

Treaties

Policy & Procedures Manual

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Policy Division

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Foreword

Australia is a party to approximately 2 000 international agreements or treaties on subjects that include trade, human rights, natural resources, the environment and education. Even though the Commonwealth Government is solely responsible for entering into treaties, all states and territories are bound by the rights and obligations imposed by treaties to which Australia is a signatory. That is why it is important for the Tasmanian Government to be involved in the treaties process.

The Policy Division within the Department of Premier and Cabinet (DPAC) is responsible for coordinating Tasmanian Government responses to treaty matters. It does so by seeking advice and input from across government.

The Treaties Policy and Procedures Manual is now available to better inform officers in the Tasmanian State Service as to how they can contribute to the treaties process.

- **Part A** provides background information on the treaties system in Australia and how it relates to Australian Law and the Australian Constitution;
- **Part B** describes how treaties are made in Australia and who is responsible for different parts of the process;
- **Part C** outlines how the Tasmanian Government contributes to the development and implementation of treaties in Australia. This section includes tips for the most effective ways for Tasmanian Government agencies to be involved.

In introducing this important guide, I would like to acknowledge the work of officers within my Department, in drafting the Manual, and the important input from other agencies.

I hope you find the information enclosed useful to your work on treaties.

Please do not hesitate to email feedback or questions to DPAC's Policy Division at: scot@dpac.tas.gov.au.

Greg Johannes
Secretary
Department of Premier and Cabinet

Part A: The policy context

I. A brief introduction to treaties

What is a treaty?

A treaty is a written agreement between two or more countries, governed by international law.¹ International organisations can also be parties to treaties. Treaties are sometimes called charters, conventions, covenants, protocols or agreements. Whatever the name, they are treaties if the intention of the parties is to be bound at international law.

Treaties can be distinguished from other documents which are not binding, such as United Nations (UN) General Assembly resolutions and Memorandums of Understanding (MOUs). These are sometimes referred to as 'arrangements of less than treaty status'.² Treaties are also distinct from agreements between countries which are expressed to be governed by the domestic law of a particular country – such as a contract or lease.

Bilateral or multilateral?

Australia is currently a party to approximately 2 000 treaties.³ There are now treaties on almost every conceivable subject – including investment, trade, human rights, the environment, natural resources, communications, education, science and transport. Treaties can be either bilateral (between 2 countries) or multilateral (between 3 or more countries).

Signature, ratification or accession?

Countries can consent to be bound by a treaty in a number of ways including signature, ratification and accession.⁴ Bilateral treaties are usually legally binding on signature, or on an exchange of diplomatic notes. However after a country signs a multilateral treaty there is usually a second step, such as ratification, that is required in order for the treaty to 'enter into force'. Sometimes, a treaty is not binding internationally until a certain number of ratifications are made. A country can accede to a treaty in circumstances where it was not one of the original signatories, but subsequently agrees to be bound by the treaty.

Declarations & reservations

When a country lodges an instrument of ratification or accession, it may be entitled to make a 'declaration' or 'reservation' relating to the treaty's provisions. A declaration clarifies a country's understanding of certain provisions of a treaty, without altering the effect of the treaty. A reservation excludes or modifies the legal effect of certain provisions of the treaty in their application to that country. At the international level, treaty disputes are largely resolved through diplomatic negotiations, or mechanisms like arbitration or adjudication.

2. Commonwealth power to enter into treaties

States and territories bound

Only the Commonwealth Government can enter into treaties. States and territories have never had the capacity to enter into treaties, even when they were colonies.⁵ At the same time, treaty obligations extend to every part of Australia – which means that the states and territories are also bound by a treaty that Australia has ratified.⁶ Australia cannot rely on its internal laws or arrangements (eg division of powers under a federation) as an excuse for failure to apply a treaty.⁷

¹ Article 1-2 of the *Vienna Convention on the Law of Treaties* (VCLT), 1969. The VCLT sets out the international rules relating to treaties. It entered into force on 27 January 1980 and applies to all treaties concluded by Australia since then.

² Department of Foreign Affairs and Trade (DFAT), "*Signed, Sealed and Delivered, Treaties and Treaty Making: Officials Handbook*" 11th Edition, September 2011, paragraphs 5, 23-29.

³ DFAT Treaties Database: www.dfat.gov.au/treaties/index.html. This includes both original treaties and amendments.

⁴ Article 11, VCLT.

⁵ Senate Legal and Constitutional References Committee, "*Trick or Treaty? Commonwealth Power to Make and Implement Treaties*", November 1995, paragraph 13.1.

⁶ Article 29, VCLT.

⁷ Article 27, VCLT.

Prior to 1901, the Commonwealth Government could not enter into treaties in its own right – the United Kingdom acted on its behalf. Australia's acquisition of full international status occurred gradually over the first part of the 20th century, culminating with the *Statute of Westminster (UK) 1931*, which confirmed Australia's capacity to enter into treaties. However the Commonwealth Government delayed domestic adoption of the *Statute of Westminster* until 1942, 11 years after it had been adopted by the British Parliament.

Domestically, it is now well recognised that the power to enter into treaties is an Executive power of the Commonwealth Government, under s.61 of the Australian Constitution. Decisions about the negotiation of international treaties and the final decision on whether to sign or ratify a treaty, are taken at Ministerial level and, depending on the nature of the treaty, are also approved by the Commonwealth Cabinet. Formal approval of the Governor-General is also required.

Since the introduction of reforms to the treaty making process in 1996 (discussed below), the Commonwealth Parliament has been granted the authority to scrutinise treaties, but this does not place any legal limits on the Executive's ability to decide whether or not to enter into a treaty.

3. Giving effect to treaties in Australian law

As a general rule, treaties do not become law in Australia through signature, ratification or accession alone.⁸ The Executive act of entering into a treaty creates international obligations for Australia however those obligations do not become part of Australian law until Parliament enacts legislation to implement them.⁹ The rationale behind this approach is the separation of powers doctrine. Treaties are negotiated and entered into by the Executive arm of government, but it has no capacity to make or alter the law - legislation is a matter for Parliament.¹⁰

Most treaties do not indicate how their obligations should be implemented. Governments have a measure of discretion which allows them to interpret their international obligations and determine how those obligations will be realised.¹¹

Each time a new treaty is entered into, the Commonwealth Government, in consultation with the states and territories (if appropriate), decides how the treaty will be implemented in Australia. Specific implementing legislation may not be necessary if existing legislation is sufficient to give effect to the treaty or because the treaty can be implemented solely through administrative means.

If new legislation is necessary to implement the treaty it may be enacted at the state, territory or Commonwealth level, or a combination of both, depending on the subject matter of the treaty. Each state and territory has a general constitutional power to make laws for the 'peace, welfare and good government' of its jurisdiction.¹² At the Commonwealth level, the power to give effect to a treaty domestically is included within

⁸ Treaties can have an indirect effect on Australian law though. For example, where there is ambiguity in a statute, courts can have regard to Australia's international treaty obligations in interpreting the law: see s.15AB *Acts Interpretation Act 1901* (Cth), s.8B *Acts Interpretation Act 1931* (Tas). Treaties may also have an impact on administrative decision makers and the development of the common law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁹ *Dietrich v R* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J.

¹⁰ Blay, S Piotrowicz and Tsamenyi, M (Eds) *Public International Law: An Australian Perspective* 2nd Ed. Oxford University Press, 2005, p.122-124.

¹¹ *Ibid*, p.125.

¹² See Preamble, *Constitution Act* (Tas) 1934.

the Commonwealth Parliament's power to make laws with respect to 'external affairs', set out in section 51(xxix) of the Australian Constitution.¹³

The 'external affairs' power has been broadly interpreted by the High Court to allow the Commonwealth to pass laws that implement international treaties, regardless of whether the subject matter is otherwise outside the Commonwealth's legislative powers, as set out in the Constitution.¹⁴ As long as the treaty is genuine and the legislation is reasonably capable of being considered appropriate and adapted to fulfil the treaty obligations, it will usually be valid.¹⁵ There are some limits on the 'external affairs' power though – the Commonwealth cannot for example remove constitutional rights, such as freedom of interstate trade, merely by relying on treaty provisions.¹⁶

The 'external affairs' power does not have to be relied on in isolation – Commonwealth legislation may be based on a number of constitutional powers in combination with the 'external affairs' power – including the trade and commerce power (s.51(i)), the corporations power (s.51(xx)) and the defence power (s.51(vi)).

It is important to be aware that Commonwealth legislation under the 'external affairs' power, or any Commonwealth head of power, can override inconsistent state legislation under s.109 of the Australian Constitution.¹⁷

¹³ Section 51(xxix) of the Constitution provides "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to... external affairs".

¹⁴ See eg *Commonwealth v Tasmania* (1983) 158 CLR 1 at 299 per Dawson J; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 213 per Stephen J and at 193 per Gibbs CJ.

¹⁵ See Winterton, G "Limits to the Use of the Treaty Power" in Alston, P and Chiam, M (Eds) *Treaty-Making and Australia: Globalisation versus Sovereignty*, The Federation Press, 1995, p.29-37; *Richardson v Forestry Commission* (1998) 164 CLR 261 at 289 per Mason CJ and Brennan J.

¹⁶ *Horta v The Commonwealth* (1994) 181 CLR 183 at 194-5; *Victoria v The Commonwealth* (1996) 187 CLR 416.

¹⁷ Section 109 of the Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Box I: Interpretation of the 'external affairs' power: Tasmanian cases

In the 1980s, the High Court's interpretation of the 'external affairs' power became quite controversial. In a number of instances, the Commonwealth relied upon treaties as the basis for legislation to override the policies of a State, in areas traditionally falling beyond the Commonwealth's powers.

***The Tasmanian Dam Case*¹⁸**

In the early 1980s, the Tasmanian Government planned to build a hydroelectric dam on the Franklin River. The Commonwealth Government opposed the construction and sought to prevent it by passing legislation based on Australia's obligations in the *Convention Concerning the Protection of the World Cultural and Natural Heritage* 1972. The Franklin River is declared a World Heritage site under that convention. The Tasmanian Government challenged the legislation, arguing that the Commonwealth had no constitutional power to regulate the construction of the dam. The High Court found in favour of the Commonwealth. The court decided that the 'external affairs' power included the capacity to legislate to ensure compliance with Australia's international treaty obligations, and because of this Tasmania was prevented from building the dam.

***The Toonen Case*¹⁹**

In the early 1990's Nick Toonen challenged the criminalisation of homosexual activity under the Tasmanian Criminal Code before the UN Human Rights Committee (HRC). The HRC found Australia was violating the right to privacy, protected under the International Covenant on Civil and Political Right. To give effect to the decision of the HRC, the Commonwealth Government relied upon the 'external affairs' power to pass the *Human Rights (Sexual Conduct) Act* 1994, which effectively nullified the Tasmanian laws. The Tasmanian Government objected to the Commonwealth's interference in its jurisdiction, and initially refused to repeal the offending parts of the Criminal Code. It was only after individuals in Tasmania launched a High Court challenge that Tasmania repealed the relevant sections in 1997.

¹⁸ *Commonwealth v Tasmania* (1983) 158 CLR 1

¹⁹ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); *Croome v Tasmania* (1997) 191 CLR 119.

4. 1996 reforms to the treaty-making process in Australia

Increasing dissatisfaction with Parliament's lack of a role in the treaty-making process, including concerns about the broad interpretation of the 'external affairs' power, led to a 1995 Senate inquiry into the treaty-making power.²⁰

The report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, made wide ranging suggestions for reform to the way Australia became party to international treaties. The majority of the recommendations were adopted by the Commonwealth Government through the Council of Australian Governments (COAG) in June 1996.²¹

The reforms had five aspects:

- tabling in Commonwealth Parliament of all treaty actions proposed by the Government for at least 15 joint sitting days prior to binding action being taken;
- preparation by the relevant Commonwealth Government department, of a National Interest Analysis (NIA) for each treaty, setting out reasons why entering into the treaty is in the national interest, and the likely impacts of the proposed treaty action, including results of consultation with states and territories and other stakeholders;
- establishment of a parliamentary Joint Standing Committee on Treaties (JSCOT), with the power to conduct hearings into particular treaties and issue recommendatory reports;
- establishment of a Treaties Council, comprising the Prime Minister, Premiers and Chief Ministers; and
- establishment of the Australian Treaties Library on the Internet.²²

Contrary to the recommendations of the *Trick or Treaty Report*, these reforms were not implemented legislatively, but rather through policy and administrative measures.

The result has been a more open and transparent approach to treaty making in Australia, but the legal and constitutional framework has not been altered formally in any way, and the Executive retains the ability to exercise its power to enter into treaties. The effect of the 1996 reforms was the creation of a level of political accountability on the part of the Commonwealth, and the adoption of a framework that promotes access and consultation with the wider community.²³

There has been no independent review of the 1996 reforms, but the Commonwealth conducted a favourable review in 1999. In August 2002, the Minister for Foreign Affairs announced refinements to the tabling process. Treaties of major political, social or economic significance which are likely to attract considerable public interest are now tabled for 20 sitting days, while other treaties continue to be tabled for 15 days.²⁴

²⁰ Charlesworth, H, Chiam, M, Hovell D, and Williams, G *No Country is an Island: Australia and International Law* UNSW Press 2006, p.41.

²¹ Council of Australian Governments Meeting 14 June 1996, Communique available online at http://archive.coag.gov.au/coag_meeting_outcomes/1996-06-14/index.cfm

²² Online at: www.dfat.gov.au/treaties/index.html.

²³ Blay, S Piotrowicz and Tsamenyi, M (Eds) *Public International Law: An Australian Perspective*, p.110.

²⁴ Minister for Foreign Affairs, *Greater Transparency for Treaty-Making Process* (Media Release FA114, 20 August 2002).

Part B: The current treaty making process in Australia

5. Roles and Responsibilities

a. Commonwealth Government²⁵

i. Department of Foreign Affairs and Trade (DFAT)

The Commonwealth Minister for Foreign Affairs and DFAT has primary responsibility for treaties. DFAT exercises this role in close consultation with other Commonwealth agencies, depending on the subject matter of the treaty.

DFAT has primary responsibility for treaties

DFAT's International Legal Branch is responsible for all aspects of the negotiation, conclusion, collection, formatting, tabling, publishing and interpretation of treaties, although other departments may also have responsibility for treaties relevant to their portfolio. DFAT's Treaties Secretariat is responsible for administrative processes relating to treaties, including printing signature texts, conducting signing ceremonies, arranging tabling in Parliament, preparing papers for the Governor-General's approval and distributing treaty information.

Other DFAT branches have functional responsibility for treaties in their policy areas. For example, specific DFAT branches manage Free Trade Agreement (FTA) negotiations and coordinate Australia's work under human rights treaties.

ii. The Attorney-General's Department (AGD)

AGD responsible for legal matters & legislation

The AGD is responsible for international legal issues relating to treaties, especially any requirements for implementing legislation. The AGD is responsible for determining whether existing legislation is sufficient or whether new legislation is necessary to give effect to a treaty. It also administers treaties which are the primary responsibility of the Commonwealth Attorney-General and the Minister for Justice, including the Convention on the Rights of Persons with Disabilities (Disabilities Convention), the Convention Against Torture and the Optional Protocol to the Convention Against Torture. The Office of International Law within AGD undertakes a number of treaty related tasks, including clearing draft NIA's, in conjunction with DFAT's International Legal Branch.

iii. Prime Minister and Cabinet (PM&C)

PM&C administers ExCo and SCOT

The Federal Executive Council (ExCo) Secretariat is located in PM&C and administers all matters submitted for the approval of the Governor-General in Council, including treaties. PM&C also administers the Treaties Council and SCOT and coordinates the provision of information to states and territories through SCOT officers in each jurisdiction. Each state and territory has a generic SCOT email address for treaty matters.

iv. Other Commonwealth agencies

Once a treaty has entered into force, the responsible Commonwealth agency administers the treaty. Most Commonwealth agencies have day-to-day responsibility for a treaty. For example, the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs has responsibility for the Convention on the Elimination of all forms of Discrimination Against Women and the United Nations Declaration on the Rights of Indigenous People.

²⁵ These responsibilities are outlined in detail in the DFAT Treaty Handbook, "Signed, Sealed and Delivered", paragraphs 16-22.

b. Tasmanian Government

The Premier is generally responsible for treaty matters, although other Ministers and their departments have day-to-day responsibility for treaties relevant to their portfolios. For example, the Department of Justice is responsible for International Labour Organisation (ILO) and Maritime Labour Convention (MLC) matters and represents Tasmania on the ILO Technical Officers Network.

Policy
Division of
DPAC's
role

The Policy Division within DPAC co-ordinates Tasmanian whole-of-government responses to treaty matters, with input from relevant Tasmanian Government agencies, depending on the subject matter.

As a part of this role, the Policy Division:

- liaises with relevant Tasmanian Government agencies to analyse issues relating to treaty matters and develops a whole-of-government response based on advice from agencies that promotes Tasmania's interests;
- liaises with other jurisdictions and obtains their views to inform the development of Tasmania's position;
- prepares necessary briefings and documentation for the Premier or Secretary of DPAC, as appropriate;
- acts as the SCOT representative for Tasmania, which involves being a key contact for Commonwealth agencies and other jurisdictions on treaty matters;
- communicates information to Tasmanian Government agencies on treaty matters; and
- manages records relating to treaties and tracks treaty matters for the Tasmanian Government, including managing the generic SCOT email box.

6. Stages of the process

There are 6 high-level stages to the treaty making process in Australia²⁶, with states and territories being consulted at various points in the process (see Annexure 1).

a. Mandate to negotiate

Initial
consultation
with states
through
SCOT

Before formal treaty negotiations are commenced, a ministerial mandate must be obtained. The responsible Commonwealth Minister must write to the Minister for Foreign Affairs outlining the proposal and seeking the Minister's approval to the formal commencement of negotiations. The Prime Minister and other Commonwealth Ministers with a portfolio interest are also informed. States and territories are usually informed of proposed treaty actions affecting them through SCOT contacts.

b. Negotiation and finalisation of text

States and
territories
represented
on delegations

Australian delegations negotiating treaties usually consist of representatives from Commonwealth agencies, who consult with states, territories and other stakeholders as appropriate. State/territory representatives, representatives from non-government organisations (NGOs) and members of parliament may also be invited to be a member of negotiating delegations, depending on the subject matter.

