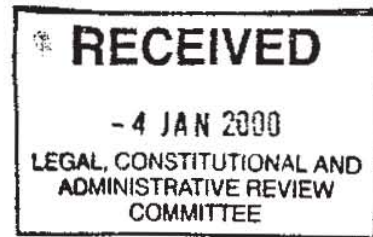




WESTERN AUSTRALIA
LEGISLATIVE ASSEMBLY



Submission No 13.
Spec 23.1

Address all correspondence to the
Chairman of the Committee

Enquiries to: Melina Newnan
Tel: (08) 9222 7483

STANDING COMMITTEE ON UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS

17 December 1999

Mr Gary Fenlon, MLA
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street,
BRISBANE, QLD, 4000

Dear Mr Fenlon

INQUIRY INTO TREATY MAKING

Enclosed is this Committee's Submission to your inquiry into the role of Parliament in treaty making.

I wish to thank you for the opportunity to provide comment on your Position Paper and look forward to your committee's final report.

Yours sincerely

A handwritten signature in black ink, appearing to read "K. J. Minson".

HON. KEVIN J. MINSON, MLA
CHAIRMAN

Encl.



RECEIVED

- 4 JAN 2000

LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

WESTERN AUSTRALIA
LEGISLATIVE ASSEMBLY

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

**SUBMISSION TO THE LEGAL,
CONSTITUTIONAL & ADMINISTRATIVE
REVIEW COMMITTEE**

**THE ROLE OF PARLIAMENT
IN TREATY MAKING**

1999

Table of Contents

	<i>Page No.</i>
Committee Members	iii
Terms of Reference	v
1. INTRODUCTION	1
1.1 Background	1
1.2 Definition of Treaties	2
1.3 Constitution	2
1.4 Treaties and Domestic Law	2
1.5 Treaty Making Process	2
1.6 Commonwealth Review	3
1.7 International Treaties	3
2. ROLE OF STATES AND TERRITORIES IN TREATY MAKING	5
2.1 Introduction	5
2.2 Review of the Treaty Making Process	5
2.3 Seminar on the Role of Parliaments in Treaty Making	5
2.4 State and Territory Matters for Consideration	6
2.5 Review of Treaties	7
2.6 Tabling of Treaties in Parliament	7
3. CONSIDERATION THE QUEENSLAND COMMITTEE - POSITION PAPER	9
3.1 Position Paper	9
3.2 Tabling Treaties in Parliament	9
3.3 Treaty Committees	10
3.4 Inter-Parliamentary Working Group on Treaties	11
3.5 Conclusion	12
Glossary & Abbreviations	13
Bibliography	15

Uniform Legislation and Intergovernmental Agreements

Committee Members

<i>Chairman</i>	Hon. K.J. Minson, MLA (Member for Greenough)
<i>Deputy Chairman</i>	Mr F. Riebeling, MLA (Member for Burrup)
<i>Members</i>	Mr E.J. Cunningham, MLA (Member for Girrawheen)
	Ms M.R. Holmes, MLA (Member for Southern River)
	Mr W.J. McNee, MLA (Member for Moore)

Committee Staff

<i>Clerk to the Committee</i>	Mr Peter Frantom, BA
<i>Legal/Research Officer</i>	Ms Melina Newnan, BA, LLB
<i>Committees' Secretary/Stenographer</i>	Mrs Patricia Roach

Committee Address

Legislative Assembly Parliament of Western Australia Harvest Terrace, PERTH WA 6000	Contact: Mr Peter Frantom Telephone: (08) 9222 7486 Fax: (08) 9222 7804 E-mail: pfrantom@parliament.wa.gov.au
---	---

Terms of Reference

On Wednesday, 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

On Tuesday, 18 March 1997 the Legislative Assembly re-established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference -

- (1) That a Standing Committee be established for the duration of the 35th Parliament to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth.
- (2) When considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister.
- (3) The Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly.
- (4) Each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament.
- (5) No member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown.
- (6) When a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly.
- (7) The Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters.
- (8) If the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report.
- (9) In respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

1. INTRODUCTION

1.1 Background

The Standing Committee on Uniform Legislation and Intergovernmental Agreements was invited to make a submission to the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland on that Committee's current Position Paper on the Role of Parliament in Treaty Making.

