and probably played an educational role out there in the community. It was able to bring down a report on that subject.

In the middle of the Hanson era, there was an issue to do with the Singapore government's helicopter facility at Oakey, which the chair mentioned. We got some pretty interesting people talking to us about another country having a sovereign base in Australia and trying to say that we were going to destroy the whole country with that. It is interesting to go out and get information and for the committee to be able to sit and listen to Australian citizens and what they think about treaties. That is a very good role.

In knocking back the Kazakhstan treaty—the only one we have knocked back—I think we were playing a diplomatic role. I think Telstra had done about four years work there and then overnight they were told that they were not going to get any other contracts because a deal had been done over dinner the night before, which is not what we, as a country, accept should happen. I think our diplomats were able to go back and say, 'The treaty committee of the Australian parliament has knocked back the treaty that we were going to sign with you, so there you are—bingo.' I think we probably played that role in that case.

The US free trade agreement was an enormous exercise and the resources on the committee were enormous. In that exercise, we wanted to be able to get the information that came before us out for the public to see. Having a secretariat working so hard on just producing the report that we had to produce as our obligation to the parliament left no opportunities or resources to be able to put all the submissions on the website so that the public could get access to that and make their own conclusions and their own arguments

ready for the public debate coming out of the parliamentary tabling or the parliamentary debate. I think that is an issue that still needs to be dealt with.

As I said, these are broad issues which make it a very interesting committee to be a part of. I have enjoyed the 10 years that I have spent on the committee. Since 9-11, issues dealing with terrorism and so on continue to come before us. Money laundering, port security and many other issues are, of course, on the table and take a great deal of time and effort. I think we need more opportunities to let more people speak on the reports. When we table the reports it is usually the chair and the deputy chair in the House of Representatives who speak, and it is probably similarly reflected in the Senate. There are probably some reports that the committee brings down which other people and other members of the parliament want to speak on. We should have processes that allow that to happen, especially when we get controversial reports.

As I said, the issue of information is very much a concern for me. We need to make sure that all the information goes on the website so everybody has access to it and can make their own conclusions. We need to look at that as a parliamentary process and the committees need to be resourced properly so that can happen. To finish up, one of the strange reports we brought down was when we changed the treaty on boundaries with Indonesia, which is always a bit contentious, especially around East Timor et cetera. I do not think anybody had gone out to talk to the good Australian citizens of Christmas Island. Christmas Island was going to become a bit closer to Indonesia and the treaties committee was given the task of telling them. Under the then chair, Bill Taylor, we flew out there and held a very good hearing. We had a couple of nice days on Christmas Island, which I recommend to all of you. It is a very pleasant place. The red crabs are worth having a look at—I understand they are under a bit of a challenge at the moment. The good people there, even though they moved a little bit closer to Indonesia—I think they are about 390 kilometres from Jakarta—when that boundary changed, accepted that in good faith.

Overall, I think the processes that we have undertaken have made it a good 10 years. As the chairman said, one should always review these things. We should always be looking at and probing for how we can make things better. I think the parliament has been better for having a process of scrutinising these treaties. I look forward to the next 10 years on the treaties committee, scrutinising the treaties that the executive make.

CHAIR (Dr Andrew Southcott MP)—Thank you very much, Dick. I would now like to introduce Devika Hovell. Devika is a lecturer in law at the University of New South Wales and director of the Gilbert and Tobin Centre of Public Law. She has practised in both domestic and international law,

working as an associate to Judge Hayne in the High Court and at the ICJ in The Hague. She has also worked locally. For the last three years Devika has been involved in a three-year project funded by the Australian Research Council researching the relationship between international law and the Australian legal system. Together with her project partners, Professor Hilary Charlesworth, Professor George Williams and Madelaine Chiam, she has published a number of articles and an edited collection on the issue. Their forthcoming book, *No Country is an Island: Australia and International Law*, will be published in May. It involves significant discussion and analysis of the practice of the Joint Standing Committee on Treaties.

Ms Devika Hovell—I would like to pay special tribute to the past and present members of JSCOT, whose 10-year anniversary we celebrate today, and also to the hardworking staff of the secretariat—I often hear praise of their work in the work that I have been doing over last three years. I will also make a slight clarification: I am not the director of the Gilbert and Tobin Centre. George Williams would be a little upset to hear that, especially since it is now in *Hansard*. I am in fact the director of the International Law Project at that centre.

According to the British constitutional tradition that Australia has inherited, treaty making is the domain of the executive and not the parliament. The power to conduct foreign relations, including the power to make treaties, is one of the royal prerogatives retained by the Crown and carried out by the executive branch, usually through the minister responsible for foreign affairs. Since prerogative powers by definition provide the executive with the power to act without parliament's consent, treaty making, including treaty ratification, is at common law a wholly executive act.

The 1996 reforms, the subject of today's seminar, were introduced in recognition that this constitutional tradition is a little outdated. The tradition emerged in an era when international law was confined to a narrow set of legal principles—and the fewer the better according to the laissez faire ideology of the times—directed solely at regulating peaceful relations between states. Even then, treaty obligations were entered into only by a narrow subset of such states—namely, the set of civilised nations admitted to that exclusive club—in an era when such obligations could be neglected without serious consequence.

How times have changed. International law is no longer merely about relations between states. It is just as likely to impact upon internal affairs and individuals and corporations within states. The scope of international law extends to such areas as investment, human rights, the environment, natural resources, communications, education, science, transport, criminal law and weather balloons. Treaties are a form of law—what is more, a form of

permanent law that can affect corporations and individuals within a nation for generations to come. In this context, a tradition vesting the task of treaty making exclusively in the executive government can be seen as the product of a bygone era, reflecting 19th century conceptions of international law and governance in the area.

Dr Southcott referred to the three-year project I have been working on with Professor Hilary Charlesworth, Madelaine Chiam and Professor George Williams, with the funding of the Australian Research Council. This has been looking at the relationship between international law and the Australian legal system. Significantly though, it has involved research on the decision-making process leading to the entry of treaties, and in the course of this I have been privileged to interview former prime ministers, former and present attorney-generals, the foreign affairs minister, departmental officers at federal and state level, and members of parliamentary committees such as JSCOT. Through this research, naturally, we formed views about the way in which Australia's political system works and does not work when it comes to treaty making. Our broad conclusion is that it is no longer appropriate for the executive government of the day to have untrammelled power to commit Australia to new international obligations. Put simply, the tradition is undemocratic.

None of this is groundbreaking. Detractors have long spoken of a democratic deficit existing in the business of treaty making, yet, like so many of these buzz words, 'democratic deficit' is a term that creates more heat than light. For the purpose of today's discussion, I would like to work with sharper tools. In assessing the 1996 reforms, I propose to be guided by three standards. A survey of domestic systems reveals that democratisation of the business of treaty making has largely been achieved using three mechanisms: transparency, scrutiny and democratic accountability.

Undoubtedly the 1996 reforms have done much to increase the transparency of treaty making. Public awareness and understanding of treaties entered into by the Australian government has greatly increased. To see this, one need only compare the Australian public's understanding of the Rome Statute of the International Criminal Court to its understanding of and relationship to a treaty entered into before the passage of the reforms—the optional protocol by which Australia accepted the jurisdiction of the United Nations human rights committee.

It does not seem too far-fetched to suggest that failure to engender public awareness of the optional protocol and to educate the public on the nature of Australia's relationship with the committee has detracted in the long-term from the perception of the human rights committee as a legitimate assessor of Australia's human rights violations. Later governments have been able to exploit the perceived illegitimacy of the committee by painting the

international human rights framework as an unjustifiable intervention in domestic affairs. Scrutiny of the human rights committee therefore took place after Australia's accession to the treaty instead of beforehand, and the scrutiny has therefore been expressed in terms of noncompliance with the treaty—an unsatisfactory solution.

Recognising the importance of the 1996 reforms for the transparency of Australia's treaty-making system, Canadian academic Joanna Harrington marvels in a recent volume of the *International and Comparative Law Quarterly*:

> ... those from abroad envy the sheer volume of treaty-making information made public through the JSCOT process ...

She also said that the dedicated efforts of those within and outside parliament interested in scrutiny have done much to prevent this volume of material from becoming overwhelming. On the other hand, as the slogan of the academic goes, it is strongly arguable that the reforms have not gone far enough. Australia may have made significant inroads into improving the transparency of treaty making; however, there is still inadequate progress along the road of scrutiny and democratic accountability in treaty making.

Canadian academics may marvel, for the tabling of treaties in the Canadian parliament is only on an ad hoc basis and Canada has no permanent treaty scrutiny body, but South African academics would not. South Africa, like Australia, inherited the British practice of vesting sole responsibility for the making of treaties in the national executive. However, the 1996 South African constitution significantly revised this process. Treaty making in South Africa is now a shared responsibility between the national executive and both houses of parliament, with all bilateral treaties of significance and virtually all multilateral treaties subject to an approval by both houses' constitutional rules.

There remain significant shortcomings in the Australian business of treaty making, and in the brief time I have I will focus on one aspect, though I would like to also briefly mention the continuing importance of the government providing parliament with rigorous and detailed national interest analyses and the problems posed by the government's unexplained refusal to convene the treaties council since its establishment, save on one occasion. These issues will certainly be dealt with by other speakers.

The main point I would like to make today though is a broader one, and it focuses on the role of JSCOT. Put simply, JSCOT has not proven to be the vehicle for analysis, or even robust criticism, of government action about treaties that some might have hoped. JSCOT's usefulness is inevitably limited by the fact that it is inevitably government controlled and therefore serves to

legitimise rather than to critique government policy. Indeed, JSCOT has almost always made recommendations in line with government policy.

Where JSCOT has been willing to criticise it has mostly done so in relation to procedural issues—and we have heard examples such as the inadequate consultation by the Treasury in relation to the failed multilateral agreement on investment and the inadequate consultation with the states in relation to the US-Australia Free Trade Agreement. These procedural issues have been criticised, and validly, as arising in the process of treaty making, but there has therefore been no opportunity for JSCOT to criticise questions of substance, such as whether Australia should ratify the treaty at all. Except for the occasion we have heard about, the other occasion was with regard to the optional protocol to the torture convention. JSCOT recommended against Australia's ratification, but the government policy, of course, was not to ratify it.

The members of JSCOT prefer consensus outcomes to issuing majority and dissenting reports. I do not criticise this practice, and it has certainly made displays of political partisanship within the committee relatively rare. The committee generally takes a pragmatic approach to its reports and is more likely to make recommendations that will be adopted by government than to take a strong stance that might be ignored. This has led to JSCOT producing somewhat decaffeinated reports, potentially detracting from the committee's influence.

In the inquiry into the Rome Statute of the International Criminal Court, the then chair of the committee, Julie Bishop, worked closely with Mr Downer in her role as chair and ran the committee with a view to achieving a unanimous report in favour of Australia's ratification of the Rome Statute. It is notable that, despite the achievement of a unanimous report by Australia's permanent treaties scrutiny body, its opinion appears not to have carried as much weight within the coalition as the views, for example, of the US government in relation to the court, and nor did it ease the concerns expressed about the International Criminal Court.

Even after JSCOT had issued its report, in the first of two meetings of the party room to discuss Australia's ratification a majority of government members are said to have remained opposed to ratification, including senior ministers and more privately the Prime Minister. Alexander Downer's recollection of the words used by his Prime Minister upon their exit from that debate in the party room was, 'Looks like you're stuffed.' The opinion of parliament's specialist treaties scrutiny body was regarded surprisingly lightly within the government.

Limitations in JSCOT's role as effective scrutineer are also evident from the experience of Australia's entry into the Australia-US Free Trade Agreement. Of course, one obvious point is that the free trade agreement was the subject of a parallel parliamentary inquiry by a Senate select committee on the agreement which was established on 11 February 2004 and had precisely the same task and mandate as JSCOT. There was considerably greater public reaction to the select committee inquiry than to the JSCOT inquiry, with the select committee attracting well over twice the number of submissions made to JSCOT. The inevitable implication is that there was greater public faith in the rigour of an opposition controlled inquiry than in the government controlled JSCOT. I appreciate that this is a political reality.

Yet it is the government's response to the JSCOT inquiry that I would like to focus on. JSCOT issued its conclusions and report on the Australia-US Free Trade Agreement on 23 June 2004. That same day the legislation implementing the Free Trade Agreement was introduced into the House of Representatives. The remarkably short time frame between the tabling of JSCOT's report and the tabling of the free trade agreement legislation gave members of parliament insufficient time to digest and debate the many recommendations made by JSCOT in relation to the free trade agreement. These factors suggest that the government had little interest in the actual recommendations of JSCOT, and regarded the process as a formality that would help to legitimise the government's decision making. The select committee was so appalled by the government's attitude towards its own treaty scrutiny committee that it described the series of events as a 'mockery of the process that was set up by the parliament ostensibly to ensure that a proper examination of international treaties and agreements took place'.

The JSCOT process, therefore, we argue, cannot be said to provide a real check on executive power. The committee tends not to produce detailed analysis of executive decisions and has a record, which would likely be the case whichever side of politics was in power, of falling into line with government policy. Members of the public and non-government organisations regularly make submissions to JSCOT and the committee plays a very important role as a forum through which the electorate can voice opinions about international treaties. Yet, the depth and timing of the JSCOT's scrutiny means that in most cases the submissions of members of the public to JSCOT have had little impact on government decisions about international law. The JSCOT process legitimises government decision making about treaties without offering genuine scrutiny or criticism of government policy.

In conclusion, the greater transparency assured by the 1996 reforms must be acknowledged and applauded. But Australia needs to take the other limbs of scrutiny and democratic accountability of treaties even more seriously. It is our view that parliament should be responsible for bringing about greater

scrutiny of, and accountability in, government decision making about international law and agreements as the institution best suited to imposing checks on the executive.

Here is the punch: we believe that the issue of ratification of treaties of major political, economic or social significance should be determined as with other matters of importance by a majority vote of each house of parliament. Each house should have the power as it currently has for a set number of days with regard to regulations made by the executive to disallow a government decision to assume new international obligations on behalf of Australia. International law increasingly impacts on our domestic affairs. Courts, for example, now use these treaties to interpret our law. It is no longer appropriate to see it as the sole business of the executive. Given the impact that certain international obligations can have on Australia's economy, environment, trade relations and the rights of individuals it is fitting that these obligations receive adequate scrutiny before Australia decides to commit itself to them. The obligation to persuade parliament that a treaty is in Australia's national interest would have the effect of increasing parliament's attention to the matter, enhancing the importance and relevance of JSCOT and introducing increasing transparency, scrutiny and accountability into the business of treaty making.

For those of you who were at the dinner last night, Alexander Downer also considered this idea but rejected it on the basis that it would be 'inconvenient'. That is the word he used. We ask whether this is really a good enough reason. Moreover, I want to ask: is it actually true? The government already adheres staunchly to a policy not to become a party to a treaty until domestic law accords with the treaty, which often therefore leads to the need to pass implementing legislation through parliament. In effect, therefore, parliament already votes or approves treaty ratification and has the power to prevent Australia's entry into treaties. Notably to date, though, it has shown a tendency to act in the national interest in considering such legislation. It has also shown ability to act in urgent situations.

It should be noted that the urgent passage of international treaties is relatively rare; however, for example, in the passage of the legislation in relation to the Rome Statute we were up against a deadline because the treaty was about to enter into force. On that occasion, the House of Representatives was given three hours to debate 353 pages of implementing legislation for the Rome Statute of the International Criminal Court. But for a bit of whingeing and moaning by the opposition at the lack of justification for the short time frame, the legislation was passed without incident.

There is a further advantage to strengthening the role of parliament. An enduring problem with Australia's engagement with international law is that

it speaks with two tongues. On the one hand, the executive may commit Australia to the latest set of international standards and to their implementation within Australia. On the other hand, the implementation of these standards by parliament may not occur, leaving Australia in breach of its commitments. Building parliament into the decision to take on new obligations to a great extent in the first place may go some way to ensuring greater accountability during the negotiation process as well as in the matter of future compliance with the treaty. One problem with the timing of JSCOT's scrutiny is that it occurs too late—once the terms of the treaty have been finalised and there is no longer a chance to influence its terms. If a new treaty is not likely to be fully implemented by parliament this should be clear from an early stage and Australia should be slow to make an international commitment to the instrument. Once the treaty has been approved by parliament, Commonwealth, state and territory governments must ensure respect for its terms.

We put forward these proposals recognising that they would require a major change in how Australia deals with international law and the relationship between the executive and the parliament. But it is not a proposal without support. I was visited last night by the prophet Rod Kemp. He was referred to by Alexander Downer as the individual who had the initial idea and motivation to create JSCOT. He expressed his support, having heard what I intended to say today.

But we argue that these changes are necessary to set a new balance in the roles of institutions more than a century after the Constitution was drafted. Many of the issues Australia faces today, such as the threat of terrorism, cannot be dealt with except as part of a discussion that leads to concerted international action. Australia and Australians should engage in the creation of international law and be prepared to comply with the international obligations that it assumes. In this sense, we must recognise that no country is an island set apart from the developing body of international law. Thank you.

CHAIR (Dr Andrew Southcott MP)—Our next speaker is Neil Roberts. Neil has been the member for Nudgee in the Queensland parliament since 1995. He is the Parliamentary Secretary to the Deputy Premier and Treasurer and he is also the Minister for State Development, Trade and Innovation. Before entering the Queensland parliament he was an industrial advocate and an electrician. He holds a Bachelor of Business degree, a Graduate Certificate in Business Administration and he is currently pursuing an MBA at the Queensland University of Technology.

One thing that the treaties committee does with the tabling of each batch of treaties is write to the premiers and chief ministers of the states and territories and also the presiding officers of the state and territory parliaments. We have

some of them here today. We do really appreciate getting the feedback from the state governments. We often get really good consideration from the Department of Premier and Cabinet in Queensland. Please welcome Neil Roberts.

Mr Neil Roberts MP—Firstly, I need to make a correction. I thank Andrew for the promotion to Minister for State Development. I am the Parliamentary Secretary to the Deputy Premier, who has all of those portfolios in her kit bag. But I would like to be the Minister for State Development. I would like to start by adding my congratulations to the JSCOT committee on its 10-year anniversary. I would also like to congratulate and thank Gillian Gould, who last night—as those of you who were at the dinner would know—was recognised for her 18 years of exemplary service to parliamentary committees. I have participated in two committees and chaired one. All members of committees rely absolutely on the professionalism and dedication of the staff. Gillian, listening to the testimonies to your contributions over the last 18 years, you have done a fine job and we wish you well in your retirement.

I wanted to touch on four key issues today relating to the state's interest in treaty making: why the Queensland government, and indeed other state and territory governments, have a key interest in treaty making; the importance of consultation, particularly early consultations, with state and territory governments; when and how the Queensland government is currently consulted; and some suggested areas for improvement. The most obvious place to start is to emphasise that treaties entered into by the Commonwealth can and do have a direct and considerable impact on states and territories. For example, a treaty may require a state or territory to amend its legislation or policies, it may remove powers in areas which have been the responsibility of a state or territory, or it may impose costs in relation to implementation. I would like to give a few practical examples of these impacts.

When the Commonwealth ratified the United States free trade agreement, it required a direct amendment to Queensland's local industry policy. The ratification of the ILO Convention No. 155, Occupational Safety and Health Convention, created the potential for the Commonwealth to regulate occupational health and safety, an area traditionally reserved for state and territory governments. Finally, ratification of the protocol on preparedness, response and cooperation regarding pollution incidents by hazardous and noxious substances has resulted in Queensland bearing additional administrative costs to ensure appropriate preparedness and response capacity at oil and chemical terminals and ports. It is therefore self-evident that state and territory governments are key stakeholders in the treaty-making process.

As such, one of the crucial elements of ensuring appropriate involvement in the process is to ensure that active consultation occurs at key stages. This will give states and territories the opportunity to raise issues about the policy direction of a proposed treaty and its effect on state responsibilities. There are two critical stages at which meaningful consultations should occur: during the negotiations themselves and prior to the determination of an Australian position. Appropriate consultation also includes the need, prior to ratification, to reach agreement on the development of any legal or administrative arrangements required to implement a treaty. In simple terms, it is important to resolve very early in the process what will or will not be done by each party and who is responsible to pay. It is also important to ensure that cross-portfolio issues have been properly considered and that the costs and benefits to local businesses and the community have been thoroughly identified and evaluated.

Currently, early-stage consultation tends to occur at different stages of the process. Information on new treaties is provided to states and territories in a number of different ways. For example, information on proposed treaties is currently provided via schedules from the Standing Committee on Treaties, through dialogue between Commonwealth departmental officials and state government officials, at ministerial council meetings or through direct correspondence between the Commonwealth and state government ministers.

