Treaties

Treaties. Australian practice in treaty formulation.

On 28 October 1982 the report of the House of Representatives Standing Committee on Environment and Conservation entitled ''Australia's Participation in International Environmental Organisations'' was presented to Parliament (PP No 297/1982). Following are some extracts from the report on Australian practice in the formulation of treaties (from Chapter 3 ''Treaties''):

Introduction

108. The description 'treaty' is a generic term which includes agreements, conventions, exchanges of notes and letters, protocols and other instruments governed by international law and giving rise to international rights and obligations. The term does not generally include those instruments which are more correctly described as arrangements or memoranda of understanding.

110. Only the Commonwealth Government has the capacity, in international law, to conclude treaties with other countries and international organisations, but neither the Australian Constitution nor any subsequent Commonwealth legislation contains any specific provision for treaty-making. This act is the prerogative of the Crown and is exercised in Australia by the Governor-General-in-Council whose approval must be sought before a treaty is either signed, ratified or acceded to by Australia.

111. Approval is sought on the submission of the Minister for Foreigin Affairs following a decision by Cabinet or the responsible Minister. Parliament has no formal constitutional function in the treaty-making process, although today the practice has developed whereby periodically the texts of all treaties concluded over a given period are tabled in each House for the information of Members and Senators.

112. The Department of Foreign Affairs has responsibility for coordinating and overseeing the conclusion of treaties irrespective of their subject matter. The Committee was told that Australia is a contracting State to the Vienna Convention on the Law of Treaties and the procedures practised by Australia for implementing treaties are in accordance with the terms of that Convention. Like other nations, Australia maintains the right not to participate in a treaty, to withdraw from a treaty and to make reservations on a treaty.

Treaty formulation

113. The Commonwealth Government constitutionally has responsibility for external affairs, which entails the negotiation of international treaties. Nature conservation and environment protection domestically has traditionally been a function of the States. When it comes to negotiating treaties with environmental implications therefore, it is evident that some machinery for regular and consistent consultation between the Commonwealth and the respective State governments is necessary.

114. The need to establish sound guidelines for consultation, agreeable to all concerned, led to the formation of a Commonwealth/State officials

committee in 1980 to review the effectiveness of principles for consultation adopted at Premiers' Conferences in 1977 and 1978. The review produced a set of draft principles and procedures for consultation on treaties which has yet to be considered and finally agreed to by Premiers' Conference. To all intents and purposes these draft principles accurately reflect the current approach to the consultation process, at least from the Commonwealth's point of view.

The draft principles were set out in Appendix 7 of the Report. The Principles and Procedures for Commonwealth-State Consultation on Treaties, as endorsed by the Commonwealth and followed since November 1983, are as follows:[1]

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

A. Consultation

i) The States are informed 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 is to be provided to the States.

ii) Information about treaty discussions is forwarded to Premiers' Departments on a regular basis through the Department of the Prime Minister and Cabinet.

iii) As a general practice, consultation is conducted by the functional Commonwealth/State Ministers or Departments concerned.

iv) Existing Commonwealth/State Ministers' consultative bodies (such as the Standing Committee of Attorneys-General, the Australian Fisheries Council, etc.) may be used as the forums in which detailed discussions of particular treaties take place.

v) Functional Departments keep Premiers' Departments, State Crown Law Offices, the Commonwealth Attorney-General's Department and the Departments of Foreign Affairs and Prime Minister and Cabinet informed of the treaty matters under consideration.

vi) When issues are to be discussed that are of particular significance to either State or Commonwealth authorities other than those directly represented on the Commonwealth/State consultative bodies, representatives of such authorities might be invited to attend the meetings in an observer role.

vii) The procedures outlined would not preclude direct communications between Premiers (and Premiers' Departments) and the Prime Minister (and the Department of the Prime Minister and Cabinet) on particular treaties. These channels may need to be invoked in cases where inter alia there is no established ministerial channel of communication, where ministerial councils are unable to reach final agreement or where significant changes in general policy are involved.

1. Text provided by the Department of the Prime Minister and Cabinet.

viii) Minister and Departments, in considering treaty matters, may draw on legal advice and, through their Law Ministers, could refer any matter to the Standing Committee of Attorneys-General for advice. It is expected that, where a major legal issue arises in a consultative body, that body will avail itself of the legal expertise of the Standing Committee.

ix) The consultative process needs to be continued through to the stage of implementation where treaties bear on State interests. Where the preparation of reports to international bodies on implementation action takes place, States should be consulted and their views taken into account in the preparation of those reports.