The Standing Committee at its meeting on 7 December 1999, agreed to make a submission to the Queensland Legal, Constitutional and Administrative Review Committee.

The Standing Committee, together with a number of parliamentary committees from all Australian jurisdictions, participated in a seminar held in June 1999 on the Role of Parliament in Treaty Making. The seminar was convened by the Joint Standing Committee on Treaties of the Commonwealth Parliament in association with the Australasian Study of Parliament Group. The Queensland Committee's Position Paper deals with issues that arose from that seminar.

The seminar participants proposed that State and Territory Parliaments might consider three specific proposals to improve parliamentary awareness of, and involvement in, treaty making and to make the treaty making process more publicly open. The proposals were -

- arranging for information about proposed treaty actions to be tabled in that jurisdiction's Parliament as a matter of routine;
- having a dedicated parliamentary committee to review proposed treaty actions and advise on the local impact of international law making; and
- contributing to the establishment of an inter-parliamentary working group on treaties to help improve general awareness of proposed treaty actions and encourage wider parliamentary scrutiny of treaty making.

1.2 Definition of Treaties

A treaty is a formal written agreement between at least two national governments which is binding in international law. The term "treaty" covers a range of international agreements including charters, conventions, covenants, protocols, pacts and exchanges of notes.

All treaties come into force upon signature. A multilateral treaty generally requires ratification for a treaty to come into force in a country.

1.3 Constitution

Under the Australian Constitution the Commonwealth has responsibility in relation to international affairs.

Section 51(xxxix) of the Australian Constitution, the external affairs power, gives the Commonwealth Government legislative power to implement treaties in domestic law.

The Commonwealth Government has the sole power to enter into a treaty and bind Australia at international law. Many treaties to which Australia is a party can be implemented by the Commonwealth under other Constitutional powers. For example, treaties dealing with international trade and transport can be implemented under the trade and commerce power of the Constitution.

An international treaty does not form part of Australian law unless its provisions have been incorporated into municipal law by Statute.¹

1.4 Treaties and Domestic Law

The executive act of entering into a treaty creates international obligations for Australia. However, those obligations do not become party of Australian law until the Parliament enacts legislation to implement them.

Commonwealth law enacted solely pursuant to the external affairs power can sometimes override State laws in areas of traditional State activity. Where a State law is inconsistent with a Commonwealth law, the Commonwealth law prevails.²

1.5 Treaty Making Process

Since 1994 the Australian Government has endeavoured to table all multilateral treaties prior to ratification. Reforms initiated in 1996 addressed some of the concerns about the way treaty making had been carried out in the past.

The reforms promoted the involvement of Parliament, State and Territory Governments and the general public in the treaty making process and provided for the tabling in Parliament of all bilateral and multilateral treaties at least 15 sitting days before the Government takes binding action. The tabling of treaties in Parliament must be accompanied by National Interest Analyses (NIS). These analyses assess the likely economic, social, cultural and environmental impact of the proposed treaty action. The Joint Standing Committee on Treaties (JSCOT) was established to consider tabled treaties.

¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at p 287.

² Commonwealth Constitution, section 109.

The Treaties Council was formed to ensure Federal-State consultation in the treaty making.

A treaties database was established to provide information on treaties to which Australia has or is considering becoming a party to.

1.6 Commonwealth Review

In 1999 the Commonwealth Government reviewed the 1996 reforms and endorsed the operation of the reforms although it recognised that there could be further improvement in the consultation between the States and Territories and the Commonwealth. It did however, reject the extension of the 15 sitting day requirement or the insertion of a “federal clause” into international conventions.

1.7 International Treaties

The changing nature of the world and globalisation has seen an increasing array of issues including trade, environmental concerns, international standards, human rights and international crime becoming the subject of treaty action. These issues require not just national but international responses. Treaties are the fundamental instruments of international law. Over time, treaties have become an increasingly important component of Australia’s own legal development. There are hundreds of treaties, bilateral, regional and multilateral that are negotiated, it is only very few that attract public attention.

It is useful that the information on treaties now available readily on a specific web site.