The Queensland government acknowledges that improvements in consultation have occurred over the past 10 years. However, it is not always clear which forum will be used, and there is little consistency regarding the stage of negotiations at which consultation will take place. Consultation at the tabling stage, however, is much more systematic and reliable. The Joint Standing Committee on Treaties, or JSCOT, provides the only routine consultation process that the Queensland government can rely on, largely because it is the only one enshrined in the parliamentary process.

Queensland values the JSCOT process and, following recommendations arising out of the last JSCOT seminar, has developed processes to table proposed treaty actions in the Queensland parliament within 10 days of their receipt. I understand that we are the only state or territory to do so. This process is aimed at increasing the awareness and scrutiny of current treaty negotiations by members of parliament and the public generally. It also provides the mechanism by which the Queensland parliament can refer a particular treaty to a parliamentary committee for inquiry and report if it considers that such a process is necessary.

The Queensland Premier commenced tabling correspondence from JSCOT on proposed treaty actions, together with national interest analyses, in March 2001. In the past 12 months, 26 treaties have been tabled in the Queensland

parliament. Queensland also acknowledges that the responses we provide to JSCOT do influence the JSCOT report to parliament. However, our ability to provide comprehensive advice to JSCOT is fundamentally constrained by the extent of early-stage consultation.

As I mentioned earlier, consultation processes in the treaty negotiations stage are not uniform, and in some cases they are unreliable. It is evident that the principles and procedures agreed by COAG in 1996 are not always followed. COAG officials are currently undertaking a review of the Commonwealth-state consultation process, and Queensland hopes that this will deliver a more systematic and streamlined approach to consultation.

There are three areas which we believe would significantly improve the existing treaty-making process. First, we would welcome advice at first ministers level or central agency CEO level at the time when the Commonwealth takes the decision to enter into treaty negotiations that could have implications for a state or territory. This includes ongoing advice on the progress of such treaty negotiations. Presently, Commonwealth departments often write to Queensland line agencies, and we are grateful for this advice. However, contact with first ministers or central agencies in the first instance would enable a comprehensive whole-of-government consultation, particularly in cases where there are limited time frames.

Within Queensland the Department of Premier and Cabinet is recognised as the central point for dissemination of information about treaty negotiations. It is responsible for whole-of-government consideration on specific treaty matters and provides Queensland's representation on the Standing Committee on Treaties. It also coordinates the tabling of JSCOT advice in the Queensland parliament and is therefore the logical initial point of contact.

I take this opportunity to point out that in this regard the Department of Foreign Affairs and Trade's approach to consultation on trade treaties has improved significantly in recent times. Queensland's recent experience with the consultation on the United Arab Emirates free trade agreement has been exemplary. For example, the federal minister for trade wrote to Premier Beattie outlining Australia's intentions to embark on negotiations and invited Queensland's views. A whole-of-government response was provided outlining Queensland's interests and preferred representative for ongoing consultation. Queensland officials have subsequently been briefed after each round of negotiations and in December 2005 Queensland representatives participated in the Australian negotiation delegation and provided information to the United Arab Emirates on the state government's procurement arrangements, which were a key aspect in negotiations. Trade ministers have also been briefed via the national trade consultations. DFAT's approach represents a well-coordinated and genuine effort. Queensland

would welcome a similar approach from other Commonwealth departments on treaties that have implications for state and territory governments.

The second area for improvement is the earlier provision of national interest analyses. Currently national interest analyses are only made available when treaties are tabled in parliament. Earlier receipt of drafts may promote a more rigorous analysis of issues and provide scope for greater consultation. As national interest analyses are intended to reflect the results of consultation, it would be appropriate for state and territory governments to have some control over the extent of consultation portrayed in the final document. Numerous Commonwealth departments state in the NIA that the Queensland government has been consulted by virtue of 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.

As an example, 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 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.

Our experience with trade treaty processes has highlighted that written advice from the responsible Commonwealth agency to the Premier at an early stage provides high-level engagement and assessment of the relevance of the treaty to state government interests and an opportunity to establish the appropriate forum for ongoing consultation. Details on the agreed forum and forum outcomes could then be included in the NIAs and would provide a true consultation trial.

The final suggested area for improvement involves the Treaties Council, which was agreed by COAG under the 1996 principles and procedures. The role of the council is to consider treaties of importance or of a sensitive nature to states and territories, either of its own motion or where a treaty is referred to it by any jurisdiction or the Standing Committee on Treaties. Although the 1996 principles and procedures specified that the Treaties Council would meet at least annually, normally at the same time and place as COAG, the Treaties Council has met only once, in 1997. This is despite calls from a

number of premiers, including Premier Beattie in mid-2000, for a meeting of the Treaties Council to discuss several treaties of importance, including the Kyoto protocol.

In summary, there is no question the past decade has seen considerable improvements in Australia's system of treaty making. Queensland particularly values the processes used by the JSCOT. These processes provide certainty for us to have input into the treaty-making process, albeit once negotiations have been concluded. Coupled with Queensland's parliamentary tabling process, the JSCOT provides a mechanism for increasing the awareness and scrutiny of proposed treaty actions by members of parliament and the community generally.

Queensland welcome the intent of the reforms under the principles and procedures agreed by the Council of Australian Governments in 1996 to create a more transparent, consultative and accountable approach, but there is room for improvement. In particular, improvements to Commonwealth-state consultation at the treaty negotiation stage is crucial, as this is the optimal time for federal issues or particular state reservations or exclusions to be negotiated. The recent efforts of the Department of Foreign Affairs and Trade during the United Arab Emirates free trade agreement provide an excellent example of what can be achieved when more effective consultation is undertaken. Queensland would welcome all Commonwealth agencies adopting a similar approach where treaties have the possibility of implications for states and territories.

CHAIR (Dr Andrew Southcott MP)—Thank you very much, Neil. Since 1996 the Department of Foreign Affairs and Trade and the Australasian Legal Information Institute have jointly developed the Australian Treaties Library. We are pleased that reports of the Joint Standing Committee on Treaties are to be included on the Treaties Library. I now invite Professor Andrew Mowbray, a professor of law and information technology at the University of Technology, Sydney and codirector of Austlii, to provide us with some insights into the redesigned library.

Prof. Andrew Mowbray—I will try and keep this fairly brief, because I realise I am standing between you and morning tea. It was going to be incredibly brief because the system did not work as at nine o'clock this morning. But I am hoping that in a moment we will be able to bring up the system. As Andrew said, Austlii has had a long relationship with DFAT. Apart from the High Court, our partnership with DFAT has been one of our longest. We appreciate that and I think the public does as well. The other thing that is notable about the system is that the Treaties Library is, I think, the largest national treaties system anywhere in the world. What is more, it is free. You can, if you want to, have a closer look at the system later on. There is

a system running up the back. We have also handed out a handout which gives you a starting point.

When we had our first Law via the Internet Conference, which some people might have gone to, when I was driving in there was this great flash of lightning that hit the top of the tower at UTS. Sure enough, it took out the whole internet for the first three hours of the conference. You can imagine that when you have got a conference called 'Law via the Internet' that made things rather difficult. We had to reorganise all the speakers.

A PowerPoint presentation was then given—

Prof. Andrew Mowbray—Basically, the main thing we have added and the point of today's launch is the JSCOT library. The link is probably so small that you cannot see it anyway, so it was hardly worth waiting for. But you get a bit of an idea of what it looks like. I will not do a demonstration. Right at the top is the new JSCOT database. You can see some of the treaties there. It is now possible to do a search over all of that material. If you search for 'WIPO' you get in the results 56 treaties, reports and so forth. The other thing we always struggle with on these occasions is knowing how exactly to launch one of these things. Basically all I will do is declare it launched.

CHAIR (Dr Andrew Southcott MP)—Thank you very much, Professor Mowbray. We do have on our website a link to the Australian Treaties Library as well. Thank you for that capability so that we can now search JSCOT reports and also for launching the redesigned Australian Treaties Library. The intention now is to have an interaction between seminar participants and the panel. There is now time for questions. I invite questions from participants.

Prof. Shirley Scott—I am from the University of New South Wales. I have a question for Devika. Can you elaborate a bit more on your proposals—in particular, if you see the problem with JSCOT, that partisan politics comes into play, how will the parliamentary process remove the partisan politics or minimise it and, secondly, what role would JSCOT have within your proposals?

Ms Devika Hovell—It is not a criticism of JSCOT that partisan politics comes into play. The fact is that partisanship is very rarely an aspect of a JSCOT report. The tendency has been for consensus to be achieved and to support government policy. In that sense—having a legitimised government policy—partisan politics comes into play. In the present climate, with government controlling both the House of Representatives and the Senate, again there will be a limited role or potential for the parliament. But my point is twofold. First of all, occasionally the Senate will therefore be in a less government controlled context. The other thing is to get parliament

interested, to ensure that parliament is tracking the process. It is an interesting aspect of *Hansard* that, when Downer announced that the Rome Statute of the International Criminal Court had been signed, the quote in *Hansard* was 'Oh'. I assume that indicated roars of surprise by opposition members who were not even aware that the whole thing was being negotiated. There is no blame on the government for that, but I want parliament to be more engaged with the process during the negotiation with the JSCOT reports, into which so much work goes. Again, there is the issue of whether the treaty should be ratified so there is more democratic accountability for the treaty ratification.

CHAIR (Dr Andrew Southcott MP)—Thank you.

Mr John Langmore—I am from the University of Melbourne. I want to speak about whether Australia complies with treaty agreements. It has been argued by the UN Human Rights Commission that Australia has not fully honoured its human rights commitments. It can be pretty persuasively argued that the industrial relations legislation does not conform with Australia's obligations under ILO conventions. Of course, this is a partisan question, in a way, but it has a serious intent.

CHAIR (Dr Andrew Southcott MP)—Shock!

Mr John Langmore—I wonder whether you would like to comment on that.

CHAIR (Dr Andrew Southcott MP)—It is open to the Joint Standing Committee on Treaties to examine any treaty of which Australia is a party. It is also open to us to examine any treaty that is currently under negotiation. It is certainly open to the Joint Standing Committee on Treaties to look at those things.

Mr Kevin Rozzoli—I am the National President of the Australasian Study of Parliament Group. My question is basically to Neil, but we could have comments from Devika and Andrew. It would seem that the process of communicating directly with premiers or chief ministers and presidents and speakers is probably not the most effective way of engaging a parliament, although it may engage a government response—the two things are subtly different. I am wondering whether or not there is value in proposing to state parliaments that in fact they assign treaty considerations to a committee—not that you would designate a particular one, but surely there would be within the committee framework a committee that could have that added to its responsibilities—and to engage that committee as early as possible so that the parliament itself, rather than the executive, has a role in responding to the inquiry. Devika mentioned greater engagement of parliament in her address,

and this would be one way of doing it and getting a more representative opinion of the community, rather than the executive.

Mr Neil Roberts MP—We looked at this issue some years ago, I think arising out of the reports of the committee in 2000—it might have been earlier. A decision was taken that we would not establish a separate treaties committee. However, our legal and constitutional committee does have the power to examine and report on treaty proposals to our parliament. So that option is already there. I am not aware whether that option has been exercised to date. In fact it has not. But the option is there for a joint parliamentary committee to examine and report to our parliament if it chooses to do so. We have given that committee that additional responsibility. I am not aware of the discussion that took place at the time but there was a detailed discussion on whether in fact a separate committee should be set up, and the decision taken at the time was to at least assign that opportunity to an existing parliamentary committee.

Ms Devika Hovell—I have no further comments. I will not make a proposal potentially for state parliaments to have a veto over treaties. Maybe I will wait for the next 10 years.

CHAIR (Dr Andrew Southcott MP)—Thank you. I think it is a good idea. It is worth looking at. As I said, I do write to the state premiers, the chief ministers of the territories and the presiding officers. We are often underwhelmed by their response, but generally I might get a letter back saying something like: 'We have tabled it, thank you very much. We do not wish to make any comments at this stage.' An Attorney-General's committee or a legal committee of the state parliament may actually have a look at it. I think it is a good idea. We do want more considered submissions from the states and territories, because we try to incorporate them in our reports and it does help our consideration.

Mr Kenneth Jasper—I am the member for the Murray Valley in the Victorian parliament. Just to provide some clarification, in Victoria I became a member of what was called, in 1996, the Federal-State Relations Committee. We were involved with treaties and released a report in October 1997, *International treaty making and the role of the states*. It is very interesting that the committee lasted from 1996 to 1999. There was a change of government and the government decided that the committee was no longer relevant. It was very disappointing. As far as I am concerned, in the Victorian parliament we do not see the treaties at all. Our report made a number of findings and contained six recommendations, including that the states be involved with reviewing treaties and that there be some consultation. It is obvious that the Queensland government are doing that. I think we should be recommending and making sure that the state governments not only receive those treaties at

a government level but indeed that a committee continue to investigate those treaties. Currently I am on the Scrutiny of Acts and Regulations Committee in Victoria and we do not see those treaties at all. That should be something that, at a state government level, we should be taking on as an important role within federal-state relations.

Prof. John Halligan—This is really a restatement of the first question to Devika: how do you see this committee evolving? There is clearly a spectrum of committees in parliaments in terms of how they come out with their decisions, ranging from unanimity through to partisanship. I think your critique is that there is too much unanimity here or complementing government, which of course is a legitimate role for some committees. But if you go to the partisanship end, of course, you run the risk of rejection of recommendations. Some committees sometimes seem to find a middle path and the question here is: what is the middle path which might balance the institutional constraints associated with the executive with a somewhat greater role for a parliamentary committee?

Ms Devika Hovell—Thank you for that opportunity. I do want to clarify that I am not criticising JSCOT for achieving decisions by consensus. The absence of partisanship within that committee is to be commended. What is concerning of course is the timing of that inquiry. Through no fault of JSCOT, they can only consider a treaty once the terms have been finalised and they have no opportunity to have any impact on those terms. For them to say that article 4 is inappropriate and should be amended is no longer possible. They do have the opportunity to criticise the treaty, expose its flaws and to recommend against ratification, which, as we have heard, has certainly occurred on one occasion with Kazakhstan. But potentially there are flaws within other treaties and the comparison between the report provided by JSCOT and the Senate select committee showed that with considerable rigour and there was a critical report by the Senate committee. There was criticism in the JSCOT report but the details did not come in as much as in the Senate select committee report. Therefore this opportunity to get parliament involved and allow these recommendations to have real impact within the parliamentary context is what I am pushing for.

Mr Dick Adams MP—I think this issue reflects on the culture within the committee system of the House of Representatives to endeavour to get consensus on reports. This usually occurs where we are way out in front and dealing with issues. You get a report on good information, a good report with good recommendations which can be used by everybody within the policy-making process. You usually get dissenting reports et cetera when you come across the politics of the day. I think that JSCOT also suffers from the fact that it is a creature of the government more so than the parliament, and every other committee of the House of Representatives suffers from that too. I think

that that is a weakness for the House of Representatives and it needs to broaden that out.

The Senate is different because it has had more independence and a bigger role. If changes take place in the parliamentary processes of electing a President or resolving those issues into the future, that could be a significant factor for the House of Representatives. I think that the role of the committees is pretty critical in getting a little bit more influence or power in being able to set their own destiny.

CHAIR (Dr Andrew Southcott MP)—I would just like to say something in defence of the committee's report on the US free trade agreement. In that report from memory there were something like 20 recommendations which related to the implementation of the free trade agreement, which we thought were consistent with the spirit of the free trade agreement. It was written very much in terms of trying to find a middle path in getting agreement between government and the opposition in what was an incredibly contentious issue. I cannot remember how many chapters there were but the entire report was agreed between government and opposition members and then there was just a final page which the opposition members put in saying, 'We are not prepared to recommend that it be ratified at this stage. We require further information.' I cannot say for sure but if I were Mark Vaile I do not think that that is the report I would have wanted. It was not a tick and flick exercise. We looked at it and, given all of the competing pressures which are political realities, it was a legitimate expression of the committee. Certainly it had a lot of recommendations—from memory, over 20—related to the evidence that we had received. It certainly was not a rubber stamp. I have been told we can have a couple more questions because the Hyatt is still baking the cakes for morning tea.

Dr June Verrier—I am interested in the comment about the failure of the consultation in COAG and the COAG Treaties Council meetings. In spite of apparent pressure or requests from state premiers for those meetings to take place, what was the explanation? Why did it fall apart? Does that comment on COAG machinery generally in that it only works when the Commonwealth thinks it should work?

Mr Neil Roberts MP—I cannot give you a full answer to that question. My understanding is that the responsibility for calling a meeting of the Treaties Council rests solely with the Prime Minister. The agreement was that the council was to meet annually. Unfortunately, meetings of that committee have not been held. I do not think that is unusual in terms of this committee; there are other committees which in their original stages were intended to meet more regularly but those original agreements have not been adhered to.

Ultimately, it is a decision of the Prime Minister of the day, who has the ability to decide when that committee meets.

Our Premier has felt on a couple of occasions, particularly in 2000 with matters such as the Kyoto Protocol, that there should have been, in accordance with the 1996 agreement, a meeting of that committee so that a full and frank discussion could have taken place at a very high level about the serious implications of some of those treaties. But the matter ultimately is not in the hands of state premiers; it is in the hands of the Prime Minister.

Mr Paul McBride—I have a comment on Dick Adams's speech, and that is that tax treaties are actually very interesting once you get to know them. Next time we present in front of the committee we will try to jazz it up a little. I am open to your guidance.

Mr Dick Adams—I look forward to the occasion.

CHAIR (Dr Andrew Southcott MP)—Diagrams and visual aids are always good.

Mr Paul McBride—We will see what we can do.

CHAIR (Dr Andrew Southcott MP)—Thank you. As there are no more questions I will adjourn the hearing until eleven o'clock.

Proceedings suspended from 10.37 am to 11.04 am

Session 2: Treaty making and review in a federal system

CHAIR (Senator Dana Wortley)—Welcome to the second session. I am a senator from South Australia and one of seven senators on JSCOT. The theme for this session is treaty making and review in a federal system. For some time prior to the 1996 reforms, concerns had been raised in various circles about the obligations which could be imposed on the states and territories by the Commonwealth government entering into treaties. One of the main bodies established to address this problem and provide a vehicle for consultation was the Standing Committee on Treaties.

I have the honour this morning of introducing Petrice Judge, who will provide us with some insights into the role of the Standing Committee on Treaties as part of the treaty scrutiny process. Petrice is currently the Executive Director of the Office of Federal Affairs in the Western Australian Department of Premier and Cabinet. Petrice has a longstanding interest in treaty negotiations and the impact on state legislation, policy and practice. She was an inaugural member of the Standing Committee on Treaties and has

also actively participated in Australian delegations as the representative for the states and territories. I invite Petrice to come forward.

Mrs Petrice Judge—Thank you very much. Welcome, ladies and gentlemen. I would particularly like to acknowledge the presence of some members of the Standing Committee on Treaties from the other jurisdictions. I want to emphasise that the views I am going to present are purely my own. They do not represent the views of my state nor indeed my department. So this is off the record, isn't it, Mr Griffiths! But I am a bit concerned that everything is being recorded.

My views have been formed as having longstanding involvement with SCOT and also managing the area within the Western Australian government that tries to feed into the JSCOT process. I have participated in Australian delegations and I have the utmost respect for my Commonwealth colleagues and ministers who are part of that process. So what I have to say does not reflect on the stance that they take in the negotiations. I am really looking at the treaty scrutiny process and more precisely the role of SCOT. But it is all about consultation with the states.

Overriding this whole process, there is no question that there needs to be a unified national voice in treaty negotiations. Nevertheless it is crucial that this accommodates a range of disparate concerns, especially where a treaty impacts on the constituent governments—that is, the states—and their legislation, policy and practice. In order to do this, the states' involvement needs to be facilitated and they need to understand the art of treaty making, which has its own language and very much its own set of behaviours. So, in this example, the search for the perfect clause is represented as tedious, immaterial and in fact pretty silly. However, we all know the importance for our peak lobby groups of even a comma in a sentence, so it is a really important role. 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. So I will consider how SCOT was set up, what it is meant to do and how effective it has been in doing it.

When the reforms were introduced in 1996, SCOT was already in existence and it provided assistance to the Commonwealth on negotiation and implementation of treaties, but it is true to say that it was in an atmosphere of great heat. It was not a comprehensive coverage. I felt that the states were really regarded by the Commonwealth officials as the least important of the special interest groups that they needed to consult. You would have industry perhaps first, environment groups second and states very much an afterthought. So at the time of the inquiry in 1995 the states and territories made a submission and they really wanted to emphasise that states and

territories were not seeking a power of veto nor did they really want a direct role for their parliaments, but they certainly wanted proper and detailed consultation and political accountability. One of the issues was that SCOT was a committee of officials and they felt it diminished their role and their ability to influence. So, in relation to the treaty making process, various forces came together and, with the incoming government, clearly on the table were issues of greater transparency, political oversight and, particularly, effective consultation with the states.