B.Treaty Negotiation Process

i) Where State interest is apparent, the Commonwealth should, wherever practicable, seek and take into account the views of the States in formulating Australian policy and keep the States informed of the determined policy.

ii) In appropriate cases, a representative or representatives of the States are included in delegations to international conferences which deal with State subject matters; subject to any special arrangements, the purpose is not to share in the making of policy decisions or to speak for Australia, but to ensure that the States know what is going on and are always in a position to put a point of view to the Commonwealth. However, State representatives are involved as far as possible in the work of the delegation.

iii) It is normally for the States to initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State interests in mind.

iv) Unless otherwise agreed, the costs of the State representatives are a matter for State Governments.

C. Federal State Aspects

i) The Government does not favour the inclusion of federal clauses in treaties and does not intend to instruct Australian delegations to seek such inclusion. The pursuit of federal clauses in treaties is generally seen by the international community as an attempt by the Federal State to avoid the full obligations of a party to the treaty. Experience at a number of International Conferences has shown that such clauses are regarded with disfavour by almost the entire international community. Experience has also shown that a Federal clause tailored to the needs of one federation will be unacceptable to the other federations. Instructing an Australian Delegation to press for a federal clause only diverts its resources from more important tasks.

ii) The Government sees no objection to Australia making unilaterally a short 'Federal Statement' on signing or ratifying certain appropriate treaties, provided that such a statement clearly does not affect Australia's obligations as a party. An 'appropriate' treaty would be one where it is intended that the States will play a role in its implementation. An appropriate form for such a statement acceptable to most States and the Commonwealth, is attached.

iii) The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States are brought into line 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 of those States which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.

iv) The Commonwealth will consider relying on State legislation where the treaty affects an area of particular concern to the States and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However the Government 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.

Federal Statement

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States.

The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

Treaties. Federal clauses. Australian practice.

Further in Chapter 3 of the Committee's Report, the matter of Federal Clauses in treaties was considered, as follows:

139. A major issue in the negotiation and implementation of environmental treaties is the question of federal clauses. In their submissions the New South Wales, Queensland, Western Australian and Tasmanian Governments each referred to the necessity for Australia, when negotiating future environmental treaties, to press for the inclusion of a federal clause in each one.

140. The Committee sought clarification from several witnesses of what was meant by the term 'federal clause' and the impact that its insertion has on the application of an international treaty.

141. The Department of Foreign Affairs said that in its original concept the traditional federal clause was one whereby a federal state (in the international sense) was permitted to apply a treaty in respect of some of its constituent units, but consciously excluding others. Generally, other international unitary states were not very receptive to this interpretation as they saw it as being something which gave special advantages to a federally constituted state, by relieving the federal state from carrying out those obligations which were incumbent upon a unitary state.

142. In Australia today the general understanding of a federal clause has been altered somewhat. Rather than excluding a constituent unit of a federation from the provisions of a treaty, the view most commonly taken by the Australian State governments is that a federal clause acknowledges

that the means of implementing the provisions of the treaty does not necessarily rest with the signing party (i.e. the Commonwealth Government) but may in fact fall within the legislative province of each of the constituent units, in this case each of the Australian State governments. By inserting a federal clause in a treaty therefore, the Australian States wish to ensure that the Commonwealth is placed in a position where it is prevented domestically from moving into (or at least finds it very difficult to move into), an area of treaty substance where the States have traditionally legislated.

143. The problem with this interpretation, the Department of Foreign Affairs claimed, was that the particular clause in the treaty then ceases to become an obligation to which all countries which are a party to the treaty are able to subscribe, so that, once included in the body of the treaty it means virtually nothing. And this does not only refer to other signatories to the treaty which have a unitary system of government. The Department of Foreign Affairs told the Committee that it is very difficult to find a situation where the legislative division in one federation coincides with that of another. For example, criminal law in Australia is administered by each of the States whereas in the Federal Republic of Germany it is administered by the central government.

144. For Australia to insist on the insertion of a federal clause is to say that it will become a party to the provisions of the treaty, but with certain exceptions. It has been suggested to the Committee that this is akin to a married couple signing mortgage documents with the proviso that they may not make each monthly repayment if either party decides it is not in their interest to do so. Obviously such a proposal is total nonsense and, for the same reasons, the whole notion of federal clauses in an international instrument is an anathema to other countries.