However, in those treaties that do affect State and Territories interests, as was pointed out the Chairman of the Standing Committee on Uniform Legislation, the Hon Kevin Minson -

... the Parliaments in the States want to be included in the loop, not just have access to information but rather to have an avenue for meaningful input.³

³

The Hon. Kevin Minson, Chairman, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australian Legislative Assembly, Report 24, A Seminar on the Role of Parliaments in Treaty Making, Joint Standing Committee on Treaties, August 1999, Appendix C, Seminar Transcript, p 105.

2. ROLE OF PARLIAMENT IN TREATY MAKING

2.1 Introduction

The Australian Constitution does not confer on the Parliament any formal role in treaty making. Notwithstanding this, the 1996 Commonwealth Government reforms provided for parliamentary scrutiny of treaties by ensuring that all treaties are tabled in both Houses of the Commonwealth Parliament for at least fifteen (15) sitting days prior to any binding treaty action being taken, with exception for urgent or sensitive treaties.

2.2 Review of the Treaty Making Process

There have been several reviews of the treaty making process which have suggested that further procedures are required to ensure that treaties of relevance are brought to the attention of State and Territory Parliaments.

The Victorian Federal-State Relations Committee in its 1997 report *International Treaty Making and the Role of the States*⁴ made a number of recommendations including -

- the tabling of treaty information in the Victorian Parliament;⁵
- the establishment of a parliamentary committee to advise on treaty matters affecting Victoria;⁶ and
- the Victorian Government calling for the extension of time that treaties are tabled in the Commonwealth Parliament from 15 sittings days to 45 sittings days in every Australian Parliament.⁷

2.3 Seminar on the Role of Parliaments in Treaty Making

The main issues and themes canvassed at the seminar on the Role of Parliament in Treaty Making held in June 1999 were -

- the need for Parliaments to recognise that international law not only can affect issues that are the constitutional responsibility of State and Territory Governments, but also can constrain the options available to domestic law makers;

⁴ Federal-State Relations Committee, First Report on the Inquiry into Overlap and Duplication, *International Treaty Making and the Role of the States*, October 1997.

⁵ This recommendation was accepted and implemented by the Victorian Government.

⁶ This recommendation was not accepted by the Victorian Government.

⁷ The Victorian Government responded that it would approach the Commonwealth to extend the 15 day period to 45 sitting days.

- an acceptance that, although inter-governmental relations are the responsibility of Executive Governments, State and Territory Parliaments have a right to be involved in aspects of treaty making;
- the importance of ensuring that more information about treaties under consideration is made available to all Parliaments and to the wider community;
- the valuable role that State and Territory Parliaments can play in improving public awareness of, and seeking public comment on, proposed treaties;
- the need for State and Territory Parliaments to devote sufficient resources to allow Parliamentarians to monitor treaty events, contribute constructively to emerging debates and represent the views and interests of their constituents (recognising that some jurisdictions have fewer resources to support such activities);
- the impressive range of treaty information that is already available through the Internet based Treaties Library maintained by the Department of Foreign Affairs and Trade (DFAT);
- the review of the reformed treaty making process, including comments on the effectiveness of the Treaties Council, national interest analyses, and Commonwealth and State Government consultation; and
- the extent of parliamentary involvement in treaty making in New Zealand, Canada, Germany and the United Kingdom.⁸

2.4 State and Territory Matters for Consideration

The majority of the seminar participants were overwhelmingly of the view that State and Territory Parliaments should be more aware of and involved in, treaty making.

Two strategies for addressing the issue were canvassed -

- first, that State and Territory Parliaments should negotiate with their respective Executives to ensure that information about proposed treaty actions is made available to Parliaments as a matter of routine; and
- second, that each State and Territory Parliament should appoint a committee with specific responsibility for reviewing all proposed treaty actions and advising on the local impact of international law making. Alternatively it was suggested that an existing State or Territory parliamentary committee might be given this responsibility.⁹

⁸ The Parliament of the Commonwealth of Australia, Report 24, A Seminar on the Role of Parliament in Treaty Making, Joint Standing Committee on Treaties, August 1999, pp 6-7.

⁹ The Parliament of the Commonwealth of Australia, Report 24, A Seminar on the Role of Parliament in Treaty Making, Joint Standing Committee on Treaties, August 1999, pp 9-10.

The Chairman of the Standing Committee stated at that seminar -

We [State Parliamentarians] have to put a mechanism in place. There is nothing to stop the tabling of [treaty] documents. It is just that we have not done it. We need to formalise a process within our own States.