So we come to the June 1996 COAG meeting, and COAG established the Treaties Council and revised the existing principles of procedures for Commonwealth-state consultation on treaties to include a defined role for SCOT. We had high hopes of these changes, particularly of the Treaties Council, which consists of the Prime Minister, the premiers and the chief ministers with the Commonwealth Minister for Foreign Affairs. It was to be advisory, to consider treaties and to meet once a year to coincide with COAG. COAG tends to meet twice a year so we thought maybe it might meet once or twice a year. There was an inaugural meeting on 7 November 1997, as you have heard, and Western Australia took a very big lead in coordinating amongst the states and territories the issues that were going to be discussed.

For the record, the treaties and international instruments discussed were: the United Nations Convention on the Rights of the Child, the draft protocol on the sale of children, child prostitution and child pornography, the World Trade Organisation Agreement on Government Procurement, WTO negotiations on financial services, the Draft Declaration on the Rights of Indigenous Peoples and the Convention to Combat Desertification. They were all interesting treaties but it is fair to say that there was not a lot of discussion. The council has not met since, despite requests, as you have heard, from individual premiers. I know the Western Australian Premier has asked on four occasions and has received no response.

It should have met, we believe, over the Australia-United States Free Trade Agreement. It did not. Why not? You did ask that before. The Prime Minister was asked in August 2005 why the Treaties Council had met only once, particularly in the light of these bilateral negotiations over free trade agreements. He said that it is only one mechanism for Commonwealth state consultation on treaty matters and that there were a range of standing and ad hoc consultative processes which were used to inform those negotiations so he did not see there was a need to convene a further meeting. So much for the Treaties Council! Did the revitalised SCOT fare any better?

SCOT is set up to identify treaties of sensitivity and importance to the states, to have regard to the potential to influence finances and future policy decisions of the states and also to recognise the need for state participation in

implementation. It also has a role of facilitating information flow from the Commonwealth to the states and to be the vehicle for coordinating state and territory representation on delegations for important treaty negotiations. There is great potential in those terms of reference. Does it carry out those roles?

How SCOT works now is that there are meetings twice a year in Canberra and this enables a lot of experts who are based in Canberra to attend and to receive questions. There is central agency coordination organised by the Department of the Prime Minister and Cabinet and we have representatives from premiers' departments, in the main, across Australia who attend those meetings. A schedule of current treaty actions is prepared by the Commonwealth and distributed to the states in advance of the meeting. The states actively caucus about what they would like to receive greater information about and they would probably request about 12 detailed written briefings. They have a look at that and say, 'We would like to discuss about half of those at the meeting.' We also have standing items on the agenda, updates from DFAT and A-G's.

Does SCOT work? The schedule is a very good discipline. We are forced to provide that information through channels and we effectively work as a clearing house so we at least know what treaties are under consideration and the relevant contact points if we want to influence it. The written briefings are extremely helpful and a much greater improvement on the previous meetings which I attended. I became very skilled at writing very fast because I was trying to take up as much information as I could so I could report it back to my colleagues who were very interested in the double taxation agreement, for example.

Towards the end of 2003 and the start of 2004, the treaty schedules did become more useful because SCOT had an influence on how they should be presented. There is an ongoing review of the strengths and weaknesses of SCOT but I am not too sure where it is going to go or how seriously it is being taken. We would say that SCOT has developed from being simply a forced information giving exercise to one where there is more dialogue at the meeting and there is more interaction. But, essentially, it is a pretty modest gain. We have established an information flow but we are far from implementing the principles and procedures which were agreed to at COAG. They are very worthwhile reading. What do they involve?

Essentially, the principles and procedures involve a more genuine commitment to consultation rather than, as has been mentioned before, merely mentioning in the national interest analysis that states have been provided with a treaty schedule. That does not equal consultation. 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. The issue about time, particularly, was demonstrated in the bilateral free trade agreements where there was an emphasis on the states developing reservation lists of legislation that was not going to be compliant with the draft terms of the treaty. We simply did not have enough time to pick up mistakes because we were in such a pressure cooker time frame of getting the information to the Commonwealth. I think there needs to be meaningful involvement of the Treaties Council and a more coordinated use of ministerial councils that have an interest in the subject matter of the treaty.

There is also the need for there to be recognition that all jurisdictions have responsibilities. It is not just window dressing that we are all in the room together. I heard one Commonwealth official—I do not know if he is here today—say before he went into the room, 'I'll feed the chooks some wheat.' That did not really put us in the best frame of mind to be consulted over this treaty. The states have to resource it too because it does have tremendous impact on the states. We have to allocate more people to having a look at what they are and we have to find mechanisms to let the Commonwealth know what we want to have portrayed in the negotiations.

It is useful to have a look at the US free trade agreement, which has been mentioned several times. That was very revealing as to the stage we have got with consultation. There were lots of meetings and there were many forums but it is fair to say that there was forum shopping on the part of the Commonwealth officials. They would go perhaps to a line agency group and hear something that was more conducive to include in the negotiations. We felt that there needed to be greater coordination. There was involvement by ministers, and ultimately premiers had to become involved because the Commonwealth needed the states because they wanted to offer nine government procurement markets to the US. So the premiers had to come in and commit to Australia being able to conclude the agreement.

In that negotiation of the US free trade agreement, Australia is seen very much as an unequal partner, a very much diminished partner in relation to the US. Certainly, the states were unequal in their relationship with the Commonwealth in those negotiations. We do not expect a chair at the table but we really do want to have our issues squarely on the table. To ensure early recognition of what those issues are, you need to consider implementation issues. That needs to be done by SCOT and I think SCOT should function as the secretariat to the Treaties Council, which is what it was set up to function as. That would enable there to be greater political accountability, which is what the issue was before the 1996 reforms. This would help to deliver to the states' satisfaction the meaning of the verb 'to

consult', which to remind you is, 'to have regard for when making plans'. That is all the states are asking for. Thank you.

CHAIR (Senator Dana Wortley)—Thank you, Petrice. There were seven senators on the committee and we very often ask questions specifically relating to our states. Our next speaker, Anne Twomey, has aroused our curiosity by her title, 'Treaty Reform—What the states wanted, what they got and what they want now'. Who better to know that than the secretary of the committee which produced the report *Trick or treaty?* As many of you are aware, in 1994 the Senate asked its Legal and Constitutional References Committee to inquire into the Commonwealth's treaty making power. The recommendations of that committee were taken into account in instituting the 1996 reforms. Anne, I welcome you to the microphone.

Ms Anne Twomey—Thank you. The *Trick or treaty?* report that the Senate Legal and Constitutional References Committee completed in 1995 was one of the most important reports that that committee ever produced, I suspect, and one of the most significant reports for the parliament. As many of you would know, a lot of work goes into parliamentary committee reports but many of them are ignored or lie on a shelf for a long time without receiving a great deal of response. The reference to the committee concerning treaties was important in itself because it was the result of a great deal of community concern. There was concern in the states and in the public that there was, as was mentioned last night at the dinner, a democratic deficit in relation to treaties and a concern that there was not sufficient transparency and accountability in the treaty making process.

The Senate committee travelled around Australia. It took submissions in every state and received a lot of evidence of that concern. It worked quite hard to present recommendations that were unanimous through all the parties participating in the committee and that would be effective. There was a discussion this morning about the benefits or the detriments of unanimity. From our point of view, when we were looking at this in the Senate Legal and Constitutional References Committee, we considered that there was a great deal of power in unanimity. Treaties at the time was an extremely controversial issue and to get unanimous agreement from the Labor Party, the Liberal Party, the National Party, the Democrats and the Greens on an issue such as treaties, which was so controversial, was an extremely powerful message to send to the government and resulted in nearly all of the committee's recommendations being supported and implemented.

The other interesting thing from the point of view of the states and the territories is that the states and territories took the issue sufficiently seriously to work extremely hard in developing a unanimous state and territory submission to the committee. As you would know, one of the problems with

federalism, particularly in the conflict between the states and the Commonwealth from time to time, is that the Commonwealth can quite happily divide and rule because the states are not necessarily agreed on a particular position. Because the states took this issue so seriously, they realised that the only way they were going to achieve change was to get a unanimous submission to put to the Senate committee, and that is what they did.

The other powerful aspect of the state and territory submission, apart from its unanimity, was the fact that it was a very measured submission. There was nothing in the submission that proclaimed states' rights. There was no call, as Petrice mentioned, for the states to have a veto over treaties. Those were the types of populist things that a state could have easily fallen into, and the result would have been the Commonwealth being able to say, 'These proposals are unreasonable or impracticable' and to take little account of the state and territory submission. But the fact that the states and territories put in a unanimous submission that was very measured in what it called for meant that it was far more likely to achieve true reforms and practical reforms to the treaty system. That is indeed what happened.

So what were the states seeking? First of all, the most important thing was better information. States and territories were concerned that they were not getting sufficient information and that their constituents in the states and territories—the citizens out there—were particularly concerned that they did not have enough access to information. One of the things that the states and territories called for was for the Commonwealth to go through the process of creating treaty impact statements, as they were called then. The idea was not just to use this to inform the states and territories of what the potential impact of treaties would be; it was also intended as an intellectual discipline for the Commonwealth to go through. If Commonwealth officers knew that they had to sit down and work out what the impact of the treaty would be, what the benefits of it would be, what the disadvantages of it would be, what sort of changes would have to be made in the law to implement it—if they had to go through that intellectual process before getting to the point of ratification and if, in going through that process, realise, 'Yes, my arguments are looking pretty flimsy on the advantage side; I am finding difficulty in giving plausible arguments as to why we should enter into this treaty'—then hopefully there would be some realisation by the Commonwealth that: 'Maybe there is some problem about entering into this treaty and maybe we shouldn't enter into it just to appear to be good international citizens. Maybe we should take more account of the reasons why we are entering into it and the impact of it.' So the call by the states for treaty impact statements was not just a matter of informing the states, very important though that may be, but also a matter of imposing a process and an intellectual discipline upon the Commonwealth.

The second thing the states sought was better consultation. We just heard Petrice talking about that and about the meaning of consultation. SCOT, which pre-existed the 1996 reforms, was generally seen by the states as a clearing house for information. The Commonwealth would come, dump a load of information on the table or speak very quickly, requiring officers to write very quickly. But it was not a body that involved any true exchange of information between the Commonwealth and the states. There was no participation in terms of the states responding, saying, 'These are our concerns, these are our difficulties, this is where it is going to impact on us.' So there was no true interaction between the Commonwealth and the states in SCOT.

The states also wanted to have greater transparency in terms of an annual report that would be published which would explain how the states had been consulted on treaties and what objections the states might have recorded in relation to treaties so that that was a matter that could go back out to the community as well. So those consultations, to the extent there ever were any, that occurred in private and secret were in some way later made accountable through some sort of publishing process—another request of the states.

The third point was greater political accountability. The states were concerned that SCOT was only dealing with things at the officials level and that to give sufficient importance to treaty negotiations, things had to be dealt with at the political level through heads of government. Therefore they proposed the establishment of a treaties council, which was to be an adjunct to the COAG process, as Petrice has told you, and was envisioned to meet at least once or maybe twice a year as part of that COAG process.

Finally and perhaps you might think curiously, the states and territories did not ask for a veto role in relation to treaties. They could have asked for that through the Treaties Council; they did not. What they did ask for was a greater role for the Commonwealth parliament in relation to treaties. You might wonder why state governments would be concerned that the Commonwealth parliament get more involved in treaties. I think it is partly seen as something that the Commonwealth government might feel a bit more comfortable with doing in terms of a forum in which treaties can be discussed and addressed but not a forum controlled by the states.

The states and territories saw the Commonwealth parliament as not just a Commonwealth body. I know that the Senate, as the states house, is something that has been regarded as irrelevant for at least the last 100 years; but the Senate still is a states house to the extent that senators come from each state in equal numbers, so there is a greater proportion in the Senate of senators who come from Western Australia or Tasmania, and those numbers do affect the way issues are seen in the party room or in parliamentary

committees as well. So the fact that there is that greater representation of the states in the Senate can flow through where there are particular state concerns, because state concerns may not be just related to states governments per se. They may be concerns of a state that affect a state's economy, so Queensland may have particular concerns about sugar, Tasmania will have particular concerns about salmon, Western Australia will have particular concerns about desertification or mining. And those concerns are not just state government matters, they are matters that are relevant to members of parliament who come from those particular states and who are concerned about the effect of those matters on their constituents. So to that extent the Commonwealth parliament and its role in relation to treaties still has some relevance in protecting state interests.

What the states and territories asked for in their submission was, first of all, for the establishment of a joint parliamentary committee on treaties, the result of which was JSCOT. So the states and territories supported the creation of JSCOT. Secondly, and more controversially, the states and territories asked for a Commonwealth parliamentary veto in relation to treaties so that either house of the Commonwealth parliament could veto a treaty. The idea envisaged was something akin to the disallowance of regulations. Given that most treaties are uncontroversial or many treaties are of a similar form, those sorts of treaties would go through on the nod; unless anybody objected to them, they would automatically be approved. So it would not be a matter of holding up the treaty system by having to have a debate on each treaty and a formal vote for approval. Everything would go through as approved unless, within a certain period of a sitting day, there was an objection, which would bring on a debate. If either house voted against the ratification of a treaty, that should be binding on the government.

I have to say there were a few constitutional issues about that too. There was an issue on the extent to which the parliament could bind the executive in relation to the ratification of treaties. But that was the recommendation of the states and territories. So, instead of asking for their own veto in relation to treaties, they hoped that, if a treaty were sufficiently controversial to be something that the states and territory governments objected to, those objections would get a run perhaps in the Senate and result in a treaty being vetoed at that level. They could do that without claiming states' rights; they could do that through a Commonwealth forum, being the Commonwealth parliament. That is what the states asked for in 1995. What did they get?

Well, the reforms flowing from the Senate's *Trick or treaty?* report in 1996 did make a significant difference. First of all, in relation to consultation, we have heard that there were reforms to SCOT and the SCOT process. The Commonwealth agreed to develop national interest analyses, which are effectively the types of treaty impact statements that the states had been

requesting. So the consultation certainly improved, although as I will mention later there are still some concerns about it. In terms of political accountability, one would have to say that the 1996 reforms failed to achieve much at all. A treaties council was established. Interestingly, although the Senate committee's report largely recommended what the states and territories had requested, there was a divergence in relation to the treaties council. The members of the Senate Legal and Constitutional References Committee rejected the state recommendation about a treaties council composed of heads of government—an adjunct to COAG. Instead, they proposed something a little bit more ambitious. They wanted a formal treaties council composed of representatives of both government and opposition from each of the states and representatives from all the major and minor parties from the Commonwealth parliament.

You might discern why this recommendation was made; the Senate Legal and Constitutional References Committee was composed of backbenchers who were members of the opposition and members of small parties. As they said in their meeting, 'We want our say, too.' So they recommended that a treaties council be composed that represented both oppositions and governments from all the state parliaments, as well as from the Commonwealth parliament. I have to say the committee secretariat did point out at the time that it was fairly unlikely that sort of recommendation would be accepted by the government, and on that point we were correct. The government did not accept that and, in fact, accepted the state and territory submission, which was to create a treaties council that was an adjunct to COAG.

As you have heard from previous speakers, the much vaunted treaties council has only ever met once. The document titled *Principles and procedures for Commonwealth-state consultation on treaties*, which was determined at COAG in 1996—this is the document that sets out the rules for consultation on treaties—says that the treaties council will meet 'at least once a year'. It also says:

> The role of the Treaties Council 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.

As you have heard from other speakers, those terms clearly state that any state or territory can refer a matter to the treaties council, so the treaties council should operate when called upon to do so by any state. As far as I can tell, most states—or probably every state at one stage or another—has asked for the treaties council to be formed to discuss a treaty and the Commonwealth has refused to hold a treaties council.

We have never had a clear explanation for this; nor has there been an explanation as to why the Commonwealth has any right to refuse a meeting of the treaties council. One can only assume that if the state premiers got together and said, 'We were having a treaties council but the Prime Minister did not attend,' it would be a relatively futile exercise. The consequence of all this is that the treaties council is effectively useless. Its only real power or importance is in the fact that it notionally exists, so it is a structure that can be used if need be. As we have seen through the US free trade agreement process, there has been consultation with state premiers but it has bypassed the treaties council. It has been going through other means. Why that means was chosen rather than going through the more formal treaties council I really do not know. Perhaps, if we have any Commonwealth speakers later, it might be worth while asking them.

At the parliamentary scrutiny level the result was mixed. We have the Joint Standing Committee on Treaties, which is obviously a very successful body. In some ways it 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. At the other level, though, in terms of looking for a parliamentary veto in relation to treaties: clearly, that did not go ahead. The Commonwealth government said, 'Let's do all these other reforms first, and see if that fixes the problems. If it doesn't then we can reconsider the issue of a parliamentary veto over treaties.'

There was a subsequent review and the conclusion was that everything was hunky-dory so we did not need to go down the parliamentary veto path. Although, I have to say that when I was talking to Senator Kemp last night he said that he was a lone voice in the wilderness still proposing parliamentary vetoes over treaties. So, within the government ranks, there is at least one voice calling for parliamentary veto over treaties.

So that is what the states got. What do they want now? Interestingly, the states are not calling for a veto over treaties—in fact, they are not even calling for a parliamentary veto over treaties. From discussions with various state representatives that I have seen, they think that is water under the bridge—an issue that has passed by. What they are calling for is improved consultation. There certainly have been improvements in consultations but more improvements can be made. The main concerns seem to be about consultations earlier on in the negotiation stage. There is a concern that national interest analyses come too late in the piece for the states, that maybe a draft version should be done earlier that could be used by the states so that they could take into account that information in 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.

There is also an issue further on about implementation. There is a concern that really what SCOT should be doing, but is not, is acting as a forum for determining how treaties are being implemented before you get to the stage that you are in breach of your international obligations by not implementing them. If a treaty does have an impact upon states then some sort of agreement should be worked on early in the piece as to whether the states will change their legislation, or what will happen, so that it is well settled before you get to the point of ratification as to how you will implement a treaty. That is not being done in a systematic way; it is being done in a haphazard way. More effort needs to be undertaken to work out earlier on in the piece what are the potential impacts on the states and what changes need to be made at that stage.

The other concern of the states seems to be that occasionally Commonwealth agencies will deal directly with state line agencies so that, if it is an environmental treaty, the department in Canberra will start dealing directly with the environmental departments in the states because they have established relationship. That is all very well and good but, unless it goes through the formal process into Premier and Cabinet, the states are not able to coordinate all the aspects of the treaty and its impact on the states. So, although bypassing those formal mechanisms through SCOT may be seen to be avoiding red tape, it actually ends up with more problems in the end and is not an effective way of doing things.

My problems with this speech were twofold. One was that there was not sufficient controversy. On the whole the states are pretty happy with the reforms, and that is a nice thing, but it does not lend itself to an interesting speech. My second problem was that my colleagues have already said a lot of what I was going to say and that meant that there was not really anything interesting to say either. So here is my one interesting point, which is a little bit off the topic that I was asked to speak about but is still about states, the Commonwealth and treaties.

The paradigm that we are used to in relation to treaties is the Commonwealth wanting to enter into treaties and states being negative about it. We are aware that states are concerned that the Commonwealth will gain a legislative head of power by entering into a treaty and might use that power against the states, therefore states are concerned to try to limit the Commonwealth's power to enter into treaties, limit the number of treaties that it enters into or somehow respond in a negative way to treaties. The trend that seems to be happening at the moment, though, seems to be a reverse of that. I think that is probably the most interesting thing, looking ahead to the future.

What you are beginning to see is reluctance on the part of the Commonwealth to enter into a treaty or to implement a treaty but finally

some enthusiasm by the states to go ahead with implementing treaties. I give you as an example Kyoto. The Commonwealth has not wanted to enter into the Kyoto Protocol but some states now want to effectively implement it at a state level. So you have states talking about establishing carbon emissions trading systems and those sorts of things. You can see the same sort of trend happening in places like the United States of America where California and various other states or even some times cities are taking action to implement the principles in the Kyoto Protocol where the federal government is not taking the action to ratify the treaty.

You can see similar sorts of trends happening in relation to human rights. You have the ACT with its Human Rights Act, you have proposals in Victoria to develop a charter of rights and you have discussions elsewhere—Western Australia and even New South Wales are beginning to think about it too. You are looking at states beginning to use international conventions and human rights conventions and the implementation of them as a basis for state legislation when at the Commonwealth level—although in this case the treaties have been ratified—the Commonwealth is very reluctant to enact its own bill of rights or charter of rights. So you have a complete reverse of the argument that we have been having with Tasmanian dams and all those cases where it was a matter of the Commonwealth implementing and the states rejecting. We have a reverse trend of that going at the moment, which I think is a really interesting development, of states wanting to implement treaties when the Commonwealth is more reluctant to do so. That is my one provocative thought for you to think about. Thank you.