The Commitee concluded (para 153):

It does not support the concept that the Commonwealth Government should be placed in the invidious position of having to negotiate in the international forum for the inclusion of a federal clause in treaties which it supports in principle. Given the inclination of other nations, even federations, not to accept the concept of federal clauses in international treaties, the Committee supports the concepts contained in the draft guidelines of May 1981 that federal clauses only be sought on a case by case basis in treaties involving matters governed by State law only and that the practice of appending a federal statement to such treaties rather than seeking to include a federal clause within the body of the treaty be actively sought as a viable alternative.

For evidence given before the Committee by the Department of Foreign Affairs (Mr W.H. Bray, Assistant Secretary, General Legal and Treaties Branch), see Official Hansard, 18 May 1982, pp 497-507, 521-523.

Treaties. Federal statements. Australia's declaration made upon ratification of the International Covenant on Civil and Political Rights. August 1980.

On 12 March 1982, during debate in the Senate on the Human Rights Commission Bill 1981, the Attorney-General, Senator Durack, said (Sen Deb 1981, Vol 88, 614-615):

I will mention one matter that has figured quite prominently in this debate. It concerns the ratification of the International Covenant by the Government last August. I think the significance of that step taken by the Government has been underrated and too great an emphasis placed on reservations and declarations made at the time. The major reservation has been referred to as the reservation to a Federal system. I think that to some extent, however, that reservation has been misunderstood because it is made quite clear:

> Australia accepts that the provisions of the Covenant extend to all parts of Australia as a Federal State without any limitations or exceptions.

We have assumed at the international level the obligations for the Covenant's applying to Australia as a whole. As I have pointed out, this obligation will be implemented at a Federal level by the Commonwealth Parliament and at the State level by the State parliaments. It will be implemented in accordance with our Federal system. The obligation exists as one applying to the whole of Australia. Australia will have to report under Article 40 about the methods by which it is observing its responsibility. That is one of the minor reasons why we have established — and the States have agreed to establish — the Ministerial meeting on human rights so that the obligations under the Covenant of both Federal and State governments can be discussed. I hope that, if there are difficulties, they can be solved. I believe that the reservation is consistent with the Vienna Convention mentioned previously. All the advice I have received from public international legal experts and experts from the Foreign Affairs Departments leads me to believe that the reservation as such is valid and in accordance with that treaty. Article 27 of the Vienna Convention on the Law of Treaties states:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

That does not deal with the reservation at all but with the observance, application and interpretation of the treaty. We recognise that. It is a fact that we cannot invoke the provision of an internal law to justify non-performance of the regulation.

Following criticism during debate on the Bill in the House of Representatives (see HR Deb 1981, Vol 88, 25 March 1981, 919 (Mr Bowen), and 938 (Mr Cunningham)), Mr Viner, the Minister representing the Attorney-General, said (ibid, 943):

> Some mention was made of the reservations expressed by Australia in regard to the International Covenant on Civil and Political Rights. I firmly believe, as does the Attorney-General, that the reservations and declarations that have been expressed are completely in accord with the Vienna Convention. We simply do not accept that, in the form in which they are drafted, the Federal-State paragraphs are in breach of that Convention or contrary to the objects or purposes of the Covenant. Indeed, they are consistent with the Federal political structure of Australia and with the authority given by the Covenant to make reservations and declarations.

On 26 March 1981 the Minister for Foreign Affairs, Mr Street, provided the

following information about the Covenant (HR Deb 1981, Vol 121, 1048):

> Article 50 of the International Covenant on Civil and Political Rights states:
>
> The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.
>
> The following countries that are generally regarded as being Federal States have ratified or acceded to the Covenant: Australia, Austria, Canada, Federal Republic of Germany, India, USSR, Venezuela, Yugoslavia.
>
> The following countries that are generally regarded as being Federal States have ratified or acceded to the Covenant with declarations and/or reservations: Australia, Austria, Federal Republic of Germany, India, USSR, Venezuela.

For the text of Australia's reservations and declarations to the Covenant, see Aust TS 1980, No 23. (Australia withdrew certain of its reservations and declarations on 6 November 1984, substituting the federal statement with one identical to that made in respect of the Women's Convention on 28 July 1983: see Part IX above.)

Treaties. Signature. Ratification. Entry into force. Treaties signed but not ratified by Australia.

On 8 May 1981 the following statement was issued (Comm Rec 1981, 619):

> The Minister for Foreign Affairs, the Hon. Tony Street, and the Minister for Science and Technology, the Hon. David Thomson, announced today that Australia had become the first country to ratify the Convention on the Conservation of Antarctic Marine Living Resources. Australia is a depositary for the Convention and its instrument of ratification was deposited on 6 May.
>
> The Ministers recalled that the Convention was concluded at a special diplomatic conference held in Canberra from 5 until 20 May 1980, and that it had been signed by all fifteen governments represented at the May conference at a ceremony in Canberra on 11 September last year.

On 8 March 1982 the Minister for Foreign Affairs, Mr Street, issued the following statement (Comm Rec 1982, 234):

> The Minister for Foreign Affairs, the Hon. A.A. Street, today announced that the Convention on the Conservation of Antarctic Marine Living Resources would come into force thirty days from today. This follows New Zealand's ratification of the Convention, the eighth country to do so. Under the terms of the Convention, it will automatically come into force thirty days after it has been ratified by eight countries.
>
> In a ceremony in Canberra today, Mr Street, representing Australia as the depositary country for the Convention, received New Zealand's instrument of ratification from the New Zealand High Commissioner, Mr L.J. Francis.
>
> The Convention provides for the establishment of the AMLR Commission with its headquarters in Hobart. Under the terms of the Convention, Australia is to convene the first meeting of the AMLR Commission in Hobart within three months of the Convention's entry into force. The AMLR Convention has now been ratified by Australia, Chile, Japan, the

United Kingdom, South Africa, the U.S.S.R., the United States and New Zealand.

On 10 June 1983 the Prime Minister, Mr Hawke, addressed the International Labour organisation in Geneva. Part of what he said is as follows (Comm Rec 1983, 817):

> The federal nature of the Australian Constitution presents certain difficulties in the process of ratification of ILO conventions. We in Australia have adopted the policy that ratification can only occur when we are satisfied that existing law and practice in both its Federal and state jurisdictions are fully compatible with the provisions of the conventions. As a federal state, we have particular difficulties in arriving at that point where all States and Territories and the Federal Government can agree to ratification

For details of International Labour Organisation conventions and recommendations adopted between 1961 and 1983, and Australian voting records on them, see the written answers in HR Deb 1981, Vol 125, 30 October 1981, 2827-2828; HR Deb 1981, Vol 125, 17 November 1981, 2927-2931; and HR Deb 1983, Vol 132, 23 August 1983, 92-93.

For treaties relating to the environment and conservation, signed or concluded by Australia, as at December 1981, see Appendix 6 to the report of the House of Representatives Standing Committee on Environment and Conservation presented to Parliament on 28 October 1982 (PP No 297/1982, pp 46-53).

For details of international transport conventions, including action taken by Australia, see the written answer of the Minister for Transport, Mr Hunt, in HR Deb 1982, Vol 130, 14 December 1982, 3567-3571.

For a list of treaties signed but not ratified by Australia, see the written answer of the Minister for Foreign Affairs, Mr Street, in Sen Deb 1982, Vol 95, 9 September 1982, 848-849, which was followed by the statement —

> It is the Government's general view that ratification of as many multilateral conventions as possible is a desirable objective. Successive Australian Governments have, however, taken the view that no convention should be ratified until an exhaustive examination has shown that law and practice in all Australian jurisdictions is completely in accord with the provisions of that convention. To this end, a full range of consultations take place, at up to and including Ministerial level, to ensure that compliance is put beyond doubt before ratification is proposed. The federal system in Australia thus means that progress towards ratification will be slower than in most centrally-governed countries.

For statements on particular treaties, see Comm Rec 1982, 1411, 1520-1521, Comm Rec 1983, 1680, 1867-1868 (fisheries agreement with Japan); Comm 1983, 968 (agreement on French-Australia school); Comm Rec 1981, 445-446 (agreements on cultural relations with China, and migratory birds with Japan); HR Deb, 29 April 1982, 1699 (science and technology agreement with Mexico); Comm Rec 1981, 1239 (technical cooperation agreement with China); and Comm Rec 1983, 786-787 (accession to Budapest Treaty on patents for micro-organisms). See also the trade agreements referred to in Part VIII above.

Treaties. Implementation. Constitutional power to legislate to give effect to treaties within Australia.