To that end, I would like to see committees with a common function and name established in each State to deal with these matters.¹⁰

2.5 Review of Treaties

One of the recommendations made by the Victorian Federal-State Relations Committee in their report *International Treaty Making and the Role of the States*, was that the Joint Standing Committee on Treaties liaise with the Victorian Parliament (and other Parliaments) in conducting its treaty reviews. The proposal at the seminar to establish an inter-parliamentary working group was designed to give effect to the Victorian Committee's recommendation.

It was proposed that the working group could comprise members from all the parliamentary committees represented at the seminar (and any other committees that may, over time, become interested in treaty matters) and would act as a forum for promoting awareness of proposed treaty actions and encouraging wider parliamentary scrutiny of treaty making.

The Chairman of the Standing Committee suggested at the seminar that the chairs and deputy chairs of the Treaties Committee and relevant State parliamentary committees (once established) should meet to consider the community and economic impact of treaty proposals before reporting to their respective Parliaments.¹¹

2.6 Tabling of Treaties in Parliament

While there is general agreement with the principle of tabling treaties in Parliament, concern exists about the 15 sitting day time period. It was argued that some treaty processes take years and it is extremely pedantic to insist on 15 sitting days when questions are being raised about parliamentary sovereignty and the need for people to be involved.

Treaties are a dynamic process. The increased role of treaties in domestic law has been a relatively new process. Our parliamentary systems and committees have not really been developed to deal with them as yet.

The process of the national interest analysis concept should take cognisance of the views of the States and Territories.

¹⁰ Hon Kevin Minson, MLA, *Seminar Transcript*, 25 June 1999, p 25.

¹¹ Hon Kevin Minson, MLA, *Seminar Transcript*, 25 June 1999, p 29-30.

3. CONSIDERATION OF QUEENSLAND COMMITTEE POSITION PAPER

3.1 Position Paper

In October 1999 the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament resolved to inquire into proposals regarding the role of Parliament in treaty making. The proposals were developed at a June 1999 seminar convened by JSCOT and the Australasian Study Group of Parliament.

One of the purposes of the seminar was to explore the opportunities for Australian Parliaments to become more aware of, and involved in, treaty making. Seminar participants proposed that -

- information about proposed treaty actions be presented to each jurisdiction's Parliament;
- a parliamentary committee should review proposed treaty actions and liaise with the Joint Standing Committee on Treaties (JSCOT); and
- an inter-parliamentary working group on treaties should be established.

3.2 Tabling Treaties in Parliament

The Queensland Committee in relation to the presentation of treaty information to the Parliament considered proposal 1 and have made the following recommendation -

Committee proposal 1.

The Committee proposes that the Premier be required (by sessional order of the Queensland Parliament) to periodically table in the Queensland Parliament: (a) a schedule of treaties being negotiated by the Commonwealth Government; and (b) other treaty information such as National Interest Analyses.

The Committee does not believe that the Premier should be required to table the full text treaties as such as they are readily available through the Australian Treaties Library and from DFAT.

The Standing Committee believes that there is merit in the tabling of treaties in the State Parliaments. The documents are public documents once they are tabled in the Commonwealth Parliament and it would therefore not be an onerous task. The Standing Committee supports the view that in a representative democracy, information about Government action (including treaty making) should be available to the public.

The Standing Committee applauds the mechanisms implemented as part of the 1996 reforms. However, the Standing Committee supports a mechanism which would allow treaty information to be brought to the attention of the State Parliaments.

It is the process of tabling information in the Parliament which is the formal process by which the peoples representatives ensure that information is communicated to the public. The Standing Committee believes that although the information about treaties can be accessed in others forums such as the Australian Treaties Library and from DFAT it is the formal gesture of tabling in the Parliament which is an acknowledgement of the need of Governments to communicate to its citizens.

3.3 Treaty Committees

Following from the Federal-State Relations Committee of Victoria's recommendations the participants at the seminar endorsed the view of enhancing awareness of treaties through the establishment of Treaty Committees in each State or Territory or conferring an existing committee with responsibility for reviewing treaties.

The Queensland Committee in its Position Paper has not endorsed the view of the seminar and has outlined its position in proposal 2 -

Committee proposal 2

The Committee does not propose that the Queensland Parliament appoint a parliamentary committee - or confer an existing committee - with specific treaty responsibilities.

