

**STANDING COMMITTEE ON  
UNIFORM LEGISLATION AND STATUTES REVIEW**

**SCRUTINY OF TREATIES**

**TRANSCRIPT OF EVIDENCE  
TAKEN AT PERTH  
WEDNESDAY, 7 SEPTEMBER 2011**

**Members**

**Hon Adele Farina (Chairman)  
Hon Nigel Hallett (Deputy Chairman)  
Hon Linda Savage  
Hon Liz Behjat**

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**Hearing commenced at 10.52 am****BACKHOUSE, MR NATHAN****Director, International Trade and Investment, Department of State Development, examined:****VAN DER GAAG, MS HOLLY****Policy Officer, Intergovernmental Relations Unit, Department of the Premier and Cabinet, examined:****GENONI, MS LYN****Executive Director, Strategic Policy, Department of the Premier and Cabinet, examined:**

**The CHAIRMAN:** We have some formalities to go through, but before we start I will introduce you to the committee members. I am Adele Farina, the chair of the committee, Hon Nigel Hallett is the deputy chair, Liz Behjat and Linda Savage are committee members. Our two legal advisors are Alex Hickman and Anne Turner, who are sitting next to me to provide me with advice as we go through the questions.

I will now go through the formalities. On behalf of the committee, I welcome you to the meeting. Before we begin, I ask you to take either the oath or affirmation.

[Witnesses took the affirmation.]

**The CHAIRMAN:** I understand that you have signed a document entitled “Information for Witness”. Have you read and understood that document?

**The Witnesses:** Yes.

**The CHAIRMAN:** These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, would you please quote the full title of any document that you refer to during the course of the hearing. Please be aware of the microphones. Try to speak into them and do not cover them or make too much noise with your papers. I also need to remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s hearing, you should request that the evidence be taken in closed session. The committee will consider that request and if the committee grants your request any public and media in attendance will be excluded from the hearing. I note that we have two members of the public sitting in the public gallery, in case you have not noticed. Until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that the publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Do you have any question about any of that, or would any of you like to make an opening statement?

**Ms Genoni:** I would like to make an opening statement. I will cover two things in the opening statement. First of all, I just want to tell you briefly about Holly’s and my respective roles in DPC in the context of our treaties work. I want to make some brief observations about what I think is the purpose of today’s hearing. First of all, my current role: I am the executive director strategic policy in DPC. I was appointed in April 2010. I have a broad policy responsibility for the work of the intergovernmental relations unit. To give you a bit of an idea, that unit supports the Premier for COAG meetings, Council for the Australian Federation meetings—that is the Premiers without the commonwealth—and all the related initiatives, projects and COAG reform council reporting that

goes with that. In terms of the Indian Ocean territories, we coordinate state services to that commonwealth territory. We also coordinate state submissions to national inquiries and provide advice and support to the Premier on other strategic priorities that the government of the day works on with the commonwealth—for example, state services to asylum seekers, tax reform, defence liaison and Anzac centenary celebrations, just to give you a flavour of the of the sorts of things we do. Treaty coordination comes within that bag as well. The director for intergovernmental relations, Warren Hill, has direct operational responsibility for all those things. He is on a plane to the east at the moment and is unavailable today and sends his apologies. I should also say that my prior job was director of intergovernmental relations and that I have worked in intergovernmental relations since 1997. I have worked in areas related to treaties for sometime.

Holly van der Gaag is the senior policy officer with direct responsibility for treaty matters in our office. She is our rep on the Joint Standing Committee on Treaties. She deals directly with the commonwealth's treaty offices in the Department of Foreign Affairs and Trade and in the Department of the Attorney General. She has been doing this work for a couple of years, at least. She is supported by principal policy officer, Anita Rudeforth, who is unavailable and on leave today. So, I think between us we can probably answer all of your questions. I have a broad policy overview; Holly does the day-to-day detailed work.

[11.00 am]

In terms of what I understand to be the purpose of today's hearing, which is to assist the committee in its recent decision to reactivate its treaty terms of reference, there are just three observations I would like to make. In that context, I note, in the first place, that similar questions about the commonwealth's treaty process and WA's input were asked of DPC officers back in 2007. At that time, as you are probably aware, they did the inquiry into administrative practice and procedures and parliamentary processes involving treaties entered into or proposed to be entered into by the commonwealth. The second point I would note is that the report from that committee's inquiry, the nineteenth report, June 2007, recommended deleting the treaty term of reference—that same term of reference that the decision has been taken to reactivate. The third observation I would make is that in that intervening period since 2007, the commonwealth's treaty-making process remains the same as it was in 2007, and the state's input into that commonwealth treaty process remains as limited and as constrained as it was then. That is a contextual observation.

**The CHAIRMAN:** Nathan, did you want to make any comments?

**Mr Backhouse:** An opening statement? Yes, if I could. I just wanted to thank the members of Parliament and the committee for the opportunity for the Department of State Development—for myself—to present here today. I head up the department's international trade investment group, and I have been in that role since December 2010. My background is in the Department of Foreign Affairs and Trade; I was a diplomat for 10 years. After that, I worked in a national business group with international connections—the Australian Chamber of Commerce and Industry. Over that period my focus has really been on, sort of, the economic aspects of treaties, so such things as free trade agreements. Again, we, I think, have a much humbler role than our cousins in the Department of the Premier and Cabinet, and, effectively, in terms of treaties our key role is to provide information to DPC and to the federal government in relation to how a free trade agreement, for example, may affect businesses. That is the relevance in relation to treaties that my department has had in recent years.

**The CHAIRMAN:** Just to clarify matters, although there was a report by a committee similar to the committee that you are currently before, it was a former constitution of this committee, so I think we need to start right from the beginning go and through all the processes again. Members on this committee were not necessarily members of the previous committee, and so we need to really start from basics and work our way through. Perhaps, to start off with, we could start right at the beginning. How do you get notified that the commonwealth is considering entering into a treaty;

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and what process do you go through from that point on in terms of determining whether you are going to provide advice, how you go about collecting that advice, and who you provide it to? Lyn, did you want to start?

**Ms Genoni:** Yes. You are probably aware that in 1996 COAG agreed some principles to allow greater input by the states and territories to the treaty-making process—that is, greater input than had been previously. It is still not brilliantly great. That is the context for the process we follow. The role of IGRU in DPC is to be the primary point of contact for the commonwealth in consulting with WA on proposed treaty actions. That treaty contact comes in two forms to DPC. There is the stuff that comes through the Joint Standing Committee on Treaties; that is the commonwealth parliamentary committee. That is a more formal process that involves an invitation to the Premier to comment on proposed treaties that have been tabled in federal Parliament. I believe the President of the Legislative Council receives the same or a similar invitation at the same time. It is fairly late in the treaty-making process, and there is a limited time for comment.

The other kind of contact we have in terms of treaties with the commonwealth is via what we call SCOT. That is the Standing Committee on Treaties, which is the officials group. So, the other one is a parliamentary committee; this is an officials group. It is chaired by Prime Minister and Cabinet, and there is cooperation with the Department of Foreign Affairs and Trade and the commonwealth Attorney General's department—the three commonwealth departments that have primary responsibility for all things treaties. There are state and territory officials on that group as well; Holly is WA's current rep on that group. They have a sort of a formal process; they have an email inbox—every state has its own—and attached to that are people in DPC who all of that documentation comes to.

**The CHAIRMAN:** Is that targeted at an earlier stage in the process, or is it at about the same time as the parliamentary process?

**Ms Genoni:** No; the SCOT contacts involve potentially much earlier in the process. It is a much more informal process as well. It can be requests for information, it can be consultation, it can be reporting on treaties that have already been ratified and are being implemented, and we are just in the process of annual reporting. It is still limited to what the commonwealth thinks the states might be interested in, so they make a judgement about which ones have relevance to the states and territories, and there is much more time to respond. It is not the very limited time frame that is involved through the JSCOT process, although it is the same point of contact. It is essentially the same process that we follow, it is just not so time limited. It is often an iterative process, so particularly for some of those human rights agreements and some of those free trade agreements, as the negotiating process goes on you will get asked for consultation on various aspects of the negotiations, and then you will be asked again in six months' or 12 months' time; you might be asked during the process. Regardless of which kind of information we are being asked for, the process is always pretty much the same. DPC consults with the relevant WA agencies on the commonwealth's behalf, and also ensures that the policies of the government of the day are incorporated into any advice back. So, essentially, what we do—I might ask Holly to give you any further detail if you need it; in fact, we could table a document that might help step you, sort of, through the process.

**The CHAIRMAN:** While that document is being distributed, I think Hon Liz Behjat has a question.

**Hon LIZ BEHJAT:** I just want to know whether the things that come to SCOT—the treaties that come to SCOT, for instance—do they then ultimately go to JSCOT, or is that not always the case?

**Ms Genoni:** They may or they may not. If they are going to be signed or if they are going to be ratified, yes they will come through SCOT. But a lot of these negotiations come to nothing, or they are speculative.

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**Hon LIZ BEHJAT:** Yes; but they never start at JSCOT and go to SCOT; they always start at SCOT, and then some will go to JSCOT?

**Ms van der Gaag:** I would say that is correct. Most of the requests do come from, say, the Attorney General's department, and then several months later we will see some of them going to JSCOT, after the consultation process.

**Ms Genoni:** It is because it is a stage in the process. It is probably safe to say that the SCOT is the sort of during-the-process thing, and JSCOT is more of an end-of-the-process thing, and hence the more formal input. Many of the things that —

**Hon LIZ BEHJAT:** More formal, but more restricted because of time constraints?

**Ms Genoni:** Yes. But, realistically, by the time you get to JSCOT, a lot of those issues have been worked through. The states know if there is going —

**Hon LIZ BEHJAT:** So, JSCOT is really a bit of a rubber stamp?

**Ms Genoni:** Well, it is into the parliamentary process; it is where decisions are about to be made.

**The CHAIRMAN:** Could you just explain: at the point that you get contacted by SCOT, what is your process for actually examining a treaty and deciding on what sort of comments you are going to get; and do you go to stakeholders outside of government agencies?

**Ms Genoni:** No. This is an entirely within-government process. I think you had a question there about how do we inform stakeholders or promote—we do not. This is an entirely within-government process. That is not to say that the agencies that we are dealing with do not deal with their stakeholders all the time, but specifically in terms of a particular treaty we do not go to, sort of, external stakeholders. But in terms of —

**The CHAIRMAN:** What is the time frame between the time that you get the referral from SCOT to the time you are required to reply to SCOT? Is there a standard time frame?

**Ms van der Gaag:** There is not really a standard time frame; it can range from about two weeks to a month, I would say, on average.

**Ms Genoni:** It depends on what you are being asked to do and the likely range of agencies you might need to talk to, and how detailed the advice needs to be.

**The CHAIRMAN:** So, realistically, within that time frame the likelihood of any government agency actually being able to consult stakeholder groups is very, very, very small?

**Ms Genoni:** Unless they were talking to their stakeholders anyway. I mean, the free trade agreements, for example: you would imagine that agencies that are talking to their business community and understand their business community are involved in negotiations on a particular free trade agreement. There might not be time to consult about that particular question, but in the process of negotiating that particular agreement there might be more time.

**The CHAIRMAN:** So, basically, you get the referral from SCOT, you identify the government agencies that might have an interest in the treaty, and then you forward the treaty on to those government agencies?

**Ms Genoni:** Yes; we contact them by phone, then we email them with a formal request. We give them an amount of time to consider the request, do what they need to do and come back to us, then we collate that information, and then it gets signed off either by—it does not come to us unless it is signed off by their CEO. Then we do the consolidated response, and then it gets endorsed by our DG, or the Premier if it is a significant free trade issue, for example.

**The CHAIRMAN:** So, the advice provided back to the commonwealth is always by way of written advice?

**Ms Genoni:** Yes.

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**The CHAIRMAN:** Do you do any analysis as to the impact on the state as part of that advice, in terms of will the treaty impose a financial obligation on the state?

**Ms Genoni:** We rely on the agencies to do that. They are looking at the economic, the financial, the legislative—really, what are the potential practical implications of the proposed whatever it is on the business of the state.

**The CHAIRMAN:** Which are the agencies that you primarily consult with on treaties?

[11:15]

**Ms Genoni:** It depends very much on the nature of the treaty. For example, if it is human rights, it would be Attorney General, but it might be Disabilities, Indigenous Affairs, Education, Child Protection; it depends a bit. With commercial ones, you would go to Commerce, Finance, probably. Trade, State Development would be the lead agency. Agriculture, Fisheries, Small Business might have an interest.

**The CHAIRMAN:** So it is pretty varied depending on the treaty.

**Ms Genoni:** Yes.

**The CHAIRMAN:** You mentioned earlier about the elements of a treaty that constitute your focus. You said legislative —

**Ms Genoni:** Financial, economic.

**The CHAIRMAN:** And do you look at human rights as well?

**Ms Genoni:** Many of them are human rights proposals, but you are looking at what is the impact on the state, what is the state's policy in this respect, what impact might this have, so the lens is the practical implications for the state, whether they be financial, economic, legislative.

**The CHAIRMAN:** What about environmental or social?

**Ms Genoni:** Yes. Again, it is up to the agencies, really, but some agencies would have that kind of a lens.

**The CHAIRMAN:** So that lens is not applied consistently; it would depend on the nature of the treaty.

**Ms Genoni:** And it depends on what agencies want to focus on, yes, so we do not give them a pro forma or anything to follow.

**The CHAIRMAN:** So you do not have a standard set of principles that you cross-check treaties against.

**Ms Genoni:** No.

**The CHAIRMAN:** Nathan, at this point, I might just ask you to step in here and just explain what happens from the point of view of the Department of State Development once you have a treaty referred to you for comment.

**Mr Backhouse:** Sure. Again, the way that I sort of frame this in my mind is this separation of political matters and economic matters. Again, as I pointed out at the beginning, those economic and trade issues are related to treaties which, by and large, would be passed to us for comment by DPC. In recent years, I think the most relevant agreements or treaties have been related to free trade agreements and free trade agreement negotiations. In actual fact, the federal government has not really signed any FTAs, except for the ASEAN FTA last year, I think it was. There were a number of reviews that the federal government undertook by the Productivity Commission into the benefits of FTAs. For example, recently we were asked to comment on the initial feasibility study related to the possible India–Australia FTA, and that would be the sort of point at which our processes would kick in. Those processes would include consultation with businesses that are related to trade with India, what sorts of interests they have, also an economic analysis of what our trading patterns and

investment patterns are with the Indian market, and what sorts of issues we would be supportive of that the federal government would run in its negotiations. We actually get two bites of the cherry, if you like. We will be asked for comment from DPC, but obviously DFAT is running a whole range of consultations with stakeholders, which we would also comment on. Following that initial process, that initial round of discussions, they then feed that into their process and pass it out to relevant federal agencies. Again, during those negotiation periods, DFAT functions as an umbrella group, and those other agencies come in and negotiate particular aspects of their interest. We would also be able to pass on, if there was something that we were particularly concerned about, to those relevant other federal agencies. The process is quite consultative. The problem, I think, that we have is just that business is not sure about the relevance of FTAs. This was one of the issues that came through with the Productivity Commission's report on the benefits of FTAs. It is sometimes very difficult for small business owners and medium-sized business owners to comment in detail and spend the time to analyse these FTAs and to raise the flag, but we do make every effort to include them and ask them for their views, and we feed those back to DPC and back to DFAT.

**The CHAIRMAN:** How do you go about communicating with your stakeholders with those businesses, and what sort of time frame do they have to respond?

**Mr Backhouse:** Usually with FTAs, you do have quite a long lead time because you never know how long it is going to take to finally sign and negotiate that actual FTA. Judging from Japan, we have had eight or nine years. China is the same. There is a long period in which you can feed into the process. At the first starting gate, we would go out to our database of contacts. We would try to call some businesses directly and say, "Look, we understand you're exporting to India. We have been asked to provide comment. What are your views? Is this a good thing or is it not?" We also talk to people like the Chamber of Commerce and Industry of Western Australia. They, in this whole process, actually play quite an important role because chambers of commerce historically have in many countries provided certificates of origin, where exporters are required to go to the chamber and ask for a certificate of origin verifying that the goods are from Australia. They are actually quite good to provide information on what the companies are that are exporting to those markets and also have views on what companies' requirements are and what sorts of items are exported. That frames a general picture that we would feed into the process of the state's strategic interests in FTAs.

**The CHAIRMAN:** When you say you consult with the Chamber of Commerce and Industry, is that just the Perth branch or do you also consult with all the regional branches?

**Mr Backhouse:** The Perth branch has a relationship with the regional branches and they have —

**The CHAIRMAN:** They do not always agree on issues, though.

**Mr Backhouse:** They do not always agree on policy and various things. In terms of those certificates of origin documents, Perth is the final location for stamping those things. So all that information from, say, Bunbury et cetera comes through to Perth and we are able to get a picture also from the regions about what is going to India, for example.

**The CHAIRMAN:** What sorts of factors do you take into account in determining what are the best interests of the state in relation to the treaty?

**Mr Backhouse:** Again, that is a very good question, and I think it is a very difficult question to answer on our part. Effectively, we are facilitators; and, if there is a specific issue or item or area that businesses in Western Australia that trade internationally raise with us, we would pass that on. We do not tend to second-guess what business wants; hence, the real importance, I think, of trying—it is a difficult challenge—to get businesses to actually let us know what it is that they want out of FTAs or what particