



Speech by

**LINDA LAVARCH**

**STATE MEMBER FOR KURWONGBAH**

---

Hansard 20 July 1999

### **JOINT STANDING COMMITTEE ON TREATIES**

**Mrs LAVARCH** (Kurwongbah—ALP) (12 p.m.): On 24 and 25 June, the Joint Standing Committee on Treaties, known as JSCOT, of the Commonwealth Parliament in conjunction with the Australasian Study of Parliament Group hosted a seminar titled *The Role of Parliaments in Treaty Making*. I was invited to attend that seminar in my capacity as chair of the Queensland Parliament's Scrutiny of Legislation Committee, even though that committee does not have within its charter the jurisdiction to scrutinise treaties.

By way of background information and for the information of members, I point out that the Australian Constitution assigns power for external affairs to the Commonwealth Parliament. That is done pursuant to section 51(xxxi) of the Australian Constitution. The exercise of a treaty-making power is a function of the Executive of the Commonwealth Government pursuant to section 61 of the Constitution. In exercising the powers subscribed to it, the Commonwealth purports to act for all State and Territory Parliaments, because as a matter of international law and foreign relations the Australian nation speaks with one voice.

Over recent years, the scope of the external affairs power has been a matter of political and legal controversy. In short, that controversy has several dimensions, namely, the extent to which the Commonwealth has used the external affairs power as a source for laws which may otherwise have been argued to be beyond the power of the Commonwealth; secondly, the way in which the Commonwealth Executive negotiates and decides to enter into international obligations such as treaties and the proper role for the Commonwealth Parliament in that process; and, thirdly, the fact that the acceptance of an international obligation or standard by the Commonwealth places obligations on the States. That raises the question of to what extent the States are or should be involved in the treaty-making process. It also raises the question of the extent to which international law, particularly in the form of ratified treaties, might be incorporated into Australian law through judicial interpretation even though the Australian Parliaments have not enacted the treaty's terms into domestic law.

In response to these issues, the Commonwealth has implemented a number of measures to achieve a degree of community, industry and State involvement in the treaty-making process. These have included the establishment of a treaty secretariat at the COAG level, known as the treaty council—and I must say that it was recognised at the seminar that the treaty council has not met for some time—having treaties and their applications to States and Territories made a permanent agenda item for the Standing Committee of Attorneys-General; and business, community and State representatives are invited from time to time to be members of the Commonwealth delegation negotiating a particular treaty. For example, it was reported in the *International Treaty Making and the Role of the States* report of the Federal/State Relations Committee of the Victorian Parliament that in 1996 Queensland represented the States at international treaty negotiations on several occasions, including the European Union mutual recognition agreement negotiations. It was also reported there that Queensland hopes to continue playing this role as long as the Commonwealth and the other State Governments agree to it doing so in cases where it has the appropriate expertise. To ensure that the rest of Australia's Governments agree to its presence at international treaty negotiations, Queensland has a standing requirement that any line agency wishing to attend an international treaty negotiation work through the Department of the Premier and Cabinet. The measures also required that the details

of treaties entered into and under investigation be made available publicly through the Department of Foreign Affairs, especially through its Internet web site.

In 1996, the Commonwealth Parliament established a Joint Standing Committee on Treaties. The committee's aim is to bridge the gap between Executive action in considering and negotiating a treaty and the Parliament in judging whether a treaty should become law. It also acts as an avenue for the dissemination of information to the public about treaties and can foster debate on any particular treaty.

The seminar was designed to examine the parliamentary aspects involved in treaty making and included sessions on the role of Australian Parliaments in treaty making, which included a panel discussion on State Parliaments; a session on the international perspective; and a session on future directions in parliamentary consideration of treaties. The speakers were drawn from a wide field of academic, Public Service and political spheres.

The seminar advanced two motions, which were not formally put to a vote but were referred back to the States for consideration and debate. Those motions were, firstly, a motion proposed by the members of the Commonwealth Joint Standing Committee on Treaties, which sought support for the formation of an interparliamentary working group on treaties. It was advanced that this interparliamentary working group on treaties should comprise members from all of the parliamentary committees represented at the seminar and any other committees that may over time become interested in treaty matters; that it should act as a forum for promoting public awareness of proposed treaty action and encouraging wider parliamentary scrutiny of treaty making; that it should meet every six months to review upcoming treaty actions in much the same way as Commonwealth and State officials meet as part of the Standing Committee on Treaties process; that it be supported by the secretariats of the representative committees on a rotational basis; and that the secretariat should be responsible for preparing and distributing agenda papers, including lists of upcoming treaty action, national interest analysis and for preparing outcome reports for each participating committee. The rationale for that motion was that it would improve public awareness of treaties, inject a State perspective into the deliberations of JSCOT and inject a Commonwealth perspective into any deliberations in which State Parliaments might become involved.

The second motion was proposed by the members of the Western Australian delegation and sought that each State establish as a matter of urgency a discrete parliamentary committee to review matters concerning treaties and have those committees make representations to the JSCOT deliberations. The rationale for that motion was that it is believed essential that the views of the various State and Territory Parliaments on the contents of treaties are taken into account by the Commonwealth Government.

From several aspects the seminar was worth while. It enabled participants to be fully briefed and updated on the current state of the law and practice surrounding treaty making at the Commonwealth level. It also allowed each State to explain the extent, if any, to which the State Parliament considered treaty obligations in their law-making processes. Finally, it proposed a course of action for the formalisation of State parliamentary involvement in treaty making, at least at the ratification stage.

From my personal perspective, it seems that the States must accept that the Constitution assigns the conduct of international affairs to the Commonwealth. Consequently, the States have a limited role in deciding or even influencing the treaty-making process. However, the States have a critical role in the implementation of international obligations accepted by the Commonwealth. The external affairs power enables the Commonwealth Parliament to garner legislative authority in areas that it otherwise would not be able to. Personally, I believe this to be a necessary incidence of Australia's engagement with the world and should not be feared. However, in many cases the Commonwealth can best achieve the international standard which has been adopted through the use of the State legislative action and not the assumption of power. It is in this area that the Executive to Executive contact between the Commonwealth and State Governments could be extended to a parliamentary process between the Commonwealth and the States.

Accordingly, I believe that there is merit in the motion proposed by the Joint Standing Committee on Treaties calling for an interparliamentary working group on treaties comprising representatives of all the State and Territory Parliaments along with the Commonwealth Parliament. The working group might usefully review treaties and determine the best legislative implementation method if implementation requires legislative change. It will also allow State and Territory parliamentarians direct access to information on forthcoming treaties.

I am less convinced that a discrete treaties committee is required in each State and Territory Parliament, as was proposed by the motion from the Western Australian delegation. Such a committee might be useful in some circumstances given that the Commonwealth's role is paramount. However, I believe a State committee would be window-dressing at best. Not all treaties proposed, signed or ratified affect the States and Territories. Very few treaties have terms that are controversial. Those that

do often become part of the public debate through means other than Parliament. For example, the proposed multilateral agreement on investment became a hot topic of public debate through the Internet and then the media, not through parliamentary debate. What the panel on the State Parliaments revealed—

Time expired.

---