On 12 October 1982 the Minister for Foreign Affairs, Mr Street, provided Parliament with the following text of a circular from the Australian Information Service to Australian missions abroad on the decision of the High Court in *Koowarta* (Sen Deb 1982, Vol 96, 1321-1322):

> A decision by the High Court of Australia on May 11 will allow the Australian Government to pass laws relating to obligations assumed by Australia under international treaties, even where those laws affect areas previously under the control of State Government and Parliaments.
>
> By a four to three decision the High Court held that the Australian Government had power under Section 51 (29) of the Australian Constitution to pass the Racial Discrimination Act.
>
> The relevant section of the Constitution gives the Parliament, subject to the Constitution, the power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs.
>
> Mr Justice Stephen, one of the majority judges, said that although the decision would mean an intrusion by the Commonwealth into areas previously the concern of the States, this did not mean that there had been some alteration of the original federal pattern of distribution of legislative powers.
>
> Rather, there has been a growth in the content of the area of 'external affairs'. This growth was seen as reflecting the new global concern for human rights and the international acknowledgement of the need for universally recognised norms of conduct, particularly in relation to the suppression of racial discrimination.

On 8 September 1983 the Attorney-General, Senator Evans, said in the course of a Parliamentary debate on treaties (Sen Deb 1983, Vol 95, 533):

> The present Labor Government's exercise of the power available to it under section 51 (xxix) of the Constitution will only be exercised, as the Prime Minister (Mr Hawke) and I and others said in the aftermath of the dams case, sensibly and responsibly and in situations where there is both genuine domestic need for national legislation and where there are genuine international obligations which Australia must meet. We will exercise that power with due regard to those considerations — the international obligations and the reality of those obligations — and we will exercise it with due regard to domestic political sensitivities. We do not propose, and never have proposed, to use the external affairs power or the existence of treaty arrangements as a vehicle to stampede around the country doing things for which there is no justification other than a desire for legislative aggrandisement by the Commonwealth. Finally, I believe that our good faith in this respect and our desire to have openly and overtly on the table the details of the treaty arrangements into which we are entering is demonstrated by the way in which, for the first time in detail, the character of those treaty arrangements has been brought to the attention of the Parliament in the way in which the tabling has been brought forward on this occasion.

On 14 October 1982 Australia's representative on the Third Committee of the United Nations General Assembly, Mr Thwaites, made a statement on human rights, part of which is reported as follows (A/C.3/37/SR.11, p.4):

> 10. Although there was far more cause for disappointment than for celebration, his delegation welcomed the fact that the number of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination continued to increase and to approach the goal of universal accession. His country held firmly to the view that it was through the acceptance of the obligations embodied in international instruments such as the Convention that the protection of human rights was best secured. Ratification or accession, however, must carry with them the determination conscientiously to fulfil the obligations undertaken, by enacting the necessary legislation and by taking steps to ensure that the objectives of that legislation were met.

Treaties. Tabling of treaties in Parliament.

For a legislative provision requiring the tabling of certain international agreements in Parliament, see section 13D of the Continental Shelf (Living Natural Resources) Amendment Act 1981.

Treaties. Territorial application. ANZUS Treaty.

On 18 August 1982 the Minister for Foreign affairs, Mr Street, provided the following written answer (Sen Deb 1982, Vol 95, 234):

> It is clear that the Treaty is intended to apply without distinction to the whole of Australia. This view has been reiterated by the Government on a number of occasions and I draw the honourable senator's particular attention to a reply to that effect by the then Minister for Foreign Affairs to a question upon notice by Mr Holding on 30 April 1980 (House of Representatives, *Hansard* 1980, Vol. 118, page 2879). The Minister went on to conclude that 'while the Treaty expresses concerns, objectives and commitments of the parties in broad terms, determination of specific action to be taken is a matter to be decided by governments from time to time'. This remains the Government's view.
>
> With regard to the Australian Antarctic Territory it should be noted that Article 1 of the Antarctic Treaty (Aust. T.S. 1961, No. 12) expressly prohibits, inter alia, 'any measures of a military nature' in the Antarctic.

Treaties. Denunciation. Treaty on the Non-Proliferation of Nuclear Weapons.

On 19 May 1982 the Minister for Foreign Affairs, Mr Street, provided the following written answer (Sen Deb 1982, Vol 94, 2207):

> The NPT is the principal international instrument aimed at preventing the spread of nuclear weapons. It is a persuasive symbol of broad-based international consensus and an important deterrent to proliferation. The strength of this consensus is demonstrated by the fact that 113 States have already adhered to the NPT. Abrogation of the Treaty by any State Party would have serious political and economic consequences. Such a State would forfeit its access to supplies of nuclear material and expertise. No State party has ever withdrawn from the Treaty except the Socialist Republic of Vietnam which in 1979 advised the three depositary

governments for the treaty that it did not consider itself bound by the treaties and agreements signed by the former Saigon administration.

Treaties. Termination. Legislation to enable termination. Christmas Island Agreement.

On 11 May 1983 the Minister for Territories and Local Government, Mr Uren, presented the Christmas Island Agreement Amendment Bill 1983 to Parliament. He explained the purpose of the Bill in part as follows (HR Deb 1983, Vol 131, 407):

> The purpose of this Bill is to provide for the winding up of the Christmas Island Phosphate Commission, and the termination of the Christmas Island Agreement with New Zealand. As indicated in the Schedule to the Bill, both the Australian and New Zealand governments have agreed to these changes being made. Honourable members will recall that in June 1981 the Christmas Island Agreement Act was amended to enable an Australian government company — the Phosphate Mining Co. of Christmas Island Ltd — to replace the British Phosphate Commissioners as the managing agents of the Christmas Island Phosphate Commission. As was indicated in the second reading speech on that legislation, those amendments were of an interim kind, and a completely new Christmas Island Agreement was to be negotiated with New Zealand.
>
> The legislation now before the House takes that process further. Article I in the Schedule provides that the Christmas Island Phosphate Commission shall cease to function as soon as practicable, following which the Christmas Island Agreement will terminate, in accordance with Article IV. As to Article II, the intention is that the assets of the Commission on the island — the phosphate rock, buildings, plant et cetera — will pass to the Phosphate Mining Co. of Christmas Island Ltd, which will then mine the phosphate deposits in its own right rather than as managing agents.
>
> Agreement is close to being reached with New Zealand on arrangements which will operate in future between the two countries in respect of island phosphate. This agreement will be embodied in an exchange of notes, which will begin to operate when the legislation before the House comes into force.

Following enactment of the Bill, the Christmas Island Agreement was terminated on 21 December 1983.

Treaties. Arrangements other than treaties. Gleneagles Declaration. Twin city arrangements. Narcotics memorandum of understanding. Science and technology memorandum of understanding. Logistic support memorandum of understanding. Fisheries and sugar contracts. Aid memorandum of understanding.

On 11 June 1981 Senator Dame Margaret Guilfoyle, the Minister representing the Minister for Foreign Affairs in the Senate, said in answer to a question (Sen Deb 1981, Vol 90, 3018):

> The Government accepts unequivocally its obligations under the Gleneagles declaration on apartheid in sport to work to isolate South Africa from international sporting competition as long as the South African Government pursues its policy of apartheid. In addition to refusing South

Africa's sporting teams or individuals representing South Africa entry into Australia, the Government has decided that no government grants will be made available to Australian sporting organisations to facilitate sporting contracts with South Africa.

On 7 September 1982 the Minister for Foreign Affairs, Mr Street, wrote in answer to a question (HR Deb 1982, Vol 128, 1147):

> The Government's policy on sporting contracts with South Africa and its commitment to the Gleneagles Agreement is well known.
>
> Since 1975 the Government, in common with its predecessor, has actively discouraged sporting contracts with South Africa. Such a policy has been in accordance with both United Nations General Assembly Resolution 31/6 of November 1976 and the Gleneagles Declaration agreed to at the November 1977 Commonwealth Heads of Government Meeting.
>
> The main practical restriction has been on the entry of South African sportsmen into Australia. Thus, while sports in South Africa are organised on the basis of race, colour or ethnic origin
>
> (a) sporting teams or groups of sportsmen domiciled in South Africa will not be granted entry to compete in Australia, irrespective of whether or not they intend to represent South Africa or any South African organisation;
>
> (b) individual sportsmen domiciled in South Africa will not be granted entry to compete in Australia as representatives of South Africa or any South African organisation;
>
> (c) individual sportsmen intending to compete in Australia as private individuals and not as representatives of South Africa or of any South African organisation will be considered for entry on a case-by-case basis;
>
> (d) applications by officials of South African sporting organisations seeking to enter Australia as visitors will be considered on a case-by-case basis.
>
> While the Government does not place restrictions on travel abroad by Australian citizens or seek to impose its views on sporting bodies, and sportsmen, it looks to them to take into account, in making their decisions, the policies it has enunciated and its reason for them.
>
> Following the 1977 Commonwealth Heads of Government Meeting, the Minister for Foreign Affairs wrote to all national sporting organisations in Australia forwarding to each a copy of the Gleneagles Declaration and reiterating to them Australia's undertaking to discourage sporting contacts with South Africa or with any other country practising racial discrimination in sport.
>
> The Government also circulated to national sporting bodies in Australia a statement of the practical application of this policy, drawing their attention to the United Nations Resolution 31/6 of November 1976.
>
> In 1978, national sporting associations were informed that it would not be in accordance with Government policy for Commonwealth grants to be used to facilitate sporting contacts with South Africa, whether such contacts took place in Australia, South Africa or elsewhere.

On 20 October 1983 the Attorney-General, Senator Evans, representing the

Minister for Foreign Affairs in the Senate, said in answer to a question (Sen Deb 1983, Vol 100, 1847).

> It is true that the matter of twin city relations is essentially a question for the local government authority involved. But it must be said that the establishment of a close relationship between an Australian city and a South African city is utterly out of keeping with the general tenor of the Australian Government's relations with South Africa which are of a kind that has been described by me in terms that have been less than kind and equally by Mr Hayden in recent times in this Parliament. The municipal authorities in South African cities such as Durban are, of course, representative of the white population only. Under those circumstances, while it is a matter for the local government authority concerned — there can be no question of any formal Federal intervention in a matter of this kind — it would appear to be wholly inappropriate for any civilised Australian town or city to enter into such a relationship with a South African purported counterpart.

For the speech by the Australian Ambassador to Thailand upon the signing of a memorandum of understanding on cooperation in narcotics prevention, see *Australian Foreign Affairs Record,* December 1982, 769-770.

On 5 March 1982 the Australian Minister for Defence and his New Zealand counterpart signed a memorandum of understanding on cooperation in defence science and technology (Comm Rec 1982, 199-200).

For procedures formally accepted by the Australian and United States Governments and which became an integral part of the Australia-United States Memorandum of Understanding on Logistic Support of 1980, see the statement by the Minister for Defence and the documents tabled in Parliament on 20 October 1982 (HR Deb 1982, Vol 129, 2264-2265).

For statements on fishing agreements between the Kaohsiung Fishing Boat Commercial Guild of Taiwan and the Commonwealth Government and the Kailis Kaohsiung Fishing Company (the Australian representative of the Guild), see HR Deb 1981, Vol 123, 26 May 1981, 2627-2628, Comm Rec 1981, 1553, Comm Rec 1982, 1560, Comm Rec 1983, 1165 and 1803.

On 28 October 1981 the Minister for Foreign Affairs, Mr Street, signed a memorandum of understanding concerning new Australian aid to the Biofarma Institute in Indonesia (Comm Rec 1981, 1411).

Treaties. Multilateral Treaty-making Process. United Nations initiative.

For reports of Australian statements on this item in the Sixth Committee of the 36th and 37th Sessions of the United Nations General Assembly, see A/C.6/SR.54, pp.8-10, SR.64, pp.15-17, and A/C.6/37/SR.65, pp.5-6.

Treaties. Breach of obligations. Australian breach of the GATT.

On 17 September 1981 the report of the Senate Standing Committee on Finance and Government Operations entitled "Australian Diary Corporation and its Asian Subsidiaries" was presented to Parliament (PP No 153/1981). Following are extracts from the report (pp 137, 143-144, 174-176):

> *The HOMPI rebate and Australia's obligations*
>
> 9.1 It is necessary at the outset of this Chapter to explain exactly what is meant in the following discussion by the expression 'a breach of GATT'. The Australian obligation in question was incurred not under the GATT as such (the General Agreement on Tariffs Trade of 1 January 1948 as

subsequently amended) but under the Arrangement Concerning Certain Dairy Products (1970) which was an arrangement among a limited number of GATT contracting parties and which was administered within the framework of GATT. The point at issue is whether Article III(iv) of this Arrangement was breached, i.e. if the rebate constituted a 'practice such as . . . a special rebate or discount' having the effect of directly or indirectly bringing the export price of 'the product. . .below the agreed minimum price'. Thus, where we refer to 'a breach of GATT', we mean a breach of this Arrangement, except where the context otherwise makes clear. . .