The Standing Committee does not agree with the Queensland Committee's proposal 2. The Standing Committee is of the view that although it would be preferable that there existed in each State and Territory Parliament a common name committee that looked at treaties and was a contact and a body for negotiating and networking with JSCOT, existing State and Territory Committees could have the review of treaties role as part of other functions.

Not all treaties affect all States and Territories and the majority are non-controversial. It is likely that very few treaties would actually be referred to a committee for review. It would therefore, in most cases not require the establishment of a new committee in each jurisdiction as the limited number of treaties that require review can be considered by an existing committee who could take on the work of reviewing that particular treaty as one of its inquiries.

This Standing Committee does not believe that great additional resources would be required for State and Territory committees to take on the additional task of treaty review.

The Standing Committee believes that the reforms of 1996 enhanced the avenues through which the States and Territories can participate in treaty making. However, those reforms did not include the State and Territory Parliaments in that process. Although the Standing Committee does not envisage the State and Territory Parliaments becoming involved in treaty negotiations it does believe that there is a role for Parliament and parliamentary committees in the process of review of a certain limited number of treaties.

3.4 Inter-Parliamentary Working Group on Treaties

The final proposal of the Treaties Seminar was the establishment of an inter-parliamentary working group on treaties. The Queensland Committee in its Position Paper recognised that the establishment of an inter-parliamentary working group might have particular benefits in -

- increasing the level of parliamentary information/consultation in the development of treaties; and
- enhancing opportunities for the State and Territory Parliaments to have a greater role regarding the implementation of international obligations accepted by the Commonwealth.

The Queensland Committee stated that it was not convinced that the establishment of an inter-parliamentary working group would significantly add value to the measures introduced in 1996. In proposal 3 the Queensland Committee stated -

Committee proposal 3

The Committee notes -

- the various mechanism already available for Parliamentarians and the community in general to access information and be consulted about treaty making;
- the added benefits that Committee proposal 1 would bring to these existing mechanisms; and
- the resources that would be involved in the Queensland Parliament contributing to an inter-parliamentary working group on treaties.

On balance, the Committee does not favour the establishment of an inter-parliamentary working group.

This Standing Committee is of the view that it is desirable for States and Territories to be involved in the treaty making process in matters which are traditionally within their jurisdiction. Although decisions to take action to implement international obligations take place at the Executive level, the Standing Committee is of the view that there is merit in the participation of an inter-parliamentary working group which would work to inform the community about the implication of treaties through the tabling of reports on the subject matter of treaties in the State and Territory Parliament.

This process would enhance the accountability of the Government through the Parliament to the community.

3.5 Conclusion

This Standing Committee is of the view that more opportunities should be available for State and Territory representatives to attend national as well as international treaty development negotiations. This is especially important where States and Territories have legislative and other implementation responsibilities which require consideration during the treaty negotiations.

The Standing Committee agrees that treaties should be tabled in each State or Territory Parliament, following the procedure adopted in Victoria.

The Standing Committee after considering the issues is of the view that only matters that affect a particular jurisdiction should be sent to a State or Territory parliamentary committee for review. The Minister responsible can refer a particular treaty to the parliamentary committee for further investigation and report to the Parliament.

This Standing Committee is of the view, that involvement of the Parliament at a later stage is important, and as an extension, greater exchange of information on treaties through an inter-parliamentary working group has merit.

Glossary

Throughout this report the following terminology has been used -

“Standing Committee” means the Standing Committee on Uniform Legislation and Intergovernmental Agreements established by the Legislative Assembly of the Western Australian Parliament on 4 August 1993 and re-established on 18 March 1997.

Abbreviations

“DFAT” Department of Foreign Affairs and Trade.

“JSCOT” Joint Standing Committee on Treaties.

“NIS” National Interest Analyses.

Bibliography

Commonwealth of Australia Constitution.

Minister for Immigration and Ethnic Affairs v Teoh (1995) CLR 273.

The Parliament of the Commonwealth of Australia, Report 24, *A Seminar on the Role of Parliament in Treaty Making*, Joint Standing Committee on Treaties, August 1999.

The Parliament of Victoria, Federal-State Relations Committee, *First Report on the Inquiry into Overlap and Duplication, International Treaty Making and the Role of the States*, October 1997.