In the case of a bilateral treaty, once the text has been settled, it will usually be initialled on each page by the head of the delegation. The initialling procedure does not mean the

²⁶ These stages are set out in more detail in the DFAT Treaty Handbook, "*Signed, Sealed and Delivered*," It is worth noting that not all treaties adhere to this process, depending on the type and urgency of the treaty.

treaty has been signed – it simply identifies the text as agreed during negotiations, prior to consideration by governments.

The text of a multilateral treaty, negotiated at an international meeting, is often recorded in what is known as the Final Act of the Conference. The Final Act is customarily signed by the head of the delegation. Any non-English language version of the text needs to be verified by accredited interpreters, prior to consideration by governments.

c. Federal Executive Council (ExCo) approval

Governor-General approval

The text of a treaty needs to be approved by the Federal ExCo (consisting of the Governor-General plus two Commonwealth Ministers) before the treaty is signed by Australia. The text of the treaty must be approved by the Minister for Foreign Affairs and any other relevant Commonwealth Ministers with a portfolio interest before it is submitted to ExCo. In nearly all cases, the Commonwealth Attorney-General's approval is required, and the Prime Minister is also informed.

d. Signature

After ExCo approval, the person nominated to sign the treaty is issued with an Instrument of Full Powers signed by the Minister for Foreign Affairs. The Prime Minister and Minister for Foreign Affairs may sign treaties without an Instrument of Full Powers, although ExCo approval is still required.

Signature itself creates an obligation to refrain from acts that would defeat the object and purpose of the treaty.²⁷ There is also an expectation to proceed to ratification in good faith, but the treaty is not binding at this stage.

e. Parliamentary scrutiny-

All treaty actions proposed by the Commonwealth Government are tabled in Parliament for a period of at least 15 or 20 sitting days before action is taken that will bind Australia to the terms of the treaty.²⁸ In practice, this is between 30-100 calendar days.

JSCOT review

Treaties are divided into 3 categories:²⁹

- Category 1 and Category 2 treaties are automatically referred to JSCOT for inquiry and report (see further details in section 8(b) below);
 - Category 1 treaties are of major political, economic or social significance: tabled for 20 sitting days;
 - Category 2 treaties are mostly uncontroversial in nature and relatively routine: tabled for 15 sitting days;
- Category 3 treaties are minor treaty actions (usually amendments to existing treaties). JSCOT has discretion to formally inquire or indicate acceptance without a formal inquiry.³⁰

Exemption for urgent treaties

If a treaty is particularly urgent or sensitive the tabling requirements may be varied. Exemptions are rare and any exempt treaty is tabled as soon as possible, with an explanation on why the normal treaty process was not complied with.³¹

²⁷ Article 18, VCLT.

²⁸ DFAT Treaty Handbook "Signed, Sealed and Delivered", paragraphs 94, 95.

²⁹ See JSCOT website:

http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/ppgrole.htm

³⁰ See JSCOT Report 93: *Treaties tabled on 12 March and 14 May 2008*, September 2008, Appendix C.

³¹ DFAT Treaty Handbook "Signed, Sealed and Delivered", paragraph 108.

When tabled in Parliament, the text of a proposed Category 1 or 2 treaty is accompanied by a National Interest Analysis (NIA), which explains why the Government considers it appropriate to enter into the treaty.³² Treaties which affect business or restrict competition are also required to be tabled with a Regulation Impact Statement (RIS).³³

f. Entry into force

Treaties become binding once they 'enter into force'. The way they come into force depends on the terms of the particular treaty.

Bilateral treaties

Australia's usual approach for bilateral treaties is signature, followed by an exchange of diplomatic notes indicating that all domestic requirements have been completed to bring the treaty into force.³⁴

Multilateral treaties

Multilateral treaties are usually open for signature for a specified length of time. Ratification is then carried out by depositing an instrument with a government or international organisation, as specified by the treaty. Some treaties only come into force once they have been ratified by a certain number of countries.

If Australia was not an original signatory to the treaty, it can only become a party by the process of accession, which is a single and binding step.

7. Options for implementing legislation

Any legislation (whether Commonwealth, state or territory) required for Australia to meet its treaty obligations, and any changes to administrative practices of agencies, must be in place before a treaty enters into force.³⁵ This means any new legislation must be passed before ratification – it cannot be assumed that the relevant Parliament/s will necessarily pass implementing legislation after the treaty is ratified.

When is legislation required?

According to the AGD, implementing legislation is only required:

- if it is necessary to give effect to the treaty;
- to impose obligations on individuals;
- to invest individuals with additional rights;
- to otherwise affect the rights of individuals under Australian law; or
- if the treaty requires a government to spend or forego money.

Which government should legislate?

Relevant factors as to which level/s of government will legislate include;

- constitutional limitations;
- costs and administration;
- the availability of existing infrastructure;
- timeliness; and
- the subject matter of the treaty.

³² A pro-forma NIA forms Annex 1 to DFAT's Treaty Handbook "*Signed, Sealed and Delivered*".

³³ DFAT Treaty Handbook "*Signed, Sealed and Delivered*", paragraphs 10, 36-38.

³⁴ DFAT Treaty Handbook "*Signed, Sealed and Delivered*", paragraphs 14, 129-133.

³⁵ DFAT Treaty Handbook "*Signed, Sealed and Delivered*", paragraphs 13, 120.

Form of implementing legislation

Implementing legislation may take several different forms, including:

- providing that certain provisions of a treaty are incorporated into Australian law – eg. s.7 of the *Diplomatic Privileges and Immunity Act 1967* (Cth), which implemented certain provisions of the *Vienna Convention on Diplomatic Relations 1969*;
- recasting relevant provisions of a treaty into legislation – eg *Racial Discrimination Act 1975* (Cth) – this method allows for greater clarity in giving effect to the treaty in Australia;
- including relevant provisions of a treaty as a schedule to legislation, although there needs to be some wording in the Act to give the treaty legal force; or
- including treaty provisions in regulations – eg. *Charter of the United Nations Act 1945* (Cth) – which provides that regulations may be made under that Act to give effect to UN Security Council Sanctions.

8. Consultation mechanisms

a. States and Territories

i. Principles and Procedures

The '*Principles and Procedures for Commonwealth-State Consultation on Treaties*' were first adopted in 1992, and amended as a part of the 1996 reforms.³⁶ A copy is attached at Annexure 2.

Commonwealth to consult 'wherever practicable'

The '*Principles and Procedures*' apply to treaties of sensitivity and importance to the states and territories.³⁷ They state that in the interests of achieving the best possible outcome for Australia, the Commonwealth should wherever practicable, seek and take into account the views of the states and territories in formulating Australian negotiating policy, before becoming a party to, or indicating its acceptance of a treaty or instrument.³⁸

States' responsibilities

According to the '*Principles and Procedures*', states and territories are responsible for the timely development of their own whole-of-government position on treaty consultations and, if appropriate, development of a consolidated states/territories position.³⁹ States and territories are also responsible for advising the Commonwealth of key contacts for consultation.⁴⁰

Consultation methods

Section 4 of the '*Principles and Procedures*' sets out the means through which information about treaties is provided to jurisdictions, including communication with the Premier's Department, the provision of a 6-monthly list of current treaty negotiations, early consultation on NIA's and reports on the outcome of international negotiations.⁴¹ This information helps jurisdictions decide whether to send a delegate to particular negotiations, at their own cost.⁴²

Section 5 outlines the mechanisms available for consultation with the states and territories. These include the Treaties Council, the SCOT and other Ministerial Councils. There is further information on each of these below.

³⁶ The '*Principles and Procedures*' were adopted by COAG at its meeting in Canberra, 14 June 1996.

³⁷ '*Principles and Procedures*' Part A, paragraph 2.1.

³⁸ '*Principles and Procedures*' paragraph 3.1.

³⁹ '*Principles and Procedures*' paragraph 3.3.

⁴⁰ '*Principles and Procedures*' paragraph 3.4.

⁴¹ '*Principles and Procedures*' paragraphs 4.1 & 4.2.

⁴² '*Principles and Procedures*' Section 6.

Implementation In relation to implementation, the *'Principles and Procedures'* provide that before the Commonwealth becomes a party to any international treaty of particular sensitivity and importance to the states, the Commonwealth and the states and territories will consult in an effort to secure agreement on the manner in which the obligations incurred should be implemented. States and territories are also to be consulted on the preparation of reports to international bodies.⁴³

'Federal clauses' The *'Principles and Procedures'* also outline Australia's current position on the inclusion of 'federal clauses' in treaties. In the past, the intention of these clauses was to modify the treaty obligations for federations. With the articulation of a broad 'external affairs' power in the 1980's, Australia could not maintain that its federal structure created any constitutional limitation on the implementation of treaties.⁴⁴ The practice of seeking the inclusion of federal clauses disappeared, however Australia does still sometimes make a federal declaration or statement, which does not modify the legal obligations under the treaty.⁴⁵

ii. Standing Committee on Treaties (SCOT)

SCOT was established in 1991, and reformed in 1996. Its terms of reference are set out in the *'Principles and Procedures'*.⁴⁶

SCOT membership & role

It consists of Commonwealth, state and territory officers who meet twice a year, normally in May and October. It is chaired by PM&C.

SCOT's role is to identify treaties and other international instruments of sensitivity and importance to the states and territories and:

- decide whether there is a need for further consideration by another intergovernmental body;
- monitor and report on the implementation of particular treaties where implementation has strategic implications and cross-portfolio interests for states and territories;
- ensure that appropriate information is provided to the states and territories; and
- coordinate the required process for nominating state and territory representatives on delegations where appropriate (usually done by an email to SCOT officers).

SCOT officers across jurisdictions regularly communicate and share information on treaty matters.

iii. Treaties Council⁴⁷

The Treaties Council was established by COAG on 14 June 1996. It consists of the Prime Minister, Premiers and Chief Ministers. The Prime Minister is the Chair.

The Treaties Council has an advisory function, and its role is to consider treaties and other international instruments of particular sensitivity and importance to the states and territories. Although it was intended to meet at least once a year, the Treaties Council has only met once, in November 1997 to discuss the World Trade Organisation (WTO) Agreement on Government Procurement and the draft United Nations Declaration on the Rights of Indigenous People.

⁴³ *'Principles and Procedures'*, Section 7.

⁴⁴ Blay, S Piotrowicz and Tsamenyi, M (Eds) *Public International Law: An Australian Perspective*, p.112.

⁴⁵ See *'Principles and Procedures'* Section 8.

⁴⁶ *'Principles and Procedures'* paragraphs 5.4-5.5.

⁴⁷ See paragraph 5.1-5.3 of the *'Principles and Procedures'*.

iv. COAG

COAG is the peak inter-governmental forum in Australia. It comprises the Prime Minister as Chair, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association (ALGA). The role of COAG is to promote policy reforms that are of national significance, or which need co-ordinated action by all Australian governments.

COAG meets as needed, usually once or twice a year. COAG can also settle issues out-of-session by correspondence. The COAG Senior Officials Meeting (SOM), comprising heads of the relevant Commonwealth, state and territory central agencies and the Chief Executive Officer of the ALGA, also meets as needed, prior to COAG.

A treaty issue of a significantly high level may be discussed by COAG, although this has not occurred recently. The Report of the Treaties Working Group (TWG) (see section 9(a) below) was requested and considered by COAG SOM.

v. COAG Councils

At its meeting on 13 February 2011, COAG agreed to establish a new system of Ministerial Councils.⁴⁸ There are three types of Council:

- standing councils, which are ongoing and address issues of national significance;
- select councils, which are reform focussed and time-limited; and
- legislative and governance fora, which oversee responsibilities set out in legislation, intergovernmental agreements and treaties outside the scope of standing councils.

COAG Councils facilitate consultation and cooperation between the Commonwealth and states and territories in specific policy areas. Councils pursue and monitor priority issues of national significance and take joint action to resolve issues that arise between governments. Councils also develop policy reform for consideration by COAG and oversee the implementation of policy reforms agreed by COAG.

Membership of COAG Councils generally encompasses responsible Ministers from the Commonwealth, states and territories. In general, they meet face-to-face twice a year, and may also settle issues out-of-session. Officials meet prior to Council meetings.⁴⁹

Treaties and other international instruments are often discussed and/or overseen by COAG Councils.⁵⁰ For example:

- the Standing Committee on Law and Justice (SCLJ) is regularly consulted about human rights treaties and their implementation in Australia – particularly legislative requirements. For example, the SCLJ is currently overseeing the implementation of Optional Protocol to the Convention Against Torture in Australia. The Tasmanian Attorney General represents Tasmania on the SCLJ, supported by the Department of Justice;
- the Standing Council on Police and Emergency Management (SCPEM) considers issues relating to international crime, cybercrime and security. The Tasmanian Minister for Police and Emergency Management represents Tasmania on SCPEM, supported by the Department of Police and Emergency Management;

Examples of
treaty issues
dealt with by
COAG
Councils

⁴⁸ COAG Communique, 13 February 2011 available online at [http://www.coag.gov.au/node/77#Ministerial Council Reform](http://www.coag.gov.au/node/77#Ministerial_Council_Reform)

⁴⁹ Further information on the COAG Councils, a list of the Councils and the *Handbook for COAG Councils* is available on the COAG website: http://www.coag.gov.au/coag_councils.

⁵⁰ See 'Principles and Procedures' paragraphs 5.6 – 5.9.

- the Select Council on Workplace Relations considers issues relating to ILO Conventions. The Tasmanian Minister for Workplace Relations attends this Council, supported by the Department of Justice.

Other relevant Councils include the Standing Council on Community and Disability Services, the Select Councils on Climate Change, Disability Reform and Women's Issues.

b. The Joint Standing Committee on Treaties (JSCOT)

JSCOT is a committee with members drawn from the House of Representatives and the Senate, appointed by the Commonwealth Parliament to review and report on all treaty actions proposed by the Commonwealth Government before action is taken binding Australia to the terms of the treaty.

The Committee was first established in 1996 and it is re-constituted with every new Commonwealth Parliament.

i. Appointment and membership

JSCOT's
role

JSCOT's resolution of appointment⁵¹ empowers it to inquire into and report upon:

- matters arising from treaties and related NIAs, and proposed treaty actions presented to Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - either House of Parliament;
 - a Minister;
- such other matters as may be referred to the committee by the Minister for Foreign Affairs, and on such conditions as the Minister may prescribe.

The Committee consists of 16 members, made up of representatives of parties in both Houses of the Commonwealth Parliament. The Government has a majority and the Chair is always a Government member.⁵²

The phrase 'treaty actions' has been broadly interpreted by JSCOT. It considers both multi and bilateral treaties, and actions ranging from entering into new treaties, to amendments and withdrawals from existing treaties.

ii. JSCOT's inquiry process

Once a treaty is tabled in the Commonwealth Parliament, JSCOT must review it within the defined 15 or 20 sitting day period, although extensions are possible in exceptional circumstances.

JSCOT advertises its reviews on its website and invites comments from anyone with an interest in the subject matter of the treaty action, including state and territory governments.

JSCOT's
powers

The review process generally involves an examination of the relevant NIA, public submissions and a public hearing on the treaty. JSCOT has the power to call witnesses and order production of documents. Those called to address the committee include

⁵¹ Available online at:

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/index.htm

⁵² A list of the current members of JSCOT is available on the JSCOT website:

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/members.htm

representatives from government departments, non-government and other private organisations and any other individuals whom the committee considers appropriate.

At the end of the process, JSCOT issues a report containing recommendations on whether binding treaty action should be taken.⁵³ The usual practice is for a single report to include reviews of a number of treaties tabled at the same time. JSCOT has also produced a number of single issue reports – including reports on the Kyoto Protocol and Nuclear Non-Proliferation and Disarmament.

The members of JSCOT seem to prefer consensus outcomes and do not regularly issue majority and dissenting reports. Despite JSCOT having a majority of Commonwealth Government members, on occasion its reports have been critical of Government actions in relation to treaties. Most criticism has been levelled at inadequate consultation by the lead Commonwealth agency⁵⁴, and insufficient information being provided to JSCOT⁵⁵. JSCOT has also scrutinised NIAs and criticised them when they fail to meet required standards.⁵⁶

To date, JSCOT has almost always made recommendations in line with Commonwealth Government policy. In the 70 reports (and over 300 treaties) considered to 1 January 2006 for example, JSCOT recommended against ratification only 3 times.⁵⁷ JSCOT has however recently recommended against ratification of the Anti-Counterfeiting Trade Agreement, until certain conditions set out in its report are met.⁵⁸ In this context it is important to remember that JSCOT reports are advisory only. The final decision on whether to ratify a treaty rests with the Executive.

Once JSCOT has tabled its report in the Parliament, the Commonwealth Government may issue a response to the report. Government responses are available on the JSCOT website.

9. Further reform to the treaty making process:

a. 2007 Report of the Treaties Working Group

In May 2004, COAG Senior Officials agreed to review the arrangements for Commonwealth-state consultation on treaties.

Commonwealth, state and territory representatives formed a COAG Senior Officials' Treaties Working Group (TWG) to undertake the review, chaired by the Commonwealth. The TWG consulted with key stakeholders, including Commonwealth and state and territory government departments, JSCOT and secretariats of Ministerial Councils.

The TWG produced a "*Report of the Treaties Working Group – September 2007*" detailing its findings. The TWG Report sets out recommendations for the Commonwealth, states and territories, as well as general recommendations for improving the level of consultation and cooperation between jurisdictions. The review did not recommend any changes to the

⁵³ All JSCOT reports are available on its website:

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/reports.htm.

⁵⁴ See for example JSCOT Report 15, June 1998, paragraphs 2.57, 3.34 and Report 14, "*Multilateral Agreement on Investment: Interim Report*, May 1998 paragraphs 1.21-1.42.

⁵⁵ See for example JSCOT Report 14, "*Multilateral Agreement on Investment: Interim Report*, May 1998, paragraphs 1.54-8.

⁵⁶ See for example JSCOT Report 7, "*Australia's withdrawal from UNIDO and Treaties tabled on 11 February 1997*", March 1997 paragraph 3.49.

⁵⁷ Charlesworth, H, Chiam, M, Hovell D, and Williams, G *No Country is an Island: Australia and International Law* UNSW Press 2006, p.45, 152.

⁵⁸ See JSCOT Report 126: *Anti-Counterfeiting Trade Agreement*, 27 June 2012.

'Principles and Procedures', but reinforced the need for all jurisdictions to ensure that they are followed in the appropriate spirit.

The TWG Report was considered by COAG SOM in September 2008. COAG SOM endorsed the report and noted that the recommendations would be addressed through SCOT. A consolidated report on progress, with input from all jurisdictions was considered by COAG SOM out of session in March 2010.⁵⁹

⁵⁹ A copy of the TWG Report and the consolidated response from all jurisdictions are available from the Policy Division of DPAC (see CA295890 and CA295889 in TRIM).

Box 2: Other possible reforms?

During the debate that led to the 1996 reforms, the possibility of requiring parliamentary approval of treaties was considered and left undecided.⁶⁰ Submissions to a review of the treaty reforms in 1999 also raised the issue of parliamentary approval. The then Commonwealth Government considered the issue and concluded parliamentary approval of treaties was not justified.⁶¹ The issue was also raised in a 2003 Senate Inquiry into Australia-US FTA.⁶²

More recently, Independent MP Robert Katter tabled a *Treaties Ratification Bill 2012*, requiring approval of both Houses of Commonwealth Parliament prior to ratification of treaties. The Bill was considered by JSCOT, which recommended against passing the Bill, on the basis that there would be practical and political difficulties associated with the Bill for the Executive, the Parliament and the treaty making process generally.⁶³ JSCOT did however recommend that prior to commencing negotiations for a new agreement, the Government should table in Parliament a document setting out its priorities and objectives, including the anticipated costs and benefits of the agreement.⁶⁴

Some suggest JSCOT could be given an expanded role. It could continue as a joint committee of Parliament, but make greater use of outside assistance, calling independent experts. It could have an earlier role in the treaty making process, providing an opinion on whether the treaty should be signed.⁶⁵ Its powers could also apply to MOUs and other arrangements.

A 1999 JSCOT sponsored seminar on the “Role of Parliaments in Treaty Making” recommended the establishment of an Inter-Parliamentary Working Group on Treaties, consisting of parliamentary representatives from all jurisdictions to meet every 6 months in conjunction with the SCOT processes, to promote public awareness of treaties and encourage wider parliamentary scrutiny of treaty-making. While this proposal received considerable support, it has not been implemented.⁶⁶

The review of treaty reforms in 1999 considered calls to increase the role of the states and territories in the treaty process. The idea of requiring state/territory approval of treaties was rejected, though a continuing commitment to their involvement in treaty negotiations (where relevant) was affirmed.⁶⁷

⁶⁰ See *Trick or Treaty*, Recommendation 11. The Senate Legal and Constitutional Affairs Committee decided that the issues should be referred to the (then proposed) JSCOT for further investigation and consideration, but this has not been progressed.

⁶¹ Department of Foreign Affairs and Trade, *Review of Treaty Making Process*, August 1999, paragraph 5.4.

⁶² Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Inquiry into the General Agreement on Trade in Services and the Australia/US Free Trade Agreement* (2003).

⁶³ See JSCOT Report 128: *Inquiry into the Treaties Ratification Bill 2012*, 15 August 2012, Recommendation 2.

⁶⁴ *Ibid*, Recommendation 2.

⁶⁵ *No Country is an Island: Australia and International Law*, p. 158. This may be difficult in the context of bi-lateral treaties due to their confidential nature.

⁶⁶ JSCOT Report 24, *A seminar on the Role of Parliaments in Treaty Making*, August 1999, paragraphs 3.31-3.32.

⁶⁷ Department of Foreign Affairs and Trade, *Review of Treaty Making Process*, August 1999, paragraph 6.6.

Part C: Tasmania's response to treaty matters

10. Why is it important for Tasmania to respond to treaty matters?

Australia participates in treaty making because it is in the national interest to do so. Where a problem cannot be adequately addressed by a country acting alone, acting cooperatively at the international level becomes essential for a country to protect its own interests.

Relevance to government agencies

Treaties establish the international frameworks and systems for dealing with issues as broad ranging as international investment, trade, climate change and human rights. More and more, treaties cover issues that are relevant to individuals at the domestic level, not just relations between countries. The wide range of subjects covered by treaties means that there is a treaty that is relevant to the subject area of every government agency. Many treaties are relevant across the whole-of-government.

Treaties can provide a useful framework for delivering policy objectives and driving change. For example, Australia recently signed the Optional Protocol to the Convention Against Torture (OPCAT), which provides for a system of regular visits to places of detention by a national body (or bodies) and also by the relevant UN Sub-Committee. The provisions of OPCAT are a useful framework to be considered in developing a custodial inspectorate, should this be introduced in Tasmania.

Direct impact on Tasmania

Treaties can have a direct impact on Tasmania in a number of ways. For example, there may be a requirement to amend legislation or policy to meet new obligations imposed under a treaty. If Tasmania does not respond, the Commonwealth may use the 'external affairs' power to legislate in areas that have traditionally been the responsibility of states. There may also be costs associated with implementing treaty arrangements and requirements to report on treaty implementation.

Tasmania therefore has a key interest in responding to treaty matters and ensuring that internal processes are in place to allow for adequate consultation with relevant line agencies to develop a whole-of-government position and raise matters about the policy implications associated with treaty actions. Tasmania has an opportunity to influence and inform the Commonwealth's position on treaty negotiations and reach agreement on implementation issues, including legal, financial and administrative arrangements.

11. The process of preparing Tasmanian responses

The Policy Division of DPAC has responsibility for coordinating whole-of-government responses to treaty matters, with input from relevant Tasmanian Government agencies.

Format of requests

Requests for Tasmanian input to treaty matters are normally received via the SCOT e-mailbox, which is administered by the Policy Division. Depending on the nature of the request, formal correspondence may also be sent to the Premier and/or another relevant Minister. An electronic version is usually emailed to the SCOT mailbox at the same time, so that work can commence in a timely manner. Most Commonwealth agencies follow this approach and are reminded to do so through SCOT from time to time.

a. DPAC Policy Division guidance

The Policy Division will analyse the particular request and assess which agencies need to be consulted, depending on the subject matter of the request. The *Administrative Arrangements Order (No.2) 2012* (Tas) can be helpful in determining which agency is responsible for Tasmanian legislation. Arrangements are in place to consult with agencies through key contacts.

The Policy Division will also consider whether there are any units within DPAC that should be consulted, such as the Social Inclusion Unit, Community Development Division, Office of Aboriginal Affairs, Tasmanian Climate Change Office and/or the Local Government, Security and Emergency Management Division. Requests to other DPAC units should always be sent (or at least copied) to the Director of the relevant unit or Division.

Often requests vary in urgency and importance. The Policy Division will use its discretion in judging how, and at what level, to liaise with agencies. For example, if the request is for factual information on Tasmanian programs or legislation, or for a preliminary Tasmanian position when there will be further opportunity to comment formally at a later stage, the Policy Division will generally send a request for input to key agency contacts via email. If formal correspondence is received at Ministerial level, seeking Tasmania's position on a particular treaty, the Policy Division will generally request input from agencies through a formal memo to Heads of Agency. Depending on the urgency of the request, advance warning may also be sent to key agency contacts via email, so that work can commence quickly.

The Policy Division will provide as much guidance as possible to agencies on the level of detail required for the response, and will try to delineate the scope of information being requested from each agency, so there is no duplication. Where there has been a previous or similar request, the Policy Division will clarify why another request has been generated and, where possible, provide a copy of any earlier material so that it can be updated or amended as appropriate.

For more complex matters, the Policy Division can prepare templates for agency input (often by adapting what is provided by the Commonwealth), to make the process of responding as efficient as possible.⁶⁸ The Policy Division can also negotiate timeframes and the extent of information required with the Commonwealth.

b. Clearance requirements

Once input is received from agencies, the Policy Division will prepare a consolidated response to the relevant Commonwealth agency or Minister. The Policy Division will also prepare the necessary Minute or Briefing Note for the Premier or Secretary.

The general rules in relation to clearance levels for treaty responses, are as follows:

- correspondence generated by a Minister seeking endorsement of a policy or advice on the Government's position should be responded to by the Premier (and/or relevant portfolio Minister);
- an officer level request for information should be signed off by the Head of Agency or Deputy-Secretary - for example, requests for factual information on Tasmania's programs, policies or legislation for inclusion in an Australian report on a treaty [NB. the response should always be from Secretary to Secretary, attention of the relevant officer];
- follow up requests, requests of a minor nature or where Tasmania has 'no comment', depending on the nature of the request and level of risk, an email response can be provided from the Policy Division, with Director level clearance.

⁶⁸ The following are some examples of templates created for agency responses: CA280287, CA263723, CA184694, CA255313, CA200380, CA173522.