CHAIR (Senator Dana Wortley)—Our final speaker for this session is Associate Professor Richard Herr. He has been teaching at the University of Tasmania for more than 30 years, where he has held a variety of positions. He was a cofounder of the Australasian Study of Parliament Group, which cosponsored the 1999 seminar of the Joint Standing Committee on Treaties. Richard is well known as a political commentator. You may have heard him recently in relation to the Tasmanian state election. I invite Richard forward to reflect on the role of state parliaments.

Prof. Richard Herr—Thank you. It is my pleasure to be here and to join my friend Dick Adams in promoting the interests of Tasmanian salmon. I certainly hope it is on the menu for lunch. It is a privilege to be here and to be able to follow up on the role we were allowed through the Australasian Study of Parliament Group in cosponsoring that 1999 seminar. I mentioned that because it provides me with much of what I want to say. Like Anne, I am doing something of a retrospective on what we saw in 1999 and how far or how little we have come down the track since then.

I would also like to use this opportunity—although our present President, Kevin Rozzoli, who I am not speaking to because he stole the punch line from my paper but I will try to forgive him by the end of my speech, may do this—to congratulate JSCOT on its successes over the past decade. Certainly, it is remarkable—even where some have pointed out limitations. We are further down the track of transparency and accountability as a consequence of JSCOT's efforts than we would have been without it.

Like my students, when I have to give a presentation such as this I immediately go to Google and see what I can find about it. I was rather surprised when it flashed across my screen that the House of Commons in its review of parliament's role in treaty making made this comment:

> ... it is not the wish of the Government or Parliament to use treaty-making as a method to undermine the legislative and administration autonomy of the devolved bodies.

It goes on to say that the domestic implementation, which lies within the remit of the devolved bodies, will be retained by them in terms of their legislative and administrative powers. I thought that was remarkable for a system which we usually teach as being unitary and not being terribly sensitive to it. I am not suggesting for a moment that the Australian states have been reduced to devolved bodies of the Commonwealth but it is part of this growing awareness that, if you are going to have treaties as legitimate parts of the international governance processes, you do have to make them more democratic, and we have talked about the democratic deficit issue for some time.

The issue I want to address came from the 1999 seminar, where we had a panel of state parliamentarians talking about the state parliamentary role in treaties. Ray Bailey, who was then President of the Legislative Council, made a point of distinguishing, as indeed subsequent speakers did as well, between the state parliament's role and the state government's role—the state executive. That provoked something of an interesting debate but it was not a terribly long one. As we are getting close to lunchtime, you might be pleased to know that that session finished early. You can go back to the seminar transcript and find that it finished early, partly because of the wish list and the sorts of reasons Anne has already touched on and partly because what the state parliamentarians could envision as their role was fairly limited. I wish it were not, and part of my talk is to try to suggest that it should not be.

One of the issues that state parliaments, as parliaments, face in trying to find a role for themselves in the treaty making process is: where should they intervene? The negotiating phase, the acceptance phase or at the implementation phase? The practising diplomats have far more than just the three phases that I have outlined here. By and large the parliamentarians are

not interested in all of the different stages that go into making up the negotiating stage. They tend to lump it all together. I only mention that because I know that the practising diplomats are sensitive to the idea that state parliaments would want to get involved at a stage which they see as very complicated, sophisticated and sensitive in a somewhat—from their point of view at least—ham-fisted way.

As has been mentioned many times already, treaty making is a Crown prerogative and it has only very slowly and recently begun to be democratised. That is important because as we look at democratising this process it is not surprising that the major strides forward have really been made where the treaty making process enters the domestic arena with some degree of reality. That has tended to be at the acceptance and implementation stages. There is also in part a practical reason why this is so. Most of the rest of the world is not as democratic as the states that we normally associate ourselves with and to that extent they would find it enormously inconvenient—and I think that is why the foreign minister used the phrase last night—to deal with overly democratic systems in terms of the negotiating stages when they are trying to get their ducks in a row.

Like Anne, I went back to the history of it. What struck me is the fact that what has driven this process has not been as much the democratic deficit argument as simply straightforward Australian federalism—the tussle between the states and the Commonwealth for control and the states trying to find a place for themselves in that process once it became a source of political controversy. It goes back at least some 20 years before the 1996 reforms. Malcolm Fraser made it part of the new federalism approach that he had. I looked at the special Premiers conference in 1997 where proposals were made and agreed amongst the states and the Commonwealth on what the states' role in treaty making should be. When I read them out to you, you will find it surprising in some ways that they were as far in front of the process as they were at the time.

There was an agreement that there would be early advice to the states on treaty discussions and that there would be consultation with the states where a proposed treaty affected a sphere traditionally within the control of the states. For me, the critical thing was that it was agreed that the first option would exist with the states for passing implementing legislation, so that the states, if it was an area that affected the states, would have the first right to pass implementing legislation to put the treaty into effect domestically. There was to be the inclusion of the states in negotiating delegations, again where the treaty affected state interests, and there was a promise to try and use the federal clause in treaties where appropriate. As I said, I found it surprising when I went back to look at this, to see that the states were actually going to be given the implementing power before the Commonwealth parliament had

that kind of substantial and organised role at its level. Of course, it did not happen, any more than the federal clause could be inserted into treaties, simply because it was impractical, and most non-federal states resisted anyway.

The other thing that struck me about it, and it is a point that has been made repeatedly thus far—and hopefully it will continue to be made, because I think it needs to be repeated—is that the bulk of the arrangements for dealing with treaty making and the federal processes in Australia have depended upon the executive arm of government to carry them through. The Fraser concessions were not, I think, grudgingly made, but there were certainly obstacles to making them work. For example, there was to be a states adviser—someone, usually a Solicitor-General, who would be added onto the international negotiating teams. But there was only going to be one of them, and that one individual was supposed to represent all the states' interests.

Any of you have worked for state governments know the impossibility of it ever occurring that a single state adviser could adequately put forward all the different state interests on a difficult treaty. Moreover, just to make it a little bit more worth while for the states to reflect on how important it was for them to be involved in the negotiating stage of treaty making, they were told that they would pay the costs of the states adviser. And, of course, the states adviser would only be advisory. In effect, it was really only to be a trip-wire to alert the states to possible interests, which presumably they would take up through the Premiers Conference, later COAG, processes.

By and large the state parliaments have tended to focus, as the national parliament has, on the later stages of the treaty-making process—that is to say the implementation stage—where legislation becomes desirable or necessary or, as others have said, amending state legislation to accommodate new obligations that have been acquired through treaties. It was interesting to me, however, again in looking at the 1977 special Premiers Conference discussions, that a lot of the wish lists then were ones that were repeated at our 1999 seminar—so they really had not been formalised more effectively or focused or indeed advanced to any great degree.

I think the JSCOT process has done a marvellous job in carving out a role for a more democratic treaty-making process in the areas that have already been described, but it has not been able to extend this to the states in any sort of practical sense. I am aware of JSCOT's criticism of the SCOT process as not fully representing the kind of consultation that it wanted, and I agree with it. Part of my reason for being involved with the Australasian Study of Parliament Group is that by and large we do not trust the executive. We should not trust them, and they should be somehow accountable and responsible to parliaments in an appropriate way.

But the JSCOT process in advancing the democratic influence on the treaty making process really did not serve as a template for the states. The states did not embrace it as something they could then use at the state level. Although they talked about it, a lot of the discussions in the late 1990s in the state reviews tended to look at it as a possibility but they did not really pursue it. A lot of the reasons for that have to do with, again, the federal process. After all, foreign affairs is a national responsibility and, although globalisation and other factors do impact on the states, few state members of parliament—indeed I do not know of any—have ever made a career out of getting re-elected by following an external affairs interest. My voice has gone I am sorry, from four weeks of commenting on what went on in the hustings. I do not know what their voices are like. None of them really dealt with external affairs; it was not a significant factor. It certainly was not going to get them re-elected and they would not get much credit if they tried to do it. It is a kind of myopia which I wish did not exist.

It is not so much that I want the state parliaments to oversight external affairs and be critical of the Commonwealth's handling of it, but it is not just the sins of commission that are important but also the sins of omission—the number of times the states should have protected state interests and the federal compact or looked at the opportunities in which they could have been involved in very positively supporting federal initiatives and so on. These all ought to be part of the mix but they do not get taken account of in any systematic or focused way at the state level.

I agree with what Petrice said. In fact, I made the same point in 1999. Far too few resources are devoted by the states to carrying out their responsibilities. It struck me as the state parliamentarians were talking then that they wanted access but very few of them were willing to offer ways they would pay for it and commit themselves to keeping informed and providing responsible intervention in the treaty making process.

I apologise to those of you here who were inundated by my emails asking for advice. I sent them out just before the Premier called the state election and immediately got distracted and did not have a chance to follow it up. From the discussions I have had, by and large it still remains very much the case that—and the intervention from Victoria from the floor previously made this point—even where the states do take an interest it has not always been maintained or followed up as governments have changed. I do not think this has been particularly to the benefit of the states. Certainly, I agree with the JSCOT chair that this lack of involvement has not assisted JSCOT in understanding the mind of the states. I do not want to be too critical. As I have already said, most state parliamentarians do not get any political advantage to their careers in spending time on this and therefore it does tend to go very much to the backburner.

I want to finish on what I think the states ought to do to address some of these problems. Before I do I want to take the opportunity to add something to the JSCOT agenda and, hopefully, to the states' agendas as well. That is something, again, that the House of Commons fact sheet of the role of parliament in treaty making drew attention to. And that was the role of international agreements which are not in the form of a treaty—agreements which impact hugely on states' foreign policies but do not go through any treaty scrutiny process because they are not written up as a treaty or dealt with as a treaty. I do not want to push my example overly much because I know immediately hackles will rise and people will tell me why I am wrong. I think the antiterrorism legislation of last December is an example of legislation that impacted hugely on civil liberties and civil rights in Australia and on the federal compact in terms of the relationship between the Australian Federal Police and other security interests and the state justice systems in ways which deserve vastly more scrutiny than it got.

This may not have been totally as a consequence of antiterrorism agreements and arrangements but was broadly argued in favour of that. It really deserved to get the full treaty review process scrutiny because there is a real risk in not doing so. I simply raise that as something that I think ought to be on the agenda. There are non-treaty international agreements that do need to be considered in some way by the parliaments—both Commonwealth and state—that do impact on the federal contract and federal relationships as well as on the rights and privileges of citizens in their role as citizens.

To conclude, what can the state parliaments do realistically as parliaments in assisting JSCOT and also in carrying out what I believe are their own obligations? The primary one is that they do need—and JSCOT has proved this—some institutional commitment to treaty review. That means that an appropriate parliamentary committee has got to be charged in its terms of reference with an ongoing continuous and continuing responsibility for oversight of these treaties. I think some of the states—and the ones that particularly struck me were Queensland and Western Australia—do a very good job at promoting the transparency of treaties through the efforts of the executive branch. I have no problem with that.

But my own experience in Tasmania has been that the executive branch often farms out their responsibilities to line agencies or to individual advisers to help bring it all together. They miss out what a proper, duly constituted parliamentary procedure would do. If you want a whole-of-government approach—and by that I mean small 'g' government—and the whole-of-state interest to be brought together, the JSCOT formula at the state level is the only way it is going to happen. I think the states ought to accept that as one of their obligations—and not try to control the process in a way which makes it convenient for them and promotes the kind of executive federalism which is

undermining a lot of the traditional relationships between the states and the centre—and to advance the role of the community in getting involved in not just the negatives of whingeing about the things they do not like in the treaty making process but also the positives.

People have mentioned this already—the fact that if you let people know what is happening, give them a proper explanation for it and give them a chance to participate in the discussions about it you build support for the treaty. That can be done and should be done to a limited extent at the negotiating phase early on. There is no reason why preliminary hearings could not be held on the issue. State parliamentary committees could get the advice through those and pass it up through their own executives into the COAG processes and directly back into JSCOT. That is important.

Similarly, in the implementation stage, which has been the more fertile area for state parliamentary action, more polished, consistent and coherent advice to JSCOT would be forthcoming if state parliamentary committees were involved and promoted debate and community involvement through parliamentary hearings on issues of importance—again not all treaties are going to require that but the ones that do would certainly be advantaged by this process and this involvement. I will probably leave it there, but I do think there is a role for the state parliaments as opposed to the state governments. I think it is their responsibility to get involved in the process. Thank you.

CHAIR (Senator Dana Wortley)—Thank you. When you mentioned that Kevin had stolen your punch line I noticed the smiles on the faces of my parliamentary colleagues. Often we walk into the House of Representatives or the Senate with our speech notes all ready to go on a particular topic to find that we are number 17 on the speaking list and by the time we get to our turn not only has every punch line been taken, but every fact, every figure and everything else contained in the speech has been taken. Then you have to stand up and present it as if it is all fresh and new. So we understand how you feel. I would like to open the discussion up for about five minutes of questions. I will take questions for our speakers.

Mr John Langmore—I would like to underline the comment by Richard Herr that there are many international agreements that are not in the form of treaties that have considerable political power in most countries. In a federation, many of those agreements require action by states in order to implement them. At the United Nations there are many international agreements relating to economic and social issues, goals, principles and strategies. They tend not to be taken terribly seriously in Australia but are in most other countries. To implement them requires the cooperation of the states.

Mr Michael Bliss—I am from the Department of Foreign Affairs and Trade. This is not so much a question as a comment. As a public servant I should avoid being controversial but I fear I may be straying into controversy here. I am struck by the fact that with all this talk about process domestically—how we consult and what we do to review treaties—there has been remarkably little discussion about how treaties are actually negotiated. This is just a plea from one of the many public servants who do go overseas and negotiate treaties for recognition as to how difficult that process can be. We always have at least one negotiating partner with national interests which are equally as important to it as ours are to us and frequently we will need to make quite difficult trade-offs in order to strike a deal. As negotiators, as we queue up at Canberra airport with our official passports and our briefs in our secure briefcases, we want something that is clear, that has identifiable bottom lines and that actually gives us a mandate to negotiate.

In my experience, at least, it is very difficult negotiating with those treaties which do have a parliamentary approval process as often—and there is one country in particular that comes to mind—the expectations domestically as to what is achievable on the international stage are not sometimes realistic. I think we need to appreciate that as we talk about how changes might be made at the domestic level because every one of those changes will have impacts on how we are able to negotiate internationally. This is not a plea simply for bureaucratic efficiency; it is for our international effectiveness on the international stage.

I will close by saying that often the question seems to be: is this the best possible treaty from Australia's perspective? Usually the answer will be no, but in fact the real question should be: is this, as the best achievable treaty, one which is worth having? In the age of globalisation I think the answer to that will usually be yes, even though it might not meet all our objectives and desires. Thank you.

Prof. Richard Herr—I would like to respond. I did in fact say in my paper a couple of times that the states have to be realistic in giving advice at the negotiating stage. But having helped to draft two international treaties I still think it is a lot better to know what kind of support you have behind you before you start than finding out halfway through that there are some fundamental objections and your negotiating partners are reading about them in their newspapers while you are trying to keep a straight face and say, 'Yes, but we really want this and we are committed to it.'

Mrs Petrice Judge—I would like to add something. I have been on delegations and I totally agree with Mr Bliss what a wonderful job the Australian negotiators do. We are a small country and I think we actually achieve more than we have any right to expect. But, if the negotiators go into

those negotiations fully armed with the possible impact within Australia they are much better prepared for those negotiations. We did have an example of an agreement that was being concluded about mutual recognition in Europe and we found out that the states had a good deal of information on that issue that would have helped the negotiators no end. We do not want to hamstring the negotiators; we just want to add value.

CHAIR (Senator Dana Wortley)—Our time is up. Thank you very much to our speakers for this session. Your contribution has been most valuable. As a new member of the committee and having only taken up my position in the Senate in July, I have found it both informative and enlightening. Thank you.

Proceedings suspended from 12.16 pm to 1.35 pm

Session 3: New developments in treaty making and review

CHAIR (Senator Russell Trood)—Good afternoon. Like Senator Wortley, I am a relatively recent addition to the committee, having joined on 1 July, and I have been asked to chair this afternoon's session. Now that our stomachs have been fortified with food and our brains have been considerably fortified by a very stimulating address from Greg Sheridan, I think we are prepared for the afternoon's activities. Just before I introduce our speakers, perhaps I could make two quick observations. As a Queensland senator, I feel obliged to dissociate myself from Greg Sheridan's remark that there is similarity between Queensland bananas and those from overseas. I would not want that to remain on the record unchallenged.

The second thing is slightly more serious. Prior to joining the Senate, I had a very strong interest in international affairs but I did not have a particular interest in treaties. However, what has struck me since I joined the committee is the range and diversity of the issues, the agreements and the treaties that have come before the committee. Chairman Andrew Southcott spoke about that this morning, and he gave you some sense of this diversity. A couple more issues reinforce that sense of diversity. We have recently dealt with putting tracers in chemical explosives and also drugs in sport, which are clearly at different ends of some kind of spectrum and add to the range of issues that Andrew mentioned previously.

This session is called 'New developments in treaty making and reviews'. We have three speakers, all of whom are well qualified to address the topic but none more so than the first of our speakers, who will be well known to almost everybody in this room. He is the Secretary to the Department of Foreign Affairs and Trade, Michael L'Estrange. For those who may not know much about Michael, you can read about him in the program, but let me just remind you very quickly, because he brings to my mind a wide range of

experience—almost a unique experience. Michael has been overseas and experienced treaty making from that dimension. He has also experienced treaty making from the dimension of a very senior public servant. Michael was a New South Wales Rhodes scholar. In the past—between 1996 and 2000—he was secretary to cabinet and head of the cabinet unit. Most recently, prior to taking up his appointment as the secretary, he was Australia's High Commissioner in London. It is with great pleasure to welcome Michael to the podium. He will address the theme of developments in free trade agreements.

Mr Michael L'Estrange—Thank you very much, Senator Trood, for your very warm welcome. It is good to renew an association with you. I thank you all very much for the welcome you have extended to me. I am delighted to join you today on this occasion, which marks 10 years of the Joint Standing Committee on Treaties. I am very pleased to accept the invitation that you have extended to me to provide some specific comments on developments in free trade agreements.

From the perspective of the Department of Foreign Affairs and Trade, our interaction with JSCOT has been positive, constructive and beneficial over the past decade—a decade of extraordinarily intensive treaty-making internationally and one in which for Australia, as well as for many other countries, trade agreements have been an important dimension. This phenomenon reflects broader trends in Australian trade policy. Australia's economy has become more outwardly oriented. Since 1984 Australia's trade intensity—that is, our exports plus our imports as a share of GDP—has increased from 30 per cent to 40 per cent. The economic gains made by Australia's integration with the global economy and the reforms that accompanied it have helped to drive faster economic growth, spur productivity and keep inflation and unemployment low. They have also given the economy the flexibility to withstand and ride out economic shocks. At the same time, the international trade negotiation environment has also transformed, particularly through the creation of the World Trade Organisation in 1995 and the growth of bilateral and free trade agreements.

The establishment of JSCOT led to the creation of supportive arrangements in the Department of Foreign Affairs and Trade. The Treaties Secretariat in our legal branch is now designed to liaise closely with the JSCOT secretariat in coordinating the preparation of the treaty texts, national interest analyses and associated documents for tabling in the parliament. DFAT's Treaties Secretariat provides advice to the government and, when required, to the committee on treaty-making processes. It maintains for the parliament and for distribution to the states and territories current schedules of all treaties under consideration, negotiation and review. By utilising the services of the Australasian Legal Information Institute, it provides comprehensive and free Internet access to treaty texts and data.

JSCOT has been an important means through which access to expert advice, public consultation and full democratic scrutiny can be enhanced. The parliament, through JSCOT, reviews the implications of particular treaties with the benefits of public hearings, at which independent experts may be examined as witnesses, with a prepared national interest analysis and with a regulation impact statement where ever the Office of Regulation Review of the Productivity Commission so requires.

The government's pursuit of free trade agreements is part of a comprehensive strategy of promoting growth through multilateral, bilateral and regional negotiations. One core principle of the WTO and its predecessor, the GATT, is the most favoured national principle. The MFN principle requires that if any member grants a concession of any kind to another member it should be extended unconditionally and immediately to all other members. One exception to the MFN rule is when members enter into so-called free trade agreements or customs unions in which they agree to eliminate trade barriers on substantially all the trade between the constituent territories. The drafters of the GATT decided that the advantages of a preferential agreement that went so far as to eliminate substantially all barriers would be deemed to outweigh the disadvantage of departing from the MFN treatment.

With a few notable exceptions—including the Treaty of Rome, which began the process of European economic integration, and the Australia-New Zealand Closer Economic Relations agreement—much of the postwar period has been dominated by multilateral trade negotiations. With the current Doha negotiations, there have been nine rounds of negotiations since 1947. The trend towards free trade agreements has come relatively recently but has accelerated sharply in the last few years. It was the uncertainty concerning the fate of the Uruguay Round between 1986 and 1994 which encouraged the development of free trade agreements, with the North American free trade agreement being a prominent example. The global spread of FTAs gained pace in the mid 1990s and accelerated following the failure at Seattle in 1999 to launch a new round of multilateral trade negotiations.

This trend towards FTAs has been particularly evident in the Asia-Pacific region, as countries have concluded agreements within the region as well as beyond it. The same trends have been apparent in the trade policy approaches of the United States, the European Union and many other countries, including developing countries. While the WTO remains Australia's highest trade policy priority, FTAs have become an important element of Australia's trade negotiating agenda. FTAs can make an important contribution to enhancing the momentum for wider reform and liberalisation. They can also address issues not fully dealt with in multilateral trade processes. They can build a constituency for extending the reach of multilateral trade rules.

Comprehensive FTAs also have the potential to deliver deeper, faster and broader liberalisation in specific cases than through the multilateral system.

Over recent times, Australia has successfully concluded FTA negotiations with Singapore, the United States and Thailand. During the last parliament, JSCOT reviewed these FTAs. Australia is currently negotiating FTAs with ASEAN, as is New Zealand, and the United Arab Emirates, Malaysia and China. Australia is studying with Japan the feasibility of a bilateral FTA, and we are starting an expert groups process with Mexico to examine the possibility of an FTA.

Australia's approach to FTAs has evolved over time with the experienced gained from the negotiation of different FTAs. The approach has always been firmly grounded in the WTO by pursuing comprehensive trade liberalising agreements. Australia's FTAs need to meet four basic criteria. One, an FTA should have the potential to deliver substantial commercial and wider economic benefits to Australia in a shorter time frame than multilateral trade negotiations. Two, FTAs should be fully consistent with WTO principles and rules and, where possible, should deliver WTO-plus outcomes. Three, FTAs should be comprehensive and deliver substantial liberalisation across goods, services and investment and should ensure all sectors are considered at the start of negotiations. Four, FTAs should enhance significantly Australia's broader economic, foreign policy and strategic interests.

Increasingly Australia's FTAs aim to contain elements which go beyond traditional market access barriers in goods and services to address, among other things, government procurement, competition and investment and trade facilitation issues such as standards and technical regulations and quarantine arrangements. Other elements include provisions relating to the protection of intellectual property rights, institutional arrangements, dispute settlement and transparency. Accessions, a further feature, allow for the scope of an agreement to be broadened to include third parties on terms and conditions that are agreeable to all parties.

Australia's forward FTA agenda remains a substantial one. Turning first to the Australia-China FTA negotiations, these negotiations are based on an MOU that sets out the key principles of comprehensiveness and single undertaking as the basis for the negotiations. Four rounds of negotiations have been held, but negotiations are still at an early stage of what will be a complex and challenging process.

As the Prime Minister pointed out, when announcing in April 2005 the decision to begin the negotiations, even without an FTA the trade and investment relationship between Australia and China will continue to grow. This strong and rapidly growing trade and economic relationship which

Australia and China share has some highly complementary dimensions, and our negotiations with China on a free trade agreement are aimed at building on these complementarities. From Australia's perspective, an FTA must be a high quality, comprehensive and liberalising agreement that delivers commercial benefits to Australian business. We are paying particular attention to consulting widely on the Australia-China FTA. We welcome any and every submission or comment on the FTA process, and our negotiators spend considerable time talking to interested parties in industry and the community. Those consultations will continue to intensify.

The decision to launch negotiations with the 10 countries of ASEAN and New Zealand was based on a comprehensive set of published guiding principles. Those principles underscore Australia's ambition for a high quality FTA with ASEAN and commit the countries concerned to negotiate an agreement that covers trade in goods and services as well as investment, provides for the progressive elimination of all forms of barriers to trade and allows for full implementation within 10 years. The five negotiating rounds to date have allowed negotiators to engage in wide-ranging information exchanges on each country's trade and investment regimes. Australia has invested considerable resources in helping to improve understanding of the commitments required from the ASEAN countries to produce a good outcome from the negotiations. There are significant challenges in our FTA negotiations with ASEAN. The region is marked by diverse interests and levels of ambition, and countries are at different stages of development. Securing binding commitments to comprehensive liberalisation will be one key to the successful conclusion of the negotiations and the biggest challenge.

Australia and Malaysia are actively engaged in negotiations aimed at an FTA that constitutes a comprehensive and high quality agreement that would bring benefits to both countries. The priority that remains for Australia is to secure such an agreement within a reasonable time frame. We have now had three full rounds of negotiations, which have achieved real progress.

The United Arab Emirates is Australia's second-largest market in the Middle East. An FTA with the UAE would help protect Australia's market share in the short term and enhance our wider economic and trade prospects in the Middle East in the longer term. The third round of negotiations with the UAE last December made solid progress, and a fourth round is taking place this week.

FTAs involve not only critical periods of negotiation and consultation but also ongoing monitoring of implementation and inbuilt review mechanisms. The first Singapore-Australia FTA review, held in July 2004, produced one set of amendments, which considered and supported by JSCOT are now in force, and a second review will take place in July 2006. The Thailand-Australia FTA

review body, which met in Bangkok in December last year, agreed to commence negotiations in a number of areas. The Deputy Prime Minister, Mr Vaile, cochaired the inaugural meeting of the Australia-United States FTA joint committee in Washington on 7 March this year, which reviewed the first year of the Australia-US FTA.

Engagement with the Australian public and business community is a vital part of the FTA process. Australia's approach on FTAs is informed by extensive domestic consultations. DFAT call for public submissions and conduct stakeholder and industry consultations in all Australian states and territories throughout each negotiation. We also provide regular website and email updates to interested parties.

In addition to our multilateral, bilateral and plurilateral trade negotiations, Australia is also heavily involved in regional efforts, particularly through APEC, to facilitate and liberalise trade and investment. However, unlike the other negotiations I have referred to today, APEC is a voluntary process. There are no treaties as such. APEC is not a negotiating forum like the WTO. APEC works to reinforce the commitment to create more open and efficient economies and to assist members in implementing appropriate policies. Its aim is to encourage APEC members to make the decisions needed to move in this direction and to support the multilateral process.

In conclusion, can I say that Australian trade policy will continue to be focused on maintaining Australia's competitive advantage in the global marketplace. A successful Doha outcome is critically important to that objective. So too are Australia's strategies for liberalising trading arrangements on a regional and bilateral level, strategies in which the implementation of existing free trade agreements and the negotiation of new ones are vitally significant. Australia's existing FTAs already cover 24 per cent of our total two-way trade, and FTAs under negotiation cover a further 19 per cent of our two-way trade. So Australia's FTA agenda ahead is wide ranging and demanding, but it is one that is clearly in Australia's national interest to pursue in an activist, committed and consultative way. For our part, the Department of Foreign Affairs and Trade look forward to our continuing and highly productive engagement with JSCOT across what we anticipate will be a wide range of activities in relation to Australia's FTA strategy. We congratulate JSCOT on its first decade and we wish it well in its important work for the future. Thank you.

CHAIR (Senator Russell Trood)—Thank you very much, Michael, for a most insightful and valuable contribution to our discussion this afternoon. Our next speaker is Associate Professor Greg Rose, from the Faculty of Law at the University of Wollongong. Greg has the virtue of being not only an academic lawyer but a lawyer who is practised in international law. He brings

wisdom from both a theoretical and a practical perspective. He has practised international law at the United Nations; he has been a member of the Department of Foreign Affairs and Trade, contributing to their international legal section; and he has also published very widely on the issues on which he is going to speak. It is great pleasure to invite Greg to the podium.

A PowerPoint presentation was then given –

Prof. Gregory Rose—Good afternoon, everybody. We are at the middle session of the session after lunch, but I hope that you are all keyed up for this exciting presentation that I have prepared for you. I would first of all like to thank Senator Trood for the introduction and to pay tribute to some persons who have not been mentioned so far. In my past life I never had the privilege of working with the secretariat of JSCOT, but the Treaties Secretariat in DFAT was set up at that time and the current head of it, Jonathan Thwaites, is here; Ruth Blunden, who was there from the very beginning, is also here today. The person who set it up, Chris Lamb, put it together in an astonishingly quick time. He had arrangements in place ready to be deployed if necessary prior to the current government being elected, and he did that all with his usual roguish humour. Congratulations, everybody, on the work that you have done and are still doing.

I have been invited to speak on treaties with our regional neighbours. My area of experience and expertise is marine and environmental treaties and, more recently, international criminal law treaties. There are gaps in my knowledge on regional treaties, so I had to do a little bit of research work, and I am sure that there are still some gaps. The first problem was to decide what region we live in. If we live in the Asia-Pacific, that is one of the five geographic regions that the UN caucuses within and it covers 62 per cent of the earth's surface and about 65 per cent of its population. If I wanted to narrow the presentation to something that was more manageable, the only region that we really have a great deal in common with is New Zealand—and that was very tempting because there would be less work involved in the preparations. In the end I decided that New Zealand's relationship with Australia is so peculiar that it would be misleading to include it in a general trends analysis—or with that we have with Antarctica and the emperor penguins! I have restricted it to ASEAN and the Pacific Islands, sometimes referred to as Oceania. There are 10 ASEAN members and, excluding New Zealand, 15 self-governing Oceania neighbours.

The treaties, as I have classified them into categories and subcategories, correspond to a relatively large degree with the way JSCOT itself divides its treaty-making activities. If we look at the relative rates of treaty-making activity across those sectors, almost half of all treaties relate to commercial matters: trades, double tax agreements—which we should not mention

because they are too boring—and investment protection, transport, postage and suchlike. The second largest area is of the more general kinds of terms of treaties, reviled by Greg Sheridan at lunch today, that relate to friendly cooperation. These treaties are mostly bilateral. The multilateral treaties that I have considered are those which are regional multilateral treaties rather than global.

In relation to overall future trends, the bottom line is that our treaty-making activities with our ASEAN neighbours continue to focus increasingly on commercial matters. Specifically, we moved from a group of trade treaties adopted in the 1970s to more free trade oriented treaties in the mid-1990s, with something of a hiatus during the economic recession in the 1980s. But there is also a new focus on intellectual property in some of those treaties and, increasingly, on judicial cooperation, which relates to transfer of proceedings in what are usually private international commercial matters.

The other area of increase in activity with ASEAN member countries is bilateral criminal justice cooperation and enforcement. Those are the extradition and mutual legal assistance treaties, which are a natural response to the growth in transnational crime opportunities that globalisation presents.

In the Pacific, the picture is very different. The region that we live in is really two different regions. Almost all the treaties are multilateral, rather than bilateral, regional treaties. They focus on strategic matters and there will be an increase in that area, as there is a need for multilateral cooperation to support law and order in unstable states. There is also a longstanding and continuing focus on natural resources treaties. In the 1980s those were mostly environment treaties but there is now a stronger focus on fisheries management as fish stocks come under greater pressure regionally.

I am going to look at each of these categories. First of all I will look at the strategic activities treaties. I have defined those as concerning boundaries—marking respect for sovereign territories so as to avoid conflicts—and defence cooperation, by which I also mean security cooperation. As the slide I am showing indicates, the majority of these treaties are defence treaties, with boundary treaty making having increased lately due to renewed negotiation with Indonesia. Most of those treaties are with ASEAN countries. Primarily, that means Indonesia although also, recently, East Timor.

So what are the trends in relation to these strategic interest treaties? They all concern maritime boundaries. Half of them are with Indonesia: four out of eight, plus one that is not in force—the 1997 exclusive economic zone treaty. Then there are the other regional countries in the Pacific with which we have treaties: the Solomon Islands, PNG and East Timor. The treaty with East Timor is not really a boundary treaty as such but a sharing of resources.

Regarding countries outside of the region, we also have treaties with France and New Zealand but they do not form a part of this survey.

In relation to the defence treaties: as we have heard a couple of times, a great number of them are with Singapore, as we cooperate to meet Singapore's defence needs. There are also multilaterals that go back to the Cold War and deal with the status of forces in respect of territories under the five powers agreements that were adopted in the 1950s. I would not really include the ASEAN Treaty of Amity and Cooperation as a defence or security treaty but rather as a friendly cooperation treaty that was necessary to secure participation in the East Asia Summit. However, multilaterals are very much the rule in the Pacific, where we have the Bougainville peace monitoring treaties, the Solomon peace monitoring treaty and one bilateral treaty, which is with Nauru on police assistance.

Natural resources activities treaties focus on two areas: environment and fisheries. Hydrocarbons treaties are essentially about the Timor Gap, where we have had a treaty with Indonesia, and, since, with East Timor, although there is no boundary delimited and the resources are allocated rather than actually managed.

I will look first at the environment and then at the fisheries treaties. You can see from the slide I am showing that the majority of treaties over time have been environmental, but there has been an increase in fisheries in recent years. In contrast to the majority of our treaties, most of these are with the Pacific countries. So when it comes to natural resources, the Pacific rules okay! We have only one fisheries treaty and no environmental treaties with ASEAN member states and the fisheries treaty is with Indonesia.

What are the likely trends within this area? There will continue to be a focus on natural resources for the Pacific. Areas of emerging concern—they will, as usual, be addressed multilaterally in the Pacific, due to the limited resources that countries have for, and the limited utility in, bilateral treaties—are: coral reefs; biosafety—that is, invasion by introduced marine pests or genetically modified organisms—about which there is increasing concern; and the use of trade measures to support environmental measures.

Within the fisheries sector, improved monitoring systems are an emerging issue, which is evident in the Niue treaty and in the Western and Central Pacific Fisheries treaty that was recently adopted. Again, it is easy enough to negotiate something on paper, but to actually implement it and make it work across a vast marine space, when one has limited resources to deploy on the water or in the air, is difficult and requires cooperative measures in the way of satellite based vessel monitoring systems, certification of fish catch landings in the market country and also port-state controls where fish are landed. So I

think we are going to see those as the emerging agenda within the South Pacific when it comes to fisheries negotiations.

In relation to the environment, the regional heydays were the 1980s and all treaties were with the Pacific. There is one pan-regional treaty, concerning plant protection, which ranges across the Asia Pacific. There is a tendency for the environmental treaties in the Pacific to be driven by external influences, so that current global political agendas, or the Greenpeace or WWF regional offices, will often mobilise Pacific island interest. That is evident in the treaties that have been adopted in the past, such as those on nuclear waste transport, hazardous waste movement through the region, and drift-nets. So there are important roles there in the multilateral secretariats that serve the Pacific islands in their multilateral negotiations, rather than their own national administrations for bilateral treaties.

In relation to fisheries treaties, you can see that there are some treaties that extend beyond the Pacific for fisheries management. Examples include the Western and Central Pacific Fisheries treaty. The dominant role is that of the Forum Fisheries Agency, a suborgan of the Pacific Forum—which used to be called the South Pacific Forum. The only fishing treaty that we have with an ASEAN member state is with Indonesia, which was adopted in 1992, noting also the MOU that was adopted in 1974 for traditional Indonesian fishing activities off the north-west coast of Western Australia. Other pan-regional treaties are set out at the bottom of the slide, for the Indo-Pacific fisheries commission and in relation to aquaculture for the Asia-Pacific.

The next treaties category is commercial activity related, divided into the groupings of trade, tax and investment; transport and communications and intellectual property. It is evident that there is a great level of activity in making these treaties. Whereas some of the other graphs have only one or two treaties over a decade that is not the case here. The trends indicate a peak in double tax agreement making during the 1990s and a gradual decline in the transport and communications related treaties, essentially because once they have been made they do not need to be remade, for things like air services and postal coordination. Again, most of these treaties are, as you would expect, with ASEAN countries but, with the increased political activity and awareness of Pacific countries following independence, they have also made a presence.

If we move into the particular subcategories within the sector—and here my presentation is largely descriptive rather than interpretive of the trends—we can see that there was a decline in bilateral trade agreements during the 1980s. There were none at all within the ASEAN region, for example. There has been a resurgence recently, as Mr L'Estrange has explained to us, in Australian governmental focus on FTA negotiations and so, within the region, we have

agreements with Singapore and Thailand already bedded down. The trade agreements in the Pacific are again mostly multilateral rather than bilateral. Although there is a bilateral agreement with Fiji, the others relate to economic cooperation more broadly across the region.

Concerning tax and investment, most treaties are double tax agreements. There are only five investment protection agreements and I do not think that we will see many more because they do not appear to be worth the paper they are written on. Around the time that we had negotiated one with Laos—actually it had just come into force—the Laos property and investments of the Dale family were seized and Mr Dale was imprisoned. The agreement did not seem to have much traction in the resolution of that problem and there have not been many investment protection negotiations since. The slide sets out the details as to whom we have double tax agreements with. You can see that there are three in the Pacific and all the other agreements are with ASEAN member countries.

This next slide illustrates transport and communications, subregionally. Again, these treaties are mostly with ASEAN member states and most are from the 1960s and 1970s. So those are the air services agreements and the postal agreements. There is one pan-regional treaty, which is the Asia-Pacific Telecommunity Treaty that was adopted in 1977. Due to the isolation of Pacific island countries, air services agreements are important to them and most of the agreements that commenced negotiation in the 1980s with the Pacific are to do with air services.

The general group of friendly cooperation treaties—the second largest group of treaty making—can be divided into science and technology, cultural and consular, and development cooperation treaties. You can see from the slide I am showing that there are quite a lot of development cooperation treaties, some of them made quite latterly, and they are mostly with Pacific island countries, which feature there from the 1990s.

Interestingly, there are no cultural, consular or scientific cooperation agreements with Pacific island countries and most of the friendly cooperation treaties that we have with ASEAN member countries are of longer standing. Also, most of the agreements with ASEAN countries relate to consular and cultural matters. This slide depicts the trends in relation to development cooperation treaty making across the region, showing that emphasis on friendly cooperation in the Pacific in the latter years.

Pan-regional agreements can be divided into those that are organised under the auspices of the Economic and Social Commission for Asia and the Pacific, based in Bangkok, which are more formal than effective, and the various agreements that have been adopted through the Pacific Forum in relatively

recent years. For the cultural and consular agreements, ESCAP established a cultural centre in 1969. The other cultural and consular treaties relate to exchange of publications, consular relations and cultural exchanges and are all with ASEAN countries.

There are only three science and technology agreements. One of them is in the Pacific region and the other two relate to nuclear science and technology—those are with the Philippines and Singapore. The Pacific agreement again is multilateral and it is a geoscience cooperation treaty, to establish the South Pacific Applied Geoscience Commission, which engages in scientific activities such as examining the seabed for hydrocarbon resources and putting together the data for delimiting boundaries between the countries.

I will move on now to the last general category of treaty making, law enforcement treaties, which are divided into two subcategories: criminal justice and judicial cooperation. We see from this slide I am showing that judicial cooperation—meaning the business of transfer of proceedings and recognition of judgments in non-criminal matters—form the minority of treaties. Most of them, and relatively recently too, are criminal justice cooperation oriented and most of them are with ASEAN member countries.

In the area of criminal justice, the increase has been especially recent. We have adopted mutual assistance treaties in this area. For example, after the Bali bombing, in order to enable the Australian Federal Police to investigate evidence and provide forensic expertise in Bali, informal arrangements needed to be reached with Indonesia. Mutual assistance treaties allow for the parties to utilise formal channels to secure evidence, which can then be used and presented in court proceedings to secure convictions. Transfer of offenders is also a relatively new phenomenon and our transfer of offenders agreements are likely to increase, I think, as efforts are made to ease the imprisonment conditions of the Bali nine.

So, with regard to criminal justice, all are ASEAN related treaties, and the majority are extradition treaties. In December last year, a new one was negotiated with Malaysia, which has not entered into force yet. The same is true in relation to mutual assistance. Interestingly, Australia has more criminal justice cooperation treaties with its ASEAN neighbours than the ASEAN member countries have with each other. There is an effort afoot that has been spearheaded by Malaysia to improve ASEAN regional cooperation in criminal matters through the adoption of a regional mutual assistance treaty, but that has only four parties at the present time. It was mentioned that we are negotiating a transfer of offenders' agreement with Hong Kong. We have one with Thailand, and I look to others in the room who might know more about what is in the wind with Indonesia.

For judicial cooperation, the Pacific features more highly in the survey. We have a civil and commercial agreement with Thailand, but in the Pacific we provide judicial cooperation for Nauru in hearing appeals. There was also treaty action for the recognition of the settlement of the phosphates case with Nauru in our respective jurisdictions. To bring our survey to a conclusion, across the ASEAN and Pacific regions, which we might grandiosely call Australasia, there is a dominating presence of treaty making with ASEAN member states and an increasing importance in treaty making with Pacific island countries. The lack of true integration across the east and the western waters that surround Australia means that there are very few pan-regional treaties that are applicable.

Among the ASEAN member states that we make treaties with, the majority are with open economies. There is little growth in the number of treaties we make each year, but there is a change in the trend of the kinds of treaties that we make. There is an increasing focus on practical necessity for matters like criminal justice, cooperation and bilateral free trade and less on symbolic treaty making related to matters like general economic cooperation or cultural exchange. What new directions might we see? We might see greater integration across legal systems so as to facilitate more transnational commercial litigation so that there will be more ready acceptance of evidence across legal systems and transfer of proceedings.

Within the Pacific the growth will continue to be in relation to multilaterals, rather than bilateral treaties, and the focus will continue to be on marine resources. But the new direction that is emerging is the support of law and order within Pacific island countries, most of which are multilateral arrangements rather than bilateral, lending a patina of legitimacy rather than imperialism to the interventions that might be necessary. That is a very broad perspective and, I am sure, not without its flaws. I thank you for giving me your time.

CHAIR (Senator Russell Trood)—Thank you very much, Greg, for providing that most interesting account—exploring the range of treaty actions that have been undertaken with our neighbours. Thank you also for the visual aids, which are always valuable after a very substantial lunch.

Ladies and gentlemen, it is with very great pleasure that I introduce the third of our speakers this afternoon—Aynsley Kellow—particularly because Aynsley was a colleague of mine at Griffith University before he sadly decamped and went to Tasmania, where he took up the chair of Professor of Government at the University of Tasmania and where he has continued, essentially, his life's work as an academic, exploring the intersection between international relations and environmental policy on a broad scale. In that context Aynsley has undoubtedly established an international reputation. I

doubt that we could have a better person to join us this afternoon to speak on issues of climate change in relation to treaty making than Aynsley Kellow. You will have noticed, perhaps—it certainly caught my eye—that he has published widely in this area. One of his more recent publications has the catchy title *The Greenhouse and the Garbage Can: Uncertainty and Problem Construction in Climate Policy*. I am not quite sure that that is the quite the theme today, but it is certainly related. Aynsley, you are most welcome.

Prof. Aynsley Kellow—Thank you, Russell, for that generous introduction. I also thank the committee for inviting me to address this seminar, which I have found fascinating and has certainly set a very high standard for me to follow. I thank particularly the staff of the committee, who have run the show like a very well oiled machine; everything has gone very smoothly. If you have ever organised a conference or a seminar, you know that it is something you should do only once, but, clearly, they do it more than once and do it very well.

I share with Dick Adams a deep and abiding interest in Tasmanian salmon, not the least because a colleague and I have a research project which is looking at the way in which Australia's obligations under the sanitary and phytosanitary agreement trickle down and are applied within a federal system. I was pleased to explore that interest in a more gastronomic sense last night, with at least some salmon on the menu.

Australia has seemingly long had a problematic relationship with conventions to do with climate change. I can remember a story, probably not apocryphal but perhaps an omen, that the then minister for the environment, Ros Kelly, almost signed the United Nations Framework Convention on Climate Change in Rio de Janeiro in 1992 on behalf of Afghanistan. Mrs Kelly's slip was attributable, perhaps, to her being used to Australia appearing first in the alphabetical listings. But the incident thus pointed to a feature of the framework convention that has now become commonplace in multilateral environmental agreements, or MEAs, and which has called into question the value of the particular approach to negotiation followed with the framework convention and the Kyoto Protocol to it—the accession to MEAs of parties such as Afghanistan which are exempted from many of their provisions. Double standards help build support but undermine effectiveness. While we would all agree that Afghanistan should not be burdened—it has enough burdens to deal with and should not be burdened with obligations on climate change—we need to point out that that division between industrial nations and developing nations is one which goes back all the way to about 1962. Excluded from obligations applying to industrial states are also states like Singapore, which happens to be the largest per capita emitter of greenhouse gases globally, something that is often overlooked.

It seems to me that the brief history of agreements on climate change serves as a useful indicator of the worth of institutions such as the Joint Standing Committee on Treaties, the 10th anniversary of which we are here to celebrate. This is because the interesting scholarship on MEAs is now focused less on the processes by which they are negotiated and more on the processes by which they are translated into effective policy outcomes—or not. MEAs are part of what Stanley Hoffman once referred to as 'low politics'—international regulatory regimes, rather than the high politics which surrounded matters of sovereignty and territorial integrity. The agreements resulting from low politics require much more action by national governments than those of high politics. They require not only ratification, as described by Puttman in his description of two level games, but the adoption and effective implementation of policy by those who become parties. Especially in a federal system, this means games at multiple levels and across multiple agencies.

Effective implementation by all parties, and thus successful outcomes, can by no means be taken for granted. It was once said in the context of the European Union that those first to agree were often the least likely to implement. That danger persists in the multilateral system, and what has been referred to as the vertical disintegration of policy is a constant risk. It is not just the vertical but the horizontal coordination of policy responses that is important. For example, while the environment directorate of the commission of the European Union remains enthusiastic about the Kyoto protocol, the energy directorate continues to find it necessary to subsidise the production of coal.

As a middle power, as the familiar line goes, Australia has an overriding interest in a rules based system and therefore tries to implement what it agrees to and, as a consequence, is careful about what it agrees to. It is this, when coupled to its political economy as the world's largest exporter of coal and a significant exporter of coal based energy and processed goods, which has made for a problematic relationship between Australia and international climate treaties.

There are now three agreements. Australia is a party to one, the framework convention; has signed but not ratified another, the Kyoto protocol; and has played a lead role in developing the third, the Asia-Pacific Partnership on Clean Development and Climate, or AP6. The scorecard on these is mixed. The framework convention has largely succeeded as a first step; Kyoto, in my view, has failed; and AP6 holds much promise but requires much more flesh to be added to a very promising skeleton. This raises questions for JSCOT, although I notice that at lunch the chair indicated that there might be some scrutiny by JSCOT of AP6. I will say some more about that later. Some will find my scoring on all three of these contentious, but I would say that the framework convention both provides a useful framework and did provide a

relatively non-specific goal of collective stabilisation of industrial nations' emissions of CO_2 at 1990 levels by 2000, which in fact was largely met. It has some problems, however, not least of which are the laying down of some structural elements which I think doomed Kyoto and an unfortunate definition of 'climate change' that is at odds with that used by the Intergovernmental Panel on Climate Change.

Kyoto, I think, has failed. It is now a paradigm case of how the very features used to speed up multilateral negotiations—double standards provisions, creative ambiguity, iterative functionalism, epistemic consensus and so on—can both undermine the effectiveness of MEAs and yet still fail to bring along those whose actions are vital to success. The US was not likely to ratify and it has been clear to all since the tenth Conference of the Parties in Buenos Aires that India and China have rejected Kyoto or any similar successor as a way forward which might see them agree to limit future emissions growth.

The communiqué from the G8 meeting last May also contained a grim portent for Kyoto, because it made only one reference to Kyoto—some largely face-saving language that those with obligations under Kyoto would honour them—and then flagged the framework convention as providing the basis for future action. The problem with Kyoto obligations is that those who have accepted them are unlikely to meet them and probably will not come close unless through policies not closely related to climate change and fortuitous circumstances such as those related to the selection of the 1990 base year, which was so propitious for the United Kingdom and Germany and thus, through the burden sharing agreement, for the European Union.

Ironically, Australia, which refused to ratify, might come closest to meeting its target. Even if targets are met, concessions to Russia on trading hot air to secure entry into force will mean Kyoto will be an expensive exercise that will achieve little discernible result. Kyoto was widely touted as a first step but it now looks like a stumble in the wrong direction. It lacks moral credibility by requiring least of those with the greatest responsibility for the current state of the atmosphere—it just happened to be the United Kingdom and Germany, as the Brazilians were unkind enough to point out with their proposal during the Ad Hoc Group on the Berlin Mandate.

AP6, the Asia-Pacific Partnership on Clean Development and Climate, is a recognition of several mistakes with Kyoto. Firstly, it is an exercise in what we can refer to as minilateralism, which should minimise the problems of negotiations moving at the speed of the slowest ship in the convoy, and the effect of the lowest common denominator and other approaches which diminish the quality of what might be agreed. It runs the danger of falling victim to its success as more parties want to join. I think the prospects are that the Canadians certainly might be interested—they are so far off their target;

they have a new government. There are also other processes, including one centred around the G8 which I understand Australia has some involvement in as well, which also provide some promise. But AP6 brings together in the six parties it involves those responsible for about half of global GDP, half of global CO_2 emissions and half the world's population. It promises, therefore, to allow a much tighter, smaller scale negotiation with less requirement to spend the hours that we saw reference to, I think, this morning in determining whether the word 'orange' should be changed to 'amber', which we all know slows down, bogs down international negotiating processes.

Secondly, AP6 reflects an alternative problem construction consistent with that advanced by James Hansen, often regarded as the father of global warming. The Hansen alternative scenario suggests that no regrets and low-cost options to mitigate emissions of CO_2 should be followed, but so too should action on several other forcing agents that collectively are just as important as CO_2 but which could be mitigated much more technically easily, much more cost effectively or with substantial co-benefits. An example of the last of these is action to clean up carbon soot from inefficient biofuel consumption, and indoor air pollution—perhaps the worst of all environmental problems in countries such as India—would simultaneously be improved.

Thirdly, AP6 is a better fit for the material interests of the region, because it reflects the resource endowments of the parties. Australia is a small but significant player in the partnership, but its interests in clean coal are important and matched by China and India. It is fanciful to think that China and India will forgo their substantial coal resources as they grow their economies over the next century. The impact of those decisions will depend crucially upon technologies relating to both efficiency and carbon capture and storage. Europe has a different perspective. Most of its coal and, some would argue, all of its cheap coal has been mined, and it is now dependent on gas, especially Russian gas, and ultimately nuclear energy, though probably nuclear energy generated in jurisdictions where siting is less problematic than in Germany, Austria and the United Kingdom. AP6 suits the Asia-Pacific; Kyoto suited Europe.

Fourthly, it is now recognised that Kyoto moved too quickly to establish targets and timetables—and we can note in this regard that the United Kingdom is having second thoughts about its targets, having failed this very week to meet them. The differential cost became apparent too early so that the veil of vagueness, which can help negotiations, was lifted too soon. AP6 is based more upon voluntary commitments, so commitment to action has been easier to initiate. It might ultimately require price elements—I suggest it probably does—to place a value on emitting to be fully effective, but there is no need yet to frighten the horses. I think that is something that is likely to

evolve as shared understanding of problems and approaches evolves within the potential regime.

Finally, AP6 has sought from the outset to engage business. Business has to be part of the solution because it is undeniably part of the problem. Even the framework convention marginalised business. A business representative pointed out to me that at one point the secretariat of the framework convention expected a single industry voice through the International Chamber of Commerce—ironically, while granting separate voices to Climate Action Network Europe and Climate Action Network North America.

Business is divided by this issue. The interests of gas, and thus oil; nuclear; renewables; coal; and energy consuming industries all diverge. So to expect global business to speak with a single voice was to ensure that it would say little, would disengage from the global arena and contest the issue in the domestic arena—the most powerful cause of the vertical disintegration of policy.

It is fair to say also, however, that this involvement of business raises some questions about AP6 as an approach. We heard some reference this morning to the consultation that takes place before negotiating sessions. States are frequently represented on delegations to international negotiations, so it raises some questions about the ways in which state governments are consulted and brought into that process.

Much remains to be done to realise the promise of the Asia-Pacific partnership. The fact that we have worked our way towards it through the failure of the Kyoto process shows the value of institutions like the Joint Standing Committee on Treaties in assisting to conduct the deliberative conversation over whether any treaty is in the nation's interest. That conversation has also been conducted in other institutions, including the executive branch of government and the fourth estate, although I must confess I remain disappointed with the quality of the contribution of the media to the debate within Australia. With some notable exceptions, particularly Paul Kelly, it has usually been content to round up the usual suspects and give them their voice rather than conduct any serious sceptical and critical analysis of the subject. I will say as an aside that I get annoyed at the lack of education about the basics of treaties and have given up writing to newspapers pointing out, when they say Australia is deliberating over whether it should sign the Kyoto protocol, that it has actually already signed it and we are talking about ratification. Editors do not like these sorts of letters, it would seem.

The JSCOT hearing on Kyoto, coming even before the modalities of the protocol had been fully identified, provided a useful way in which Australia

could have a more serious conversation about a complex and controversial measure. Just as intergovernmental negotiations in a federal system tend to promote executive federalism, so too do intergovernmental processes at the international level enhance the competence of the executive—and the Commonwealth executive, at that, in a federation. Scrutiny by JSCOT can therefore be seen as having contributed to the process by which we have come to place our faith in the mini lateralism of AP6, an experiment that might prove valuable for future negotiations if it were then expanded into a wider-reaching agreement. It has also helped maintain the relevance of the parliament in an age when some of its traditional roles are in question.

As I said earlier, Andrew Southcott indicated that the committee is going to take an interest in AP6. One of my concluding questions, before he stole my thunder at lunch—Richard Herr also partly stole this point from me—was going to be what role the treaties committee might play in international agreements that are not formal treaties. This is a question that applies not just to agreements like AP6, which might eventually, once we get the evolution of a good regime that is based on a clear understanding of how to deal with these problems—and I suggest it is not likely to happen in the next five years—lead to a treaty. But the treaty by that stage will have so many of its elements decided and determined that, if JSCOT does not involve itself until five or more years down the track, its role will be diminished. But it is a question that applies equally to a number of other agreements that occur in various ways, including—flowing on from another research interest looking at Australia's interactions with the OECD—bodies like the OECD. I think there was also a mention this morning of decisions made by United Nations bodies. The OECD certainly can make decisions of its council that are binding on members. I am not sure whether JSCOT has taken within its interests that sort of activity, which nevertheless establishes binding commitments for Australian governments.

CHAIR (Senator Russell Trood)—Thank you very much, Aynsley. As you will have noticed, all the speakers from the committee today have emphasised the fact that all of the committee's deliberations try to take place in a bipartisan way. Speaking as a government senator, I thank you for your very sound and clear exposition of the relative merits of Kyoto versus AP6. Ladies and gentlemen, we will have five to 10 minutes of questions, comments or criticisms. That should provide you with an opportunity in relation to this session.

Dr June Verrier—Michael, you reassured us that our efforts in the negotiation of FTAs do not come at the expense of our commitment to multilateral obligations and agreements. I have two questions. Is it not possible, though, that the diplomatic and bureaucratic effort that goes into FTAs could have the unintended consequence of neglect of multilateral

negotiations and commitments, on the one hand? The second question is: is it not also possible that terms and conditions of individual FTAs might compromise us or tie our hands behind our backs in negotiating at the multilateral level?

Mr Michael L'Estrange—I have now been in this position for just over 15 months and, from my personal experience, I think your concerns on the first count are not warranted in terms of what I have seen at first hand. The intensity that is applied to the WTO negotiations I think reflect the priority that the government accords to them, particularly in the last six or nine months as we can see this process reaching a critical point, and that point is not very far off. It is not just an intensity and creativity of thought; it is actually the physical demand of the meetings themselves which are constant. I do not believe that there is a concern that the pursuit of particular FTA negotiations, which have their own intensity and their own rhythms, are such that it diminishes or detracts from the effort that we are committing to WTO. I think that effort is at maximum levels and will continue to be applied because the stakes are so high—and I do not think anyone has any illusions about that.

On the second point, in relation to individual FTAs and tying our hands, I think we have been scrupulous over recent years in the WTO-consistent tests that we apply to our FTAs. One of the issues at the moment is the extent to which the WTO itself can improve the quality of FTAs being negotiated. There are some discussions going on within the WTO, for instance, on greater definition of its tests of comprehensiveness, and we are actively involved in those. But, for our own part, I think we have taken those tests extremely seriously in terms of WTO consistency, and I would be confident that none of the FTAs we have negotiated which I have referred to have really tied our hands in ways that will reverberate against us. I know that commitment remains rock solid.

Mr Kevin Rozzoli—I have a quick question of Aynsley. You mentioned at the end of your talk that, if JSCOT delayed its deliberations on treaties, regardless of whether it is Kyoto or the other one, for five years, its role would be greatly diminished. Does that just mean that, if they did nothing, we would save ourselves all the trouble of the expense of looking at it, or did you really mean to say that they would need to cut into the process more quickly, because we could actually gain a lot from JSCOT's participation in the process to put us in a better position in five years time than we would be if they stay outside the process until the traditional time they would come in?

Prof. Aynsley Kellow—What I am suggesting is that there is more likely to be a kind of democratic buy-in if an institution is established to provide a means of the public understanding what is at stake, what the process is and why it is being pursued. Having its say right from the beginning is probably

likely to produce a better level of satisfaction with the product. Inasmuch as that is an important role that the committee performs, that is probably preferable.

I note that, when JSCOT conducted its inquiry into Kyoto, I am not sure that anyone—or anyone meaningful—had ratified Kyoto at that stage, because the modalities were not really finalised until quite late in the piece. I think it was really COP6 before important details were available. So people would not really know what they were signing up for had they thought about ratifying before those details were filled in. A lot of concessions were made to get Russia on board.

One of the problems from the point of view of the importance of the veil of vagueness that helps people sign onto things is that, if it then turns out that what you thought was vague has embedded within it things that are to your particular disadvantage relative to other parties, then that is a source of failure in both the breadth of acceptance and the enthusiasm for honouring commitments that parties are taking on. Only once Kyoto entered into force did we really know, thanks to the extent of provision for trading Russian hot air as well as European hot air within the burden sharing agreement, whether it was worth taking on because its effectiveness by that stage had been so much undermined by what was traded away to get it to enter into force.

I think our situation now is that yes, we might gain in some ways by becoming a party and taking part in international emissions trading, but to what end? It would certainly involve some costs for other sectors of our economy and it would make an infinitesimal difference to the level of greenhouse gas emissions and on possible global warming by 2100. So it is a different picture once all of that is played through, once it has entered into force and we know what has really been agreed to. That is a good reason why that consideration by JSCOT in 2002 was not, in that sense, premature—because as a society it helped us have a conversation about what was involved and whether we should accede to it.

CHAIR (Senator Russell Trood)—I thank the panellists very much for a most stimulating session directly after lunch. I think it has been very valuable indeed. Thank you, gentlemen, for your attendance.

[3.02 pm]

Session 4: Perspectives from abroad

CHAIR (Mr Kim Wilkie MP)—This session is entitled 'Perspectives from abroad' and we have a number of speakers. Firstly we have Dr Palitha Kohona, who is a special adviser to the President of Sri Lanka on the peace

process and was from 1995 until 22 March 2006 the Chief of the Treaty Section of the Office of Legal Affairs at the United Nations. Dr Kohona has a Bachelor of Laws with honours from the University of Sri Lanka, a Master of Laws from the Australian National University and a PhD in international economic law from Cambridge. Prior to joining the Treaty Section of the United Nations, Dr Kohona worked for the Australian Department of Foreign Affairs and Trade, where among other things he was posted to Geneva and subsequently appointed Head of the Trade and Investment Section. Some of Dr Kohona's recent publications include *The role of non-state entities in the making and implementation of international norms*, *The International Rule of Law and the United Nations* and *Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depository of Multilateral Treaties*. I was talking to Kohona last night over dinner, and he was telling me that we think we have problems having looked at 365 treaties. The United Nations has something like 50,000.

We also have Dianne Yates MP, who is the Chairperson of the Foreign Affairs Defence and Trade Committee in the New Zealand Parliament. She has been a member of the Labour Party since the 1970s and a member of the New Zealand Parliament since 1993 after standing successfully as the Labour Party candidate for Hamilton East. Prior to parliament, Ms Yates was a secondary teacher for 16 years and, among other things, worked as a continuing education officer at the University of Waikato. Please welcome our speakers. You will notice that other people are up here as well. Dianne has some people from the New Zealand Parliament here and will introduce those people to us. Please welcome Dr Palitha Kohona to the microphone.

Dr Palitha Kohona—Thank you for that introduction, Chair. I take this opportunity to thank Dr Andrew Southcott for having invited me to this event today. It was fortuitous that I was passing through Canberra on the way to my new post. I congratulate the secretariat for having done a wonderful job in organising this event.

A PowerPoint presentation was then given—

Dr Palitha Kohona—I would like to talk about recent developments in treaty law, especially from the perspective of the Secretary-General as depository of multilateral treaties. I noted that the Secretary of the Department of Foreign Affairs and Trade referred to the developments that have occurred in the area of treaty law with regard to Australia, specifically in the area of trade. My old colleague, Greg Rose, talked mostly about bilateral treaties relating to Australia in recent times and Professor Kellow made some very interesting, challenging and thought-provoking comments about treaties relating to climate change.

I have had the privilege of observing recent developments in treaty law because some of the major developments have occurred in New York and in Geneva and I was fortunate to be the head of the Treaty Section of the United Nations, which gave me a particularly advantageous position from which to observe these developments. I can also—having listened to Greg Sheridan during lunch—assure you that neither I nor any of my colleagues have ever imposed a treaty on anybody. I know there are some treaty bodies established under treaties which monitor compliance with these treaties, but the members of these treaty bodies are actually elected by the sovereign states who are parties to these treaties. The members of those bodies are not faceless bureaucrats from New York or Geneva. So rest assured: contrary to the popular belief that there are some faceless people imposing a global regime on unsuspecting Australians, it does not happen.

The Secretary-General is the depository of over 500 multilateral treaties. That number continues to grow on almost a monthly basis. These treaties cover almost the entire spectrum of human interaction and international interaction, whether it be human rights, humanitarian affairs, disarmament, trade, communications, commodities, outer space, the seas, the environment et cetera. If there is an area which affects human beings, there is likely to be a treaty in that area which is deposited with the Secretary-General. The Treaty Section of the United Nations maintains a website which details the texts, the participation status and other details on these treaties. Amazingly, this website receives over 1.8 million hits per month. In some months the number of hits exceeds 2 million. I sometimes wonder what people do at night when they have insomnia: they are probably reading treaties.

One could say there is very little that happens in our daily lives which is not underpinned by some treaty provision or other. We do not stop to spare a thought about it. Every time you make a telephone call overseas, every time you get on an aeroplane, every time you post a letter, every time you mail an article to some destination overseas, there are likely to be one or more treaty provisions that guarantee that the act you have undertaken at this end is effectively completed. In fact, it could be argued that modern commerce could not have achieved the levels it has reached today if not for the underlying framework of treaties that supports it.

In addition to these treaties, which have had an impact on the development of treaty law, one has to remember that the international community has grown as well. In 1946 there were 51 members of the international community. Today there are 191 members of the United Nations. In addition, there are countries which are not members of the United Nations. The multiplicity of treaties, with their different requirements, and the expanded global community, with its diverse needs, has had a significant influence on developments in international treaty law.

There is another aspect that some of the speakers referred to this morning—that is, the increasingly intrusive impact of many treaties on the lives of individuals and on the business activities of corporations. This is a fact of modern life, whether it is in the area of human rights, the environment, labour standards et cetera. Multilateral treaties are increasingly impacting on the lives of individuals and on the business activities of corporations. Therefore, in that context, I should note that bodies like JSCOT play a vital role, because if these treaties are going to impact on our lives and our work, it would seem only natural that we should have some input into the development of these treaty provisions and to their eventual implementation.

The multiplicity of treaties deposited with the Secretary-General has also created the foundation for the expansion of the international rule of law. I would like to quote the Secretary-General when he observed in 2000:

> The expansion of the rule of law in international relations has been the foundation of much of the political, social and economic progress achieved in recent years. Undoubtedly, it will facilitate further progress in the new millennium.

Furthermore, he said:

> The new millennium is the appropriate occasion to reaffirm the primary objectives of our Organisation and focus on them anew. Establishing the rule of law in international affairs is a central priority.

It could be argued that the international rule of law as we know it today is underpinned to a substantial extent by the framework of treaties deposited with the Secretary-General. Let me discuss some of the details.

The word 'treaty' is misunderstood at times. But, as far as the secretariat of the United Nations is concerned, the term 'treaty' is defined to mean an instrument concluded between two entities capable of concluding treaties, and such instrument must create enforceable rights and obligations at international law. The entities that are capable of concluding treaties are governments and international organisations with that particular capacity. Even when a company—however big it might be—enters into an agreement with a state, that agreement would not be a treaty as far as we are concerned, as far as international law is concerned, because only states or international organisations with the appropriate capacity are able to conclude treaties.

There are some entities in the global community that may be described as states. In fact, they claim to be states themselves, but neither the Secretary-General nor the organisation recognises these entities as states. Taiwan is an example. Taiwan might possess many of the characteristics—or even all the characteristics—of a functional state, but the organisation does not recognise it as a state. A treaty could be described in any number of ways—it could be

called a convention, an agreement, an MOU, an exchange of notes—under different names. But what is important is that, to be considered a treaty, an instrument must meet the criteria which I described earlier. The characterisation adopted by the negotiating parties is not important.

We should pause for a moment here to consider the role of the Secretary-General as depository. The Secretary-General's role is defined by law. He is guided by the relevant provisions of each treaty deposited with him. Article 77 of the Vienna Convention of the Law of Treaties 1961 elaborates on the role of the depository. Then, of course, there is the practice of the Secretary-General himself, which predates the Vienna Convention of the Law of Treaties 1969 and which has evolved in certain respects since the adoption of the Vienna convention. There are also the underlying rules of customary international law.

The Secretary-General, as depository, provides advice and assistance relating to the conclusion of treaties, particularly relating to the conclusion of final clauses of treaties. He also provides interpretations of final clauses. These interpretations have contributed to the development of treaty law. In interpreting final clauses, the Secretary-General plays a cautiously proactive role, and this proactive part of his role has become more significant in recent times. For example, where the final clauses of a treaty prohibit reservations, he would refuse to accept in deposit a statement that is a reservation or is tantamount to a reservation. I think Australia was involved in a discussion concerning this issue in connection with the statute of the International Criminal Court. I recall the discussions that took place, which lasted almost a day, in which we agreed to introduce additional wording into the declaration that Australia made on becoming a party to the statute of the ICC, in order to ensure that the declaration that was made did not constitute a reservation in actual fact.

The Secretary-General has also refused to accept a notification of denunciation of a human rights treaty. The example I have in mind is the denunciation of the International Covenant on Civil and Political Rights by North Korea in 1996. After having been miffed about a report issued by the human rights commission, North Korea gave notice of withdrawal from the ICCPR. The ICCPR, of course, has no provision on withdrawal, so, after taking into account the provisions of the ICCPR and also the relevant provisions of the Vienna Convention of the Law of Treaties, the Secretary-General, as depository, circulated a note suggesting that the DPRK's notification of withdrawal was not valid. It was a risky note because the depository does not normally take that sort of proactive step in relation to actions undertaken by a sovereign state. But in this case, 29 states wrote to the Secretary-General endorsing the approach that he took. The result was that, after about two years, North Korea quietly started submitting its reports

without ever referring to the notice of withdrawal that it had submitted in 1996.

Then again we had a major engagement relating to the readmission of Yugoslavia to the United Nations in 2001. You will recall that the Socialist Federal Republic of Yugoslavia broke up in 1992. There were five new entities, but one of those entities—Serbia-Montenegro, which styled itself as the Federal Republic of Yugoslavia—notified the Secretary-General that it intended to continue the legal personality of the socialist federal republic. In that manner, it continued to undertake treaty actions with regard to many treaties deposited with the Secretary-General. Of course, this notification, although recognised by the Secretary-General, was objected to by many countries. I believe that even Australia was one of the countries that objected to this notification.

In 2002, as a result of much political pressure and the changes that occurred in the Federal Republic of Yugoslavia, Yugoslavia changed its mind and went back on the statement that it made in 1992 and decided to rejoin the UN as a new member and succeed to many of the treaties that the socialist federal republic had been a party to previously. Of course, this created endless problems for the depository, because there were treaty actions undertaken between 1992 and 2002 which had resulted in various legal rights and obligations. After much deliberation and extensive consultations with the interested parties, we came up with a series of proposals which the new Yugoslavia complied with. In fact, in one day, the Federal Republic of Yugoslavia undertook 243 treaty actions. All of them were successions to treaty actions undertaken by the socialist federal republic prior to 1992. In the case of two treaties—the United Nations Framework Convention on Climate Change and the Convention on the Prevention and Punishment of the Crime of Genocide—it acceded. In the case of the climate change convention, the problem was that the federal republic, which had become a party to the climate change convention, was not eligible to undertake such action. Only members of the United Nations were eligible to become a party to the climate change convention. After its readmission to the UN in 2002, it acknowledged that it had not been a party to the UNFCCC between 1992 and 2002, and it acceded to the convention. In the case of the genocide convention, there was the small matter of the genocide case lodged against the federal republic by the other succeeding states to the socialist federal republic before the International Court of Justice. That matter, I believe, is still before the court.

One might ask why the Secretary-General at times takes this proactive approach to his functions as depository. I would suggest that there are a number of reasons for this. There is a need to maintain integrity of the multilateral treaty system. As I said before, there are over 500 multilateral treaties and, if the 191 members of the United Nations family were to do

whatever they pleased with these treaties, there would be much uncertainty at an international level. It is desirable that, at least in certain cases, the depository becomes proactive. Unlike at a time when there were only a few members of the international community, it is no longer feasible for each member to take their own approach to the treaties deposited with the Secretary-General. The Secretary-General also has a responsibility to the international community. In this respect, he discharges his responsibility with a great deal of caution and impartiality.

It is in the area of reservations and declarations that I have noticed the most proactive initiatives on the part of the Secretary-General as depository. For example, traditionally in the Secretary-General's practice, only the head of state or government or the foreign minister could formulate a reservation, because it is acknowledged that only the same authorities who can undertake a treaty action can formulate a reservation. Therefore, the Secretary-General would not normally allow a permanent representative of a member state of the United Nations to lodge a reservation to a treaty to which that state is a party. However, in order to facilitate or make life easier, he has permitted certain permanent representatives who possess what are known as 'general full powers' to undertake specified treaty actions, including the formation of reservations. There are only two countries which use this facility: the United Kingdom and China. In these cases, their permanent representatives possess 'general full powers' and these PRs can lodge reservations to the treaties to which those countries are party in their own name. It is also interesting to note that the Special Rapporteur of the International Law Commission, Professor Pellet, endorses this approach as a practice developed by the Secretary-General.

There is also the question of the time for formulating reservations. Under the Vienna Convention on the Law of Treaties 1969, reservations can be formulated only at the time of signing, ratifying, accepting, approving or acceding to a treaty. However, in order to comply with this strict requirement, certain countries have actually denounced treaties in order to reaccede with reservations. There were the interesting cases of Guyana and Trinidad and Tobago. Both of them, confronted with a law and order situation in their countries and also with politically sensitive issues relating to the imposition of the death penalty, denounced the optional protocol to the International Covenant on Civil and Political Rights and reacceded with reservations. From a human rights perspective, this action has come under a fair amount of criticism—in fact, if you go to the UN treaty collection website you will see that there are many objections to the actions undertaken by Trinidad and Tobago and Guyana. Nevertheless, they went ahead and did what they did. In the case of Guyana, it stayed on as a member of the optional protocol with its reservation. However, Trinidad and Tobago—which was confronted with a situation where the human rights committee actually ignored its

reservation—denounced the optional protocol a second time. So what the human rights committee did resulted in a situation where now the optional protocol has one member less.

Another interesting situation which has come up relates to territorial exclusions. There are some states which, on becoming party to treaties, have adopted the practice of excluding their territories from the application of the treaty. Examples are the United Kingdom, the Netherlands, Denmark, New Zealand and, in some cases, China. In all these cases, the exclusions relate to non-metropolitan territories in the case of the United Kingdom, or distant island territories. In the case of China, the exclusions invariably relate to Hong Kong and sometimes also to Macau.

Of course this practice has been heavily criticised by certain academic writers because, under article 29 of the Vienna Convention on the Law of Treaties, a state becomes party to a treaty on behalf of all its territories and if it excludes a part of its territory then that would be tantamount to a reservation. This practice has been adopted even in the case of those treaties which prohibit reservations. However, I should note that the Secretary-General has, since 1973, accommodated this practice on the basis that it is a practical necessity. In the case of many of these distant territories, there may be a need to consult the local legislatures or local administrations. Sometimes it is simply not practical. So the more appropriate approach is for these countries to become party to these treaties after excluding these non-metropolitan territories.

There is also a question relating to treaties that are silent on reservations. The Secretary-General has received a huge number of reservations with regard to those treaties, especially the human rights treaties which are silent on reservations. Of course, such reservations must be consistent with article 19 of the Vienna Convention on the Law of Treaties. One of the conditions under article 19 is that reservations should be consistent with the object and purpose of a treaty. Any such reservation will be presumed to be accepted by the other parties to the treaty unless a party objects to that reservation. This presumption causes a major concern for some of the smaller countries, because we circulate literally dozens of reservations on an annual basis and some of the smaller countries simply do not have the resources to examine each of these reservations to determine whether they are consistent with the object and purpose of a given treaty.

Professor Pellet, the rapporteur to the International Law Commission on reservations has suggested that, in this instance, the depositary has a role to play, which is basically to draw the attention of the countries concerned to the fact that a statement lodged could be a reservation that is inconsistent with the object and purpose of the treaty concerned. However, although this

suggestion has received the endorsement of quite a number of small states, it has been objected to by the bigger states, which tend to follow the traditional approach to treaty making and reservations—that reservations are a prerogative of sovereign states themselves.

The question arises as to who should have the right to determine whether a reservation is consistent with the object and purpose of a treaty. At times human rights bodies have taken this role upon themselves and this initiative of the human rights bodies has run into a barrage of opposition from some of the major states, such as the United Kingdom, France, the US, India et cetera. I mentioned the suggestion of the special rapporteur that this is a role that can be played by the depositary. Again, that has not been received with much enthusiasm by those major states. The state parties can continue to preserve that role. The problem with this, as I mentioned, is that some of the smaller states do not have the resources to examine every single note that is circulated to determine whether the note constitutes a reservation that is objectionable. Maybe there is a role for the human rights bodies to play in the case of human rights treaties, which is that they could, within the 12 months permitted for objections to be lodged, draw the attention of the parties concerned to the problems involved with a given reservation and then leave it to the states themselves to determine whether they are going to object or not.

There is another interesting development relating to reservations; we call them late reservations. As I mentioned earlier, there is a strict requirement relating to the time for the lodgment of reservations under the Vienna Convention on the Law of Treaties. In other words, reservations can be lodged only at the time of ratification, acceptance, approval, accession or signature. However, a practice has developed of certain states lodging reservations even after this. We call these late reservations. The Secretary-General has accommodated these late reservations and has accepted them in deposit on the basis that none of the parties to the treaty would object to them. The rationale for this approach is that it is an inherent right of sovereign states to modify their treaty relations with the consent of each other. This approach has also been discussed by the special rapporteur and he has lent general endorsement to it.

There is a time limit within which objections to late reservations can be lodged. It is now 12 months. It used to be 90 days, but that was a problem for many federal states and for the European Community because the European Community has a mechanism for coordinating its approach to legal issues, specifically reservations, called the COJUR. There was a time when there were 15 members of the European Community; now there are 25. The original time limit that was permitted for objections to late reservations of 90 days was considered to be totally inadequate for the purposes of the European Community. From memory, I would have thought that it would be totally

inadequate for Australia also, if there were a need to consult the states. So, after much consideration, the time limit was extended to 12 months.

Finally, I would like to touch upon another initiative undertaken by the depository, the Secretary-General, since 2000. It is normally not the role of the depository to encourage wider participation in the treaties deposited with them. His role is much more limited. But since 2000 the Secretary-General has been encouraging the members of the United Nations to undertake treaty actions with regard to the treaties deposited with him. In other words, he has actively encouraged wider participation. There are a number of reasons for this. There were many treaties that were adopted with great enthusiasm but which have remained far from universal participation. Similarly, there were other treaties which were not even in force after many years. It was also thought that encouraging wider participation would raise awareness relating to the treaty framework, of which the Secretary-General was the custodian.

In 2000, the millennium summit year, he wrote to the heads of state and government and invited them to undertake treaty actions when they visited New York for the summit. The response to this invitation was overwhelming. In fact, 274 treaty actions were undertaken in three days by 84 states, many of them by heads of state and government. It was amazing to see the likes of Chirac, Tony Blair, Schroder, the King of Jordon, the Prime Minister of India and the Prime Minister of Japan all trooping in to sign, ratify or accede to treaties deposited with the Secretary-General. The outcome of this initiative was such a success that it has since been decided to have a treaty event annually, in conjunction with the general debate of the General Assembly.

In 2001 we had a treaty event entitled 'Focus 2001: Rights of Women and Children'. In the same year, in response to the terrorist attacks on New York and Washington, there was a special treaty event focused on terrorism. In 2002 the theme was sustainable development; in 2003 it was treaties against transnational organised crime and terrorism; in 2004 it was the protection of civilians and in 2005, in conjunction with the 60th anniversary, the theme was advancing the Millennium Development Goals. In 2005 there were 99 states participating in the event, and the European Community. They undertook 265 treaty actions in three days. In 2006 the theme will be 'crossing borders'. I think that this is a theme relevant to Australia in more respects than one—it relates to refugees, immigration et cetera.

CHAIR (Mr Kim Wilkie MP)—That was a very fascinating insight into the United Nations treaty making process. Thank you very much for that. Would you please join me in welcoming Dianne Yates MP, who is going to talk about the treaty review process in New Zealand.

Ms Dianne Yates MP—Thank you very much, Chairman Wilkie; thank you very much, Dr Andrew Southcott, for inviting us here to take part in this conference. I was totally distracted by Dr Kohona saying that people were counting treaties. If Australians and New Zealanders are 'ovi-moronic' for counting sheep in the middle of the night, what do you call someone who counts treaties in the middle of the night? I will leave you to think about that.

First of all, I wish to introduce our team. I am the Chair of the Foreign Affairs, Defence and Trade Select Committee of the New Zealand Parliament. We have here with us today Georgina te Heuheu, who is the deputy chair. Georgina has also been Minister of Women's Affairs and Minister for Courts in the past. We also have with us today Keith Locke, and Keith has come up to the front with me for a very good reason. Our Foreign Affairs Defence and Trade Select Committee has nine members: four National, four Labour—we are the government—and one Green, Keith. As you can see, we as the government do not have a majority on that committee but, as the chair, I am very good at negotiating, so Keith holds a very important position on the committee. He also holds a very important position because he previously had a private member's bill on the treaty making process. Although the bill was turned down by the House, his report has informed the treaty making process, and many of the things that were in his bill, which had been talked about for some time, have become part of our custom and practice. Keith will certainly be happy to answer questions in that regard.

I also want to recognise that we have two people from the Ministry of Foreign Affairs and Trade, Gerard van Bohemen and Lucy Richardson. We also have our committee clerk, Svea Cunliffe-Steel. The interesting thing about our select committee is that I was previously on with the Hon. David Lange. I heard someone today—I think it was Richard Herr—say that elections are rarely run on international issues. I think David Lange would strongly disagree with you on that. In fact, the nuclear issue was still very much alive in New Zealand at the last election.

On our committee we also have two former staff members of Foreign Affairs and Trade, which is very interesting at times, and three former ministers, so it is a very interesting committee, combining people with various experience and interests. I was saying to someone at lunchtime that my first experience in parliament on a select committee was on the Foreign Affairs, Defence and Trade Committee with the Hon. David Lange, who was then a backbencher. The committee was involved in bringing the Antarctic treaty into New Zealand law. David had a great deal of fun with that, entertaining us with various aspects of what you could do with throwing chicken bones to penguins, which of course could then get newcastle disease. But with the occurrence of Asian flu and so on, it really was a very serious matter. As members of the committee, we thought at the time that it was quite amusing,

but then we realised how important such things are and how important it is, as David said, for us to have night carts in Antarctica to take away all our rubbish to be dumped way out to sea, somewhere near New Zealand!

The treaty making process is very important to New Zealand, not only because of the history of how we came about our treating making process—like most countries of the Commonwealth of Nations, through the Westminster system—but also because one of New Zealand's founding documents is the Treaty of Waitangi. If ever we become a republic, that will be a matter we will have to sort out with the British Crown. The three-clause treaty is one that constantly pervades all legislation in New Zealand—and very rightly so.

One of the points made at lunchtime was that of globalisation and that we are increasingly becoming a smaller world. Within that smaller world we are increasingly, with communications and trade, getting smaller and smaller. Within that, we seem to have a greater need to more closely define ourselves. It happened at the recent games in Melbourne. We had the United Kingdom with three very distinct teams arguing when they counted up the medals whether they should continue to have their distinct teams. Within globalisation, we are constantly desperate to maintain our sovereignty and our autonomy. I think that was particularly brought out, as I said, at lunchtime.

We in New Zealand, as you will know, do not have a separate treaties committee. This is one of the reforms that was discussed in 1999: should we have a separate committee? I am thinking that when I go home I might revise the idea again, because we have a private member's bill that wants to reduce the number of members from 120 to 99. One of the arguments we can put forward is that perhaps we should have a separate treaties committee, and then we would need more MPs to cover that. But, being a small nation, there is a limit to the number of committees that you can have.

Our Foreign Affairs, Defence and Trade Committee looks at the treaties and then delegates them to the appropriate subject committees. The committee I previously chaired, on government administration, dealt with the sports and drugs area. For the last two terms of parliament I have been on the Health Select Committee. I particularly want to talk about what happened on that committee with a bilateral treaty to do with therapeutic goods and Australia. That was a very interesting process. Yes, we have bilateral treaties. Yes, we have multilateral treaties. Yes, we have a series of criteria by which a treaty actually gets sent to a committee. Yes, we have a treaties list—and I think it was pointed out earlier this morning by Devika Hovell that having a list is not necessarily consultation. But our committee is provided with a list from the

Ministry of Foreign Affairs of all treaties that we are involved in. If a treaty is not referred to a committee, it can ask that that process happen.

What happened with the therapeutic goods treaty was that, first of all, there was public consultation. We in New Zealand stress that right at the very beginning: negotiation and public consultation—the more work you put in at the front end, the less trouble you have further down the track. A public discussion document went out in 2002. Then the Health Select Committee got hold of this and said, 'Let's have an inquiry into this,' reason being the structure of the suggested joint agency, whether that joint agency was a good idea and whether other options should not be pursued, but also the content, which was about alternative health, which is becoming much more fashionable, if I can use that word. There is the whole area of nutraceuticals and how important they are becoming in our society, the whole issue of intellectual property and the whole issue to do with Maori medicine and the intellectual property around that and so on. So there were content issues and there were process issues.

The inquiry by the Health Select Committee produced a report about two inches thick. Very significantly, David McGee, the Clerk of the House, said the committee turned it down. It was not quite as simple as that. The committee said, 'If we had a choice between a joint agency and a mutual recognition regulatory authority, we would go for the mutual recognition one, but we have 34 recommendations.' Those 34 recommendations went to the executive and to cabinet. In December, the month that New Zealand signed up to the joint agency, the inquiry reported back to parliament. So while the inquiry was going back to parliament we also agreed to this joint agency.

However, then came to the select committee the agreement and the national interest analysis. So we have had the inquiry, which the committee initiated. Then we got the agreement with the national interest analysis and we got the response from the government to our inquiry report. The select committee then reported back and said, 'We are still not happy with it and we now have 10 recommendations.' We whittled it down to 10. Those of you who are involved in this matter know that there are still negotiations going on around the detail.

In my former life in parliament I was on the Regulations Review Select Committee. Anybody who has been on that committee knows that for some people it is absolutely dead-boring and really picky, but it is also a tremendously powerful committee because it looks at whether the rules are consistent with the substantive legislation. We looked at this joint agency and said, 'Who is going to be making the New Zealand rules?' because if the rules are made by this treaty and they are made in Australia and we have to enforce those rules in New Zealand—hello, hello, just a minute—will the

regulations review agree with that and what is the process going to be in the New Zealand regulations review committee?

We are at the point now where we are trying to iron out the finer details. Most of it has to do with process rather than content, but there are still some content issues that are being ironed out in the finer detail. It is a little bit like salmon and Tasmania—big brother and smaller sister or whatever. We are trying to work through the implementation details. But that was a very interesting process when a select committee, through its inquiry, actually said, 'No, we do not like it.' Then what happens to that process? The ultimate decision is with the executive.

The other issue that I wanted to talk about is a treaty that we have just signed and which has just gone through our select committee. This is the P4 agreement, which is the Trans-Pacific Strategic Economic Partnership between New Zealand, Chile, Brunei, Darussalam and Singapore. We already had an agreement with Singapore. It has now been extended to include Chile, Brunei and Darussalam, and hopefully that kind of treaty will expand and there will be further negotiations with other countries in that regard.

As I said, if you do the work up-front you have less trouble further on. The process has been going on for years. I think it was at lunchtime that someone said, 'Take your time over these things.' Since 2002 there have been negotiations, there have been internal consultations within New Zealand, there have been public papers put out, there have been seminars with chambers of commerce, there has been consultation with Iwi groups and Maori groups, and huge amounts of effort have gone into the national interest analysis. That then came back to the select committee. We looked at it and we did a report. After the national interest analysis came back to our select committee, we called for submissions but we got only three—two against and one for. We invited submissions, we advertised in the papers—we asked everybody. People felt they had been consulted. They had already had their say in the national interest analysis.

Then when it actually came to the legislation—we had to have a change in New Zealand law to amend our tariff act to enable the final agreement on the treaty—we had no submissions at all. When we called for submissions on the NIA, we only got three. So we sent that through our select committee with no submissions at all. I think there had been over 120 on the actual NIA itself. So doing the work up-front means that it is easier further down the track.

I think there was comment this morning by Richard Herr about New Zealand in 1997 saying, 'We have negotiation acceptance and implementation.' I think the points that were made today about transparency, scrutiny and accountability are very important. We also think that whole

consultation process is extremely important. We have precedents in our law about what constitutes consultation. I think what is also very important in an increasingly smaller world is that public participation element and also implementation. In the inquiry process, our select committee can have an inquiry on how the implementation of any treaty is going along. We are actually looking at formulating some terms of reference on an inquiry at the moment to ask: 'How is a certain treaty getting on? How is the implementation going? Is it working in the way that we would have expected?'

There are a couple of other points that I wish to comment on in relation to New Zealand. All the details about how we go about our national interest analysis are in the paper I have tabled. There was a comment on Keith Locke's bill. When it was reported back to the House, the select committee felt that there should be a greater cost-benefit analysis in the national interest analysis, although there are economic issues to be considered. Certainly on the therapeutic goods issue, when the Health Select Committee did the inquiry we called for a cost-benefit analysis. I know it is getting late on Friday night, but I will point out quickly that in our paper, which you can read, I had included the matters that are involved, including the national interest analysis, which is part of the standing orders of New Zealand, and the importance of the Pacific.

There was some discussion today—I think one of our members nudged me when New Zealand was put in brackets by Greg Rose, but we don't mind that!—of the fact that one our concerns in New Zealand, and one of the things we look at in terms of aid, is enabling our Pacific brothers and sisters to comply with treaties. One of the things that our Ministry of Foreign Affairs is working on and that our committee is looking at is how we can best, without being paternalistic, enable smaller nations that are closely allied to us to meet with the requirements. When you have a very small nation that is the size of a small high school, how can you comply with all these treaty requirements when you are not going to spend all night counting sheep, treaties or whatever it is? I think that Australia and New Zealand between them can work out how best to work with the nation states of the Pacific to work on treaty compliance.

There is a lot more in the paper, but I realise time is getting on. I did say to Keith that, as he had worked on the legislation, he may like to make one or two points and perhaps answer any questions.

Mr Keith Locke MP—It has been interesting listening to the discussion today because it seems that the pressure for more openness, more engagement with the treaty making process at an early stage is coming from the states, who feel that, given that they have legislation that might be

affected or changed, they want to be engaged early. In New Zealand, where we do not have states and two levels of parliament—the Senate and the House of Representatives—the pressure is coming from our proportional system. The current government and the previous three governments have all been minority governments. A minority government can sign up to a treaty but that does not guarantee that the implementing legislation is going to get through the parliament, which is sort of what has happened with the therapeutic goods issue. It is wrong to say that, in the sense that it was not really a division between the government and everyone else, because it was a collective committee process, but I think the fact that we are operating in a framework of minority governments tends to open up the process in a sense.

What happens in New Zealand with every bill that comes before the parliament—and this really applies to every treaty that comes before the government—is that they have to look at who supports it. I think one of the things the Prime Minister asks when a bill comes before cabinet from a minister is, 'Which party outside of the government have you got supporting this bill so that we can have a majority in parliament?' That has been for every bill over the last several years. There is a different composition of parties depending on the bill.

One interesting treaty is the free trade and investment agreement between New Zealand and Singapore. I think the debate on that was in about 2000-01. In that parliament you had the Labour and the Alliance parties making up a minority government—they did not have a majority on their own—working with the Green Party in a confidence and supply agreement. On that Singapore-New Zealand free trade agreement, of those three parties only Labour supported it. The Alliance, even though it was in the government, said: 'We don't support this agreement; we want to differentiate ourselves.' They forced a debate in parliament on the treaty. There was not actually a vote to approve the treaty, because we did not have that constitutional power. My bill was for the parliamentary approval of treaties, but we had not and still have not changed in that direction. But there was an indicative vote in parliament on whether the parliament approved the Singapore-New Zealand free trade treaty prior to ratification. The Labour Party knew it would get a majority, because it knew the National Party, the other major party, supported that agreement. So it was interesting that Labour's two closest allies in that parliament were dissenting on that particular treaty.

The other thing with the Singapore agreement is that the select committee subsequently assessed how it was going—the trade balance and things like that. So the select committee does have a role in looking at compliance. So there has been a shift over the last few years. One of the results of my private member's bill, even though it failed in its principle purpose, was to produce a lot more transparency, to use one of those three terms. Every six months the

Ministry of Foreign Affairs and Trade provides the committee with a list of all the treaties that are under negotiation and the stage they are at. The committee can, if it chooses, engage with any of those treaties. We have asked in the past for a report on how the negotiations for a free trade agreement with China are going, and we received a little report from the Ministry of Foreign Affairs and Trade. So there is more engagement, even though our committee, and the parliament as a whole, does not have any right to approve treaties.

Ms Dianne Yates MP—I also heard today someone talking about consensus reports from the committee. We do not necessarily strive so hard for that but it is important that, if there is a minority report, that goes in the report and that goes back to the House and people are aware of the arguments that were presented at the committee itself. We report on what happened at the committee.

CHAIR (Mr Kim Wilkie MP)—Thank you very much for that. I think we can have a couple of questions before we close.

Dr Michael Morgan—I want to pick up on the point that Professor Kellow made about this concept of democratic deficit. We have touched on these points a little over the last presentations, in particular in relation to compliance or otherwise with treaties and covenants. I wonder when we are thinking about democratic deficit whether it might be more productive to think about the absence of national debates as a marker of the success or otherwise of the treaty making process. Just to emphasise: power configurations and the modalities of treaty making—to pick up the phrase used earlier—vary greatly across the region. In some jurisdictions I think you would find the vast majority of MPs, legislators, deputies and congresspeople are not only unclear about the content of the treaties and the covenants with which they are dealing but also about the international treaty regime itself. They are also much less clear about what they can do about it, whether wilfully or otherwise kept out of the processes of discussing international covenants.

Dr Kohona's presentation about 2005: Focus on the Millennium Development Goals provides a useful example in the Pacific Islands in particular, where there are now substantial lags between the agreements that were signed onto and the actual implementation. There are a raft of treaties where this is the case—CRC, CEDAW and so forth. It raises the question for me: what advice would the collective wisdom of participants in this seminar give to legislators who are supportive of a greater role in the processes of treaty making or of opening up national dialogues about these issues, based on the experience of developing these systems relatively recently in Australia and elsewhere?

Dr Palitha Kohona—With regard to ensuring compliance there are two points that I would like to make. Compliance is not a major issue in many of the developed democracies. Democracies tend to comply with their international obligations quietly but meticulously. It is very rarely that you find a country like the United States not complying with its international obligations. When it does not, it becomes headline news—and that is why you know it is not complying. If it were not complying on a daily basis then its non-compliance would not make the news. But when it does not comply, or people perceive it not to be complying, it hits the news. So I think that non-compliance is not a major problem with developed democracies. There may be criticisms that you can level because you are dealing with international standards, some of which are not absolutely specific, but I do not think I have a problem with these countries.

The problem arises with some of the less-developed countries. In those countries I suspect—and I am trying to be charitable—that the problem is not a lack of will but a lack of resources. Many of these countries do not have the mechanisms with which to give effect to their international obligations, and they do not have the resources to develop those mechanisms. I think that that is where countries like Australia and New Zealand in the South Pacific region can come in and play a positive role. They can help in capacity building and in developing the local infrastructures et cetera. For example, you mentioned CEDAW, the Convention on the Elimination of all Forms of Discrimination Against Women. I think that, by and large, this convention can be given effect in a comprehensive manner throughout the region if capacity for that purpose can be effectively built up. I think that is where the problem lies.

CHAIR (Mr Kim Wilkie MP)—Thank you for that. Are there any other questions?

Ms Dianne Yates MP—I would like to comment on that, because I think that, partly, that is what today is about—having a 10-year review. It is like today at lunchtime with the good guys and the not-so-good guys. You get situations like UNROC with the children. We have a situation in New Zealand in relation to the rights of paperboys and paper girls delivering newspapers. The employment conditions of children delivering newspapers do not actually conform with UNROC. We have had to work out how to deal with that. It is not quite the same as a huge amount of exploitation of child labour in some other places. I think you have answered the question very carefully about how you work through that. As you have said, public outcry is often the best way to do it when you cannot do it in other ways. It may tend to be around those social issues. The issue of trade sanctions comes with that as well. There are huge problems of compliance. As I have said today, one of the reasons for signing up is so that you look as though you are a good guy.

But, when you sign up, there is some element of commitment that you are working towards that goal.

Mr Keith Locke MP—Could I put in a plug for multiparty democracy in terms of generating the national debate you are talking about. Since we moved to a proportional system in New Zealand, we have eight parties which cover a wide spectrum of political views. That means that if there is dissent with a treaty somewhere in the community it would tend to be reflected in one of those parties and a national debate would more likely to be created, perhaps, than in Australia, which has a less diverse political spectrum.

CHAIR (Mr Kim Wilkie MP)—Thanks for that. Are there any other questions before we move on to the closing remarks? As there are no questions, would you please join me in thanking our guests. Thanks very much, everybody, for coming today. It has been a fascinating seminar. Unfortunately, I could not be here for part of this morning. I am also on the Joint Standing Committee on Foreign Affairs, Defence and Trade, and today we have been having an inquiry into air superiority in our region, because we have to keep an eye on the Kiwis, you see! We are looking at what sort of aircraft we are going to buy into the future. I have been doing some of that this morning.

I have been a member of this committee since 1999, and it has been a fascinating experience. As Dick said this morning, we have looked at many different treaties over the years. With the first treaty I came into contact with, when I walked into the room we were looking at the Defence agreement with the Americans on Pine Gap—and for people who do not know, Australia and America have a joint facility in the centre of Australia called Pine Gap. We had a briefing at that meeting. Someone from Defence came in and put up a projection on the wall of a helicopter flying over some domes in the desert. The helicopter landed and people got out of it and walked through the entrance of a building. A bus was seen coming through a gate, and the people got out of the bus and walked through the entrance to a building. Then the screen went blank and they said, 'That's it.' We said, 'Pardon?' They said, 'That's the briefing about Pine Gap.' I could not believe that we were receiving so little information with which to make our decision as to whether we should go down the path of the treaty. In fact, I remember that, at the end of the day, one of the recommendations said something like, 'Despite the fact that we've received so little information regarding the operation of this facility and that we could have obtained more information had we visited a public library, we have found that we haven't received any information that says we shouldn't ratify it; therefore, we should.' Some of us thought that that was not appropriate. That has been the case on both sides of the parliament when we have looked at some of these treaties and not had proper

information and scrutiny and we have made appropriate recommendations accordingly.

No process is perfect, but we are working on it. That is partly why we have had this 10-year review today—so that we can take away suggestions and make improvements. I think that it has been a fascinating experience and one that has been very worth while.

I would like to go through the list of speakers we have heard today and comment briefly on what they have said. Thank you, Andrew, for your introduction and for giving us a brief outline of how we operate things in Australia. To Dick: what can we say? Everything from fun to boring—from free trade agreements to Pine Gap and double taxation agreements, which are quite boring, but, fortunately, we find that most of these double taxation agreements are very similar so that we can usually move fairly quickly through dealing with those particular treaties.

We heard from Devika Hovell, who has worked on 'Ten Years of JSCOT: A critical analysis' . She covered transparency, scrutiny and democratic accountability. I think that is very important. One thing I noticed while sitting here, which you would not have seen, is that throughout the day people have been coming through the public gallery, looking at what has been going on and moving through. It is great to see that the public has been involved.

Neil Roberts MP spoke from a state perspective, covering the impact of treaties on the states and territories and the need for early consultation, which does not always occur. We have found that and it is something we need to work on. I agree with the view that there needs to be early provision of a national interest analysis. I have been quite critical in the past of the fact that often the NIA only states what is good about a treaty and does not cover some of the issues that we really need to consider because they might be detrimental to the country if we go down that path. He also mentioned that the Treaties Council needs to meet more. The fact that they have only met once since 1997—and really they should meet every year—is something that I think we need to take forward.

Petrice Judge, Anne Twomey and Associate Professor Richard Herr covered various matters. I am sorry I was not there but I have heard that the presentation was excellent. To Anne, who wrote the original report, *Trick or treaties*, which led to this committee being established: 'Well done, Anne; thank you.' They also came out with the view that there needs to be more consultation with the states. The states also need to take more action independently through their own parliaments to look at treaties. Often the states do not do that; they forget the fact that they are operating separately,

constitutionally, and that they really need to come up with some of those things.

We heard from the speaker from the Tasmanian parliament and of course the president of the council in Western Australia. Maybe we could take that back to those people and others could take it back as well.

Then, at lunch, we moved on to Greg Sheridan. What a presentation Greg gave—and I hope he is not watching here! It was fascinating. Greg made mention of his dislikes—the bad treaties, and the risk to democratic states. He spoke of having referendums to look at certain treaties—I am not sure how we will go with that but it is something we could consider in the future, Andrew—and of trade treaties being very good. One thing I have noticed today, and that I noticed last night, is that we have talked about Tasmanian salmon ad nauseam in this committee but I think we are going to have to go down the path of discussing bananas more, because Greg talked about bananas. We need to ensure that treaties are not supported just for the sake of supporting them and I agree with that. Often we will get things coming past our desk of which we think, 'What are we doing this for?' If it is just to make ourselves look good internationally, then we need to consider that. Someone mentioned Zimbabwe during Greg's presentation, suggesting that if they had oil they might get a little bit better treatment—but I did not want to go down that path!

We then moved on to Mr Michael L'Estrange from DFAT, who talked about DFAT's position in regard to the treaty process. DFAT have been fantastic over the years with us, because they have provided us with the advice that we need. Michael also covered the history of the GATT, the WTO, general multilateral agreements and free trade agreements and talked of where we are going, the sorts of challenges we are going to be faced with in the future and how we are going to undertake more consultation.

Professor Greg Rose spoke about treaties with regional neighbours. Greg, that was great. It decided that our place in the universe is Oceania. We have to deal with certain issues to do with the scope and categories of the different treaties negotiated in our region. Professor Aynsley Kellow spoke on climate change treaties. I could not agree more with some of the comments that were made by him. I do not know whether the framework convention came before our committee but certainly, with Kyoto, we went off and had an independent inquiry and looked at certain problems covered there. That could possibly lead to an inquiry by the committee into the AP6. I thought Aynsley made a very important distinction—that is, whilst Russia is looking at hot air trading, we in the House of Representatives think that that should be something we should looked at with regard to the Senate; we reckon we could get quite a lot of money if we were trading in hot air! The AP6 was covered—and the

promise to look at the Asia-Pacific partnership. A question was asked about the role of the committee in non-binding agreements such as climate change agreements. Dr Palitha Kohona covered recent trends in treaty law from the perspective of the UN Secretary-General. Thank you very much. That was a fascinating insight into how the UN treats treaties. I also acknowledge Dianne Yates and Keith Locke from the New Zealand Parliament. I had the pleasure of going to New Zealand and looking at the treaty making process you have over there and was very impressed. Thank you very much for your presentation. Please join me in thanking our presenters.

It is also fitting that we take the opportunity today to acknowledge the work of the sponsoring departments who not only negotiate the treaties but prepare the national interest analysis, which is fundamental to the work of the committee, and who appear as witnesses before the committee. They often present the reports and then come and face a grilling from us. I also acknowledge the work of the treaties secretariat, headed up by Jonathan Thwaites, particularly for the efforts in coordinating the tabling of proposed treaty actions which stand referred to the committee. We thanked Gillian Gould last night—and rightfully so—but I would like to mention some others as well. I make special mention of Ruth Blunden. Ruth is one of the founding members of the secretariat. Thanks very much, Ruth, for all your work; it is great to see you here today.

I would like to thank the seminar coordinator, Serica Mackay, ably assisted by Heidi Luschtinetz and Stephanie Mikac, and others members of the secretariat: Janet Holmes, Clare James, Gaye Milner and Peter Banson. Thank you. Preparations for today have also extended beyond the secretariat. In particular, we thank Lisa McDonald for designing the program booklet and Matt Johnson and Andy Reinpacher for the printing. I say to those guys: well done. We have also received assistance from our Liaison and Projects Office, the Department of the Senate and the Department of Parliamentary Services. We thank everybody who has contributed to the success of the seminar, not least the Clerk, Ian Harris, and his enthusiastic support for the JSCOT endeavour. Thank you all for coming. Have a safe trip home and happy treaty processing in the future. Thank you.

Committee adjourned at 4.18 pm