9.14 The Committee concurs with the opinion of the Department of Trade and Resource and the Attorney-General that 'it could reasonably be concluded that payment of the rebate during the period when skim milk powder was sold at the agreed minimum price breached the (GATT) Arrangement'. However, this assessment was based on the assumption that the rebate was distributed pro rata to HOMPI shareholders or in some other manner according to HOMPI's directions. As we stated in Chapter 8, the Committee has received no corroboration that this actually happened. Although the fact that the ADC received its 13⅓% share suggests that the funds might have been distributed pro rata, so many other doubts about the disbursement of the account arose, that we believe it is at least possible that the rebate arrangement did not technically breach the GATT Arrangement. The Department of Trade and Resources in its letter to the Committee adds that if 'the rebate monies were paid . . . otherwise than pursuant to directions from HOMPI, it could not be reasonably concluded that the transaction breached the arrangement'. It is clear that it was Messrs Uytengsu and Young who personally controlled the funds and negotiated for their disbursement. Whether in so doing they were acting as the agents of HOMPI is not clear from any evidence which the Committee was able to obtain.

9.15 The possibility that there was in fact no technical breach of GATT — although we reiterate our view that it is more likely than not that a breach of the GATT arrangement did occur — demonstrates the problems which arose from the then prevailing lack of detailed knowledge on the rebate. It does not seem to have occurred to anyone to ascertain the precise legal effect of the rebate on Australia's GATT obligations. A common assumption was made that the obligation was breached. The Committee considers that the DPI should have checked with ADI (HK) Ltd to ascertain the exact arrangement and with the Department of Trade and Resources, which was responsible for overseeing Australia's GATT obligations, to confirm that the arrangements which had been made for the payment of the rebate actually constituted a breach of those obligations . . .

Conclusions and recommendations

9.39 The Committee considers that lessons can be drawn from the problems outlined in this Chapter as to the responsibilities of the ADC, its overseas subsidiaries, the DPI and the Minister in relation to maintaining Australia's obligations under international treaties. These lessons are founded on the view that Australia *must* conform with its treaty obligations. The responsibility of each of the groups involved is set out below.

9.40 *The Department of Primary Industry.* There is a basic obligation for the DPI to keep the ADC fully informed to Australia's treaty obligations. This will obviously require regular liaison with other responsible departments such as Trade and Resources and Foreign Affairs. The DPI should draw the ADC's attention to any breach, or anticipated breach, of these obligations. The DPI should also inform the Minister of any breaches by the ADC and its subsidiaries. This presupposes that the DPI is sufficiently well informed of the activities of the ADC and its subsidiaries to detect actual and potential breaches. We consider that the relationship between the DPI and the ADC is in need of review. We discuss this further in Chapter 12. At present, the primary method for information to flow to the DPI is through its representative on the ADC board. Clearly also, it is the responsibility of the DPI to take follow-up action to ensure that where breaches do occur, then they have in fact been stopped. In the case of the breach discussed in this Chapter, we consider that the DPI was not sufficiently well informed about the activities of the ADC and HOMPI to be aware of the breach when it commenced. However, we consider that the DPI did not take sufficient steps after November 1976 to check that the breach was not continuing. The surprising inactivity of the Department between 2 April 1976 and the end of August 1976 is discussed in Chapter 12.

9.41 *The ADC and its subsidiaries.* The basic obligations of the ADC's board and management is to ensure that Australia's treaty obligations are complied with and to remedy any breach once they are drawn to their attention. Because of the ADC's official connection with the Australian Government, through its creation by Commonwealth legislation, and its status as a Statutory authority, the ADC should be specifically careful to ensure that Australia's treaty obligations are met. The ADC should also keep their subsidiaries informed of the obligations and should ensure that no breaches are incurred by those companies. The subsidiaries are effectively an arm of the Australian Government and as such should also, in our view, conform with treaty obligations. Problems arise in those subsidiaries in which Australia does not have a controlling interest. This matter is discussed further in Chapter 13.

9.42 *The Minister.* If the ADC or its subsidiaries are in breach of Australia's treaty obligations the basic obligation of the Minister must be to direct the ADC to cease that breach. The relationship between the Minister and the ADC and the manner of ministerial involvement in its activities is discussed further in Chapter 14. Summarising our views here, we consider that such Ministerial involvement in the ADC should not be by way of a 'request' (which does not become known to the parliament or the public). He should give a formal direction which is recorded in writing and brought to the attention of the Parliament as soon as possible notwithstanding that this will disclose Australia's breach of a treaty. We also believe that there is an obligation on the Minister to ensure that a direction is complied with once it is given. Ministerial inaction in the face of a known continuing breach cannot be condoned.