12. Tips for Tasmanian Government agencies

The following tips may be useful for agencies to assist in responding to treaty matters:

- | | |
|---------------------------------|--|
| Key contacts | <ul style="list-style-type: none">• agencies should provide a key contact for treaty matters who has a good general knowledge of the responsibilities and working areas of the agency, so requests can be distributed quickly to relevant parts of the agency;• consider all parts of your agency which may have a view or comment on the subject matter of the request – including any independent statutory offices whose functions fall within the relevant portfolio – for example, the Commissioner for Children or the Anti-Discrimination Commissioner;• agencies should email the Policy Division (scot@dpac.tas.gov.au) if there is a change of key contact, or arrange an alternative if the key contact is going to be away for an extended period of time; |
| Commonwealth requests | <ul style="list-style-type: none">• requests for input to treaty matters usually come through DPAC, but individual Commonwealth agencies/Ministers may write separately to Tasmanian agencies or Ministers. If this occurs, inform the Policy Division, which can coordinate a whole-of-government response, if necessary. In some instances, it might be appropriate for a request to be handled by a particular agency - this can be determined through discussions between the Policy Division and the agency concerned; |
| Deadlines | <ul style="list-style-type: none">• if a request for input is unclear or a deadline for response is impractical, the Policy Division can liaise with the Commonwealth agency to seek clarification or negotiate an extension;• if you receive a request for input and there is a more appropriate agency to respond, let the Policy Division know as soon as possible; |
| Level of detail required | <ul style="list-style-type: none">• usually the information required is high level - short, succinct responses that address the question, with links to relevant legislation or websites, are generally sufficient. If more detailed information is required, the Policy Division will contact you; |
| Clearance requirements | <ul style="list-style-type: none">• it is important that you obtain an appropriate level of clearance for the information provided by your agency – depending on the level of request, this could be Director level or Deputy Secretary/Head of Agency clearance. Information provided by business units within DPAC must be cleared by the Director of the relevant division. General rules on clearance are set out in section 11 above. |

13. Examples of treaty requests received by Tasmania

a. Signature/ ratification and preparation of NIAs

The Commonwealth Government consults with the Tasmanian Government when it is considering signing or ratifying a treaty that will have an impact on states and territories. Tasmania is asked whether it agrees to Australia signing the treaty and the implications this will have for Tasmania – for example, whether legislation or policies would have to be changed to comply with the treaty. Often Tasmania is also asked to comment on draft NIAs. Tasmania is consulted as negotiations progress, and if there are steps required to implement the treaty, the Commonwealth will continue to liaise closely with states and territories prior to ratification.

b. Existing human rights treaties

Australia has ratified a number of core international human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Racial

Discrimination, the Convention Against Torture, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child and the Disabilities Convention.⁶⁹

Most human rights treaties establish a committee responsible for supervising countries' obligations under the treaty. The committees can make 'general comments' or 'general recommendations' to guide countries in their implementation of the treaty concerned, but the committee's decisions are not binding.

The AGD sends out a schedule of upcoming actions on human rights treaties, usually in conjunction with SCOT meetings. The Policy Division will send this out to agency contacts for their information.

i. Australia's reporting obligations

Under each of the major human rights conventions, Australia is required to submit reports to the relevant treaty committee.⁷⁰ The Commonwealth should consult with states and territories in the preparation of reports to international bodies, because there are subject areas under treaties which are the responsibilities of states and territories.⁷¹

The process of preparing Australia's report is usually as follows:

Tasmanian
input – draft
to reports

- Tasmania is asked to provide input to the Australian report - this can be requested anywhere up to 12 months before the report is due to the committee to allow adequate time for input, Ministerial approvals and translation;
- the relevant Commonwealth agency will collate information and prepare a draft of Australia's report – as a part of this Tasmania may be asked for follow up information, or further detail on a particular issue;
- a draft of the report is provided to Tasmania for comment.

A report will generally cover a specific period – usually 2-4 years. The Policy Division will obtain input on Tasmanian legislation, policies and programs from Tasmanian Government agencies. When the draft is sent for comment, usually this is an editing process – Tasmania is asked to check that the process of compiling the report has not resulted in any unacceptable changes. The Policy Division will review the draft to ensure consistency, and send to relevant agencies for comment if necessary.

ii. Committee hearings

Once reports are lodged there is a hearing before the relevant UN committee. There are 4 main areas in this process where state/territory input is requested:

List of Issues

- the committee will review Australia's report and prepare a formal List of Issues for Australia (ie. a list of further questions or areas the committee would like information on). Tasmania is usually asked to have input to Australia's response to the List of Issues;

Delegation
Briefing

- the relevant Commonwealth agency will prepare a briefing for the Australian delegation appearing before the committee. Tasmania may be asked to have input to the briefing. This might include updating information in the original report and

⁶⁹ Information on each of these treaties is contained in the Commonwealth Government's publication *In Our Hands: A Guide to Human Rights for Australian Public Servants*, September 2011 available online at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Pages/default.aspx>. There are also guidance sheets on human rights.

⁷⁰ Information on Australia's obligations and previous reports is available on the AGD website: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Humanrights.aspx>

⁷¹ 'Principles and Procedures', paragraph 7.2

- addressing any issues that have been raised by NGOs, who sometimes prepare what is called a 'shadow report' to the committee;
- Hearing Date**
- during the actual hearing, Tasmania will be asked to provide a key contact person (including after-hours numbers) in case the committee asks further questions that require state/territory input during the hearing;
- Concluding Observations**
- once the hearing has been conducted, the committee will issue its 'Concluding Observations' which make recommendations relating to Australia's compliance with the treaty. Tasmania is usually asked to comment on the Concluding Observations, for input to Australia's response. The Concluding Observations are normally addressed in the next reporting cycle, however sometimes the relevant committee asks for a response to particular 'Concluding Observations' within a shorter timeframe.

As a useful tip, it is helpful for the Policy Division to give advance warning to agencies of the committee hearing date (usually over a 2 day period) and the possibility of urgent requests for information.

It is worth noting that, for some treaties (currently the Convention Against Torture and the International Covenant on Civil and Political Rights), Australia has agreed to adopt a streamlined reporting process whereby the relevant committee produces a 'List of Issues Prior to Reporting.' This is based on previous reports and appearances and other sources. Australia's response to the List of Issues forms its periodic report.

iii. Possibility of individual complaints

A number of human rights treaties (or their optional protocols) allow individual or group complaints to be made to the relevant committee. Australia has taken the necessary steps to permit such complaints (called 'communications') to the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture and the Committee on the Rights of Persons with Disabilities. Domestic avenues must have been exhausted before an individual or group can make a complaint to the UN.

A number of individual complaints have been made to treaty committees by Australians. The first successful communication to a treaty body by an Australian resident came from Nick Toonen, a Tasmanian, discussed in Box 1 (p.8). In the event that there is another complaint relating to Tasmania, Australia's response would be coordinated by the relevant Commonwealth agency, with input from Tasmania.

c. Treaties tabled in Parliament – JSCOT review

When treaties are tabled and referred to JSCOT, an email inviting a submission to JSCOT is usually sent to the SCOT email box, and the Premier receives a formal letter requesting comment. Treaties will be forwarded to relevant agencies for consideration.

JSCOT submissions Generally, commenting through the JSCOT process is the last resort for states and territories if they have particular concerns with a treaty. If the consultation processes have been working properly (ie. SCOT briefings, opportunity to comment on draft NIAs etc), concerns will have been raised earlier in the process and outstanding issues should be reflected in the NIA.

If it is necessary to make a submission to JSCOT, a copy of JSCOT's submission guidelines is available online.⁷²

⁷²http://www.aph.gov.au/Parliamentary_Business/Committees/Getting_Involved_in_Parliamentary_Committees

d. Foreign Investment Review Board (FIRB) proposals

FIRB and Treasury's role

The Tasmanian Department of Treasury and Finance is responsible for co-ordinating whole-of-government responses to applications made to the Australian Government's FIRB. Treasury emails these proposals to DPAC and the Department of Economic Development, Tourism and the Arts for comment (and other agencies if appropriate).

The proposals usually relate to confidential mergers or acquisitions involving a foreign company, which are required to be approved by the Australian Treasurer.

DPAC will normally only comment where it can add value. The Policy Division will consider whether the companies involved have a direct link to, or presence in Tasmania. If they do, the proposal could have negative impacts on the State. For example, does the proposal include reference to maintaining the existing workforce, enhancing the operation or investing further? Responses can be sent to Treasury by email. There is generally no need for Director level involvement unless the proposal is particularly sensitive for Tasmania.

e. AusAID reporting

DPAC receives a biannual (June and December) email request from the Australian Agency for International Development (AusAID) to collate information from all State Government agencies on their financial flows to developing countries. All agencies (including the DPAC Finance Division) are consulted. The Policy Division uses the information received from agencies to complete an AusAID template spreadsheet, detailing actual and estimated expenditures for the reporting periods specified. As a general rule, most agencies have nothing to report, but usually one or two will have made a donation or provided in-kind support in the reporting period.

14. Trade matters

DEDTA's role

The Department of Economic Development, Tourism and the Arts (DEDTA) has general responsibility for international trade matters affecting Tasmania. The General Manager, Sectors, Trade and Migration, is a key contact for trade matters.

DFAT usually sends correspondence on trade matters to the General Manager in DEDTA and the SCOT contact in DPAC. DFAT also sends a forward schedule of upcoming trade matters prior to SCOT meetings. This should be distributed to agency contacts as appropriate.

Treasury's role in procurement issues

The Department of Treasury and Finance represents Tasmania on the International Procurement Consultative Group, a group coordinated by the Australian Procurement and Construction Council, which deals with government procurement issues associated with Free Trade Agreements (FTAs). Treasury should be consulted on all government procurement issues relating to FTAs.

It is also important to consult the Manager of the Property and Procurement Branch of DPAC in relation to trade matters.

If a whole-of-government response is required, DPAC will usually coordinate the response in consultation with relevant agencies. For example, Tasmania may be asked to endorse a market access offer under a proposed FTA, endorse a government procurement chapter or provide a list of 'Non-Conforming Measures' (ie legislation that does not comply with the obligations under the FTA).

DFAT runs an annual course on FTA negotiation. It is useful for officers within the Policy Division to attend this if they are closely involved in responding to trade matters.

Information on Australia's trade priorities and FTA's is available on the DFAT website: <http://www.dfat.gov.au/trade/index.html>.⁷³

15. SCOT meetings – preparation and tips

SCOT meetings occur twice a year, usually in May and October.

The process leading up to the SCOT meeting is usually as follows:

- 1 month prior: PM&C sends schedules of all the bilateral and multilateral treaties that are currently under negotiation or review. Individual written briefings are also sent for new treaties or particular treaties that have an impact on states and territories;
- 3 weeks prior: states and territories are invited to request additional written briefings, based on the information in the schedules;
- 2 weeks prior: additional briefings are provided by PM&C;
- 1 week prior: states and territories are requested to provide agenda items;
- 2-3 days prior: agenda is provided.⁷⁴

Meetings are usually held by telepresence. Commonwealth officials from a range of agencies (eg DFAT and AGD) provide briefings and updates to the meeting, and states and territories have the opportunity to ask questions and raise treaty issues.

Depending on items on the SCOT agenda, it may be useful to consult with relevant Tasmanian Government agencies and SCOT officers in other jurisdictions prior to the SCOT meeting. It is also useful to send a list of the briefings to Tasmanian agencies so they can request copies if they are interested in the subject matter. On return from the meeting, it is also good practice to send a brief update by email to agencies on relevant matters raised at the SCOT meeting, including upcoming consultations and likely timeframes.

16. Policy Division – Administration

Administrative procedures for the Policy Division of DPAC are set out in Annexure 3.

⁷³ DFAT's submission to the Productivity Commission's *Review of Bilateral and Regional Trade Agreements* (April 2010) is also a good resource on Australia's trade policy priorities and the benefits of current FTAs. It is available on-line at: <http://www.pc.gov.au/projects/study/trade-agreements> (see Submission No 53).

⁷⁴ Sample SCOT agendas are in TRIM: see CA463637 (October 2012) and CA435434 (May 2012); CA392066 (October 2011). Minutes are CA467060, CA455577 and CA408191 respectively.

Acronyms and Definitions

- AANZFTA** – Australia – ASEAN – New Zealand Free Trade Agreement
- ALGA** – Australian Local Government Association
- ANZCERTA** – Australia New Zealand Closer Economic Relations Trade Agreement
- APEC** – Asia Pacific Economic Cooperation Forum
- APCC** – Australian Procurement and Construction Council
- ASEAN** – Association of Southeast Asian Nations
- AUSFTA** – Australia-United States Free Trade Agreement
- AGD** – Attorney General's Department
- CAT** – Convention Against Torture, Cruel or Inhuman or Degrading Treatment or Punishment
- CBD** – Convention on Biological Diversity
- CEDAW** – Convention on the Elimination of All Forms of Discrimination Against Women
- CERD** – Convention on the Elimination of All Forms of Racial Discrimination
- COAG** – Council of Australian Governments
- COAG SOM** – Council of Australian Governments Senior Officials Meeting
- CROC** – Convention on the Rights of the Child
- DFAT** – Department of Foreign Affairs and Trade
- DPAC** – Department of Premier and Cabinet, Tasmania
- ExCo** – Federal Executive Council
- FIRB** – Foreign Investment Review Board
- FTA** – Free Trade Agreement
- GATS** – General Agreement on Trade in Services
- GATT** – General Agreement on Tariffs and Trade
- HREOC** – Human Rights and Equal Opportunity Commission
- IAFTA** – Indonesia – Australia FTA
- ICC** – International Criminal Court
- ICCPR** – International Covenant on Civil and Political Rights
- ICESCR** – International Covenant on Economic, Social and Cultural Rights
- ICJ** – International Court of Justice
- ILO** – International Labour Organisation
- IPCG** – International Procurement Consultative Group
- JSCOT** – Joint Standing Committee on Treaties
- MAFTA** – Malaysia-Australia Free Trade Agreement
- MLC** – Maritime Labour Convention
- MOU** – Memorandum of Understanding

NIA – National Interest Analysis

NGO – Non Government Organisation

OPCAT – Optional Protocol to the Convention Against Torture, Cruel or Inhuman or Degrading Treatment or Punishment

PM&C – Prime Minister and Cabinet

'Principles and Procedures' – Principles and Procedures for Commonwealth-State-Territory Consultation on Treaties

RIS – Regulation Impact Statement

TAFTA – Thailand-Australia Free Trade Agreement

TWG – Treaties Working Group

SAFTA – Singapore-Australia FTA

SCLJ – Standing Committee on Law and Justice

SCOT – Standing Committee on Treaties

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDRIP – United Nations Declaration on the Rights of Indigenous People

VCLT – Vienna Convention on the Law of Treaties

WTO – World Trade Organisation

UNCAC – United Nations Convention Against Corruption

UNHCR – United Nations High Commissioner for Refugees

UNHRC – United Nations Human Rights Committee

UPR – Universal Periodic Review

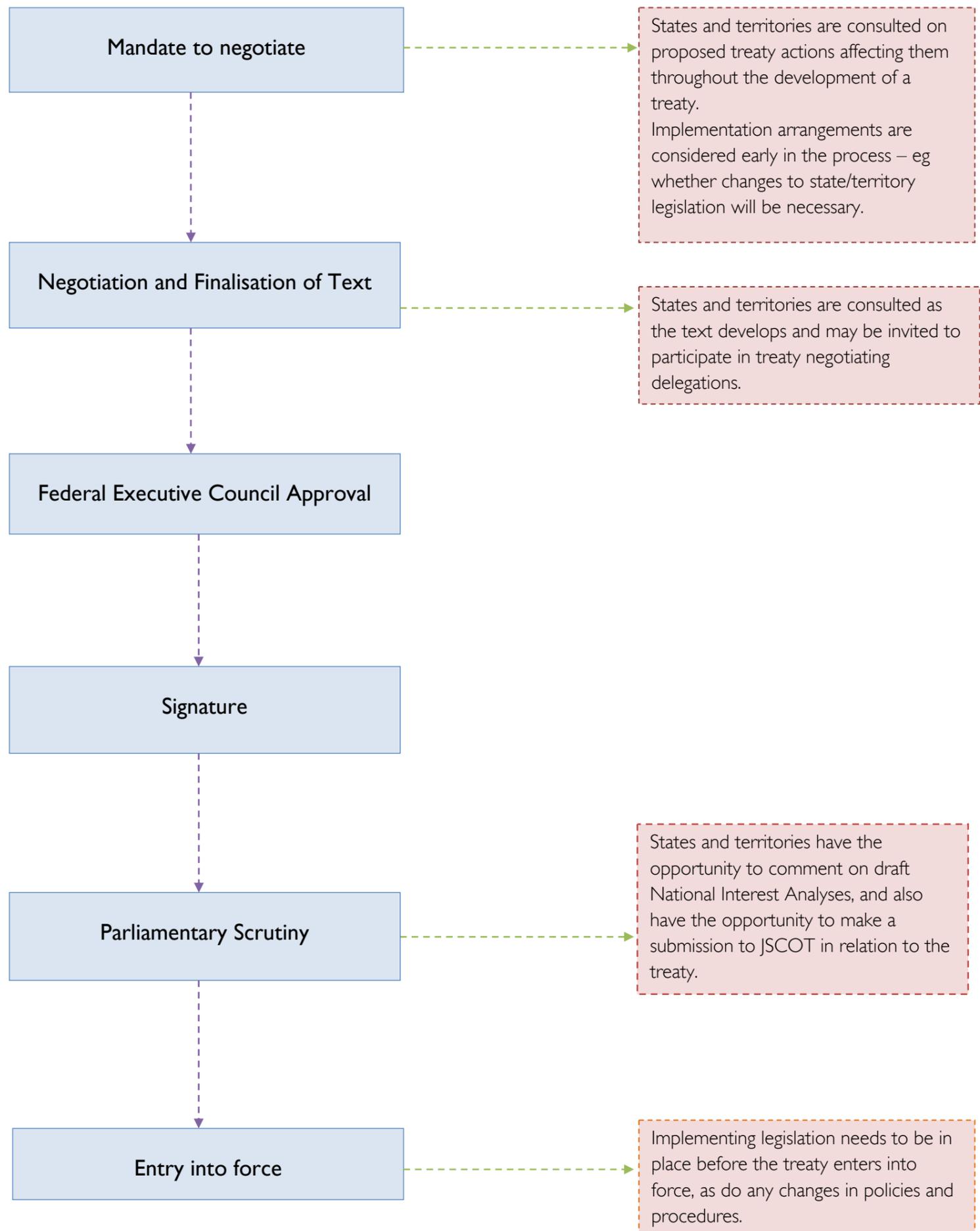
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Useful Websites

- Attorney General's Department: www.ag.gov.au
- Department of Foreign Affairs and Trade: www.dfat.gov.au
- Australian Treaties Library: www.austlii.edu.au/au/other/dfat
- DFAT Australian Treaties Database: www.dfat.gov.au/treaties/index.html
- JSCOT:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/index.htm
- United Nations Treaty Collection: <http://treaties.un.org>

STAGES OF THE TREATY MAKING PROCESS



Principles and Procedures for Commonwealth-State Consultation on Treaties

Part A: Introduction and Principles

These principles and procedures are adopted subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.

1 Introduction

1.1 The Council of Australian Governments agreed at its meeting in June 1996 that this set of Principles and Procedures should be adopted in order to achieve the best possible outcome for Australia in the negotiation and implementation of international treaties. They update those adopted in 1992.

2 Instruments covered by these Principles and Procedures

2.1 These Principles and Procedures relate to treaties of sensitivity and importance to the States and Territories.

2.2 Treaties are multilateral, limited party (plurilateral and trilateral) or bilateral agreements which create legally binding obligations under international law. Treaties pertaining to matters of national security are excluded from these Principles and Procedures.

2.3 Having regard to these Principles and Procedures, the Commonwealth will inform the States and Territories of other international instruments where they cover matters of sensitivity and importance to the States and Territories such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.

3 Principles

3.1 In the interests of achieving the best possible outcome for Australia, and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Commonwealth should, wherever practicable, seek and take into account the views of the States and Territories:

- in formulating Australian negotiating policy, and
- before becoming a party to, or indicating its acceptance of, that treaty or instrument.

The Commonwealth should then also keep the States and Territories informed of the determined policy.

3.2 The consultative process will be continued through to and include the stage of implementation, if any.

3.3 The States and Territories will each be responsible for the timely development of their own whole of government position with respect to any aspect of the consultation and, where they choose, for the development of a consolidated States and Territories position.

3.4 The States and Territories will establish and advise the Commonwealth on the appropriate channels of communication, and persons responsible for consultation, to ensure that the Commonwealth can discharge its international responsibilities in a timely manner.

Part B: Procedures

4 Information

- 4.1 The Commonwealth will inform States and Territories in all cases and at an early stage of any treaty discussions in which Australia is considering participation. Where available, information on the long-term treaty work programs of international bodies will be provided to the States and Territories.
- 4.2 There will be various ways in which information on treaty negotiations is provided to the States and Territories.
- (a) Information about treaty discussions is forwarded to Premiers'/Chief Ministers' Departments or Cabinet Offices on a regular basis through the Department of the Prime Minister and Cabinet and the Treaties Secretariat of the Department of Foreign Affairs and Trade. One vehicle for making information about current treaties and negotiations available will be the Treaties Schedule.
 - (b) The Commonwealth will provide the States and Territories every six months with a list of current and forthcoming negotiations (forecasting 12 months ahead) and of matters under consideration for ratification, accession etc. Updates of this list will be provided at three monthly intervals.
 - (c) National Interest Analyses (NIAs) will be prepared by the Commonwealth for all treaties. States and Territories will be consulted at an early stage in the preparation of NIAs in relation to those treaties in which they have a major interest. NIAs will be finalised in time for tabling in Parliament. NIAs will represent the best understanding of the Commonwealth at the time they are prepared. A National Interest Analysis which includes the elements in the NIA pro forma (Appendix I) will accompany each treaty tabled in Parliament.
 - (d) the Commonwealth will whenever practicable provide States and Territories with a report on the outcome of international negotiating sessions which are of sensitivity and importance to the States and Territories. These may be provided on a confidential basis.
- 4.3 The provision of the above information will not affect the flow of information on treaties to the States and Territories which occurs on an ongoing basis from the time that negotiations begin.

5 Consultation mechanisms

The Treaties Council

- 5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers. The Treaties Council will have an advisory function.
- 5.2 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. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council. The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.

- 5.3 The Treaties Council will meet at least once a year. The Prime Minister will chair the meetings, with the Minister for Foreign Affairs in attendance when appropriate. Meetings of the Treaties Council will normally take place at the same time and place as COAG.

Standing Committee on Treaties

- 5.4 There will be a Standing Committee on Treaties consisting of senior Commonwealth and State and Territory officers which will meet twice a year, or more often if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories and:

- decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements;
- monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories;
- ensure that appropriate information is provided to the States and Territories; and
- co-ordinate as required the process for nominating State and Territory representation on delegations where such representation is appropriate.

- 5.5 In identifying treaties and other international instruments of particular sensitivity and importance to the States and Territories, the Committee should have regard to their potential to affect the finances or current or future policy decisions of the States and Territories or the need for State and Territory participation in implementation, including legislation.

Ministerial Councils and other consultation mechanisms

- 5.6 Subject to any recommendation of the Standing Committee, as a general practice, consultation will be conducted by the functional Commonwealth/State and/or Territory Ministers for Departments concerned. Exceptions will exist where there are significant cross-portfolio interests.
- 5.7 In general, existing Commonwealth/State and Territory Ministerial Councils and consultative bodies will be used as the fora in which detailed discussions of particular treaties and other international instruments take place.
- 5.8 When issues are to be discussed that are of particular significance to either State and Territory or Commonwealth authorities other than those directly represented on the Commonwealth/State and Territory consultative bodies, representatives of such authorities may be invited to attend the meetings in an observer role.
- 5.9 The protocols relating to the operation of Ministerial Councils will apply to these consultations - including those relating to Representation of Constituent Governments and Liaison between Councils (Commonwealth-State Ministerial Councils, A Compendium, May 1994).

6 Participation on International Delegations

- 6.1 In appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters. Subject to any special arrangements, the purpose is not to speak for Australia, but to ensure that the States and Territories are well informed on treaty matters and are always in a position to put a point of view to the Commonwealth. However, State and Territory representatives will be involved as far as possible in the work of the delegation.
- 6.2 The States and Territories will normally initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State and Territory interests in mind.
- 6.3 Unless otherwise agreed, the costs of the State and Territory representatives are a matter for State and Territory governments.

7 Implementation

- 7.1 Before the Commonwealth becomes a party to any international treaty of particular sensitivity and importance to States and Territories, the Commonwealth and the States and Territories will consult in an effort to secure agreement on the manner in which the obligations incurred should be implemented.
- 7.2 Where the preparation of reports to international bodies on implementation action is required, States and Territories will be consulted and their views taken into account in their preparation.

8 "Federal - State" Aspects

- 8.1 The Commonwealth does not favour including federal clauses in treaties and does not intend to instruct Australian delegations to seek to include them. In the Commonwealth's view, the international community sees the pursuit of federal clauses in treaties generally as an attempt by the "Federal State" to avoid the full obligations of a party to the treaty. The Commonwealth's experience at a number of International Conferences has shown that these clauses are regarded with disfavour by almost the entire international community. Further, its experience is that a federal clause tailored to the needs of one federation will be unacceptable to other federations. The Commonwealth believes that instructing an Australian delegation to press for a federal clause only diverts its resources from more important tasks.
- 8.2 The Commonwealth does not object to Australia making unilaterally a short "Federal Statement" when it signs or ratifies certain appropriate treaties, if this statement clearly does not affect Australia's obligations as a party. An "appropriate" treaty would be one where it is intended that the States and Territories will play a role in its implementation. An appropriate form for a statement like this is at Appendix 2.
- 8.3 The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States and Territories accord with the mandatory provisions of the treaty. However, where a suitable "territorial units" federal clause is included in a treaty, the possibility of Australia acceding only in respect to those States and Territories which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.

- 8.4 The Commonwealth will consider relying on State and Territory legislation where the treaty affects an area of particular concern to the States and Territories and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However, the Commonwealth does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

Appendix 1

National Interest Analysis Pro Forma

Date of proposed binding treaty action

Date and explanation of binding treaty action e.g. definitive signature, ratification, exchange of notes etc.

Date of Treaty tabling

Date when the treaty will be tabled with this NIA.

Reasons for Australia to Become a Party to the Treaty

This section should address the advantages and disadvantages to Australia of becoming, and of not becoming, a party to the treaty. It should include significant, quantifiable and foreseeable economic and/or environmental effects of the treaty. Where relevant, it should also include a description of any likely social and cultural effects of the treaty.

Obligations

A description of the major provisions of the treaty and the obligations they impose on Australia.

Costs

Any direct financial costs to Australia of compliance with the treaty, for example, contributions to international organizations provided for in the treaty, costs of establishing any new domestic agency as a direct result of entering into the treaty.

Future Protocols etc.

Whether the treaty provides for the negotiation of future related legally binding instruments such as protocols and/or annexes. If possible, what areas these future instruments are likely to address.

Implementation

A description of the measures Australia intends to take or has taken to implement the treaty, including any legislation. Whether Commonwealth and/or State and Territory action is required or desirable. Any changes to the existing roles of the Commonwealth and the States and Territories as a consequence of implementing the treaty in this way.

Consultation

A statement setting out the consultations which have occurred in relation to the treaty between the Commonwealth, the States and the Territories and with community and other interested parties. A summary of the views of those parties should also be included. The statement must include the date of first mention in Insight and of inclusion in the Standing Committee on Treaties' Treaties Schedules.

Withdrawal of Denunciation

Whether the treaty provides for withdrawal or denunciation and, if so, what procedures apply. In the absence of express provisions in the treaty, a general description of the Vienna Convention on the Law of Treaties provisions on termination and denunciation will be included.

Appendix 2

Federal Statement Example

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central and State and Territory authorities.

The treaty will be implemented throughout Australia by the Federal, State and Territory governments, according to their respective constitutional powers and arrangements concerning the exercise of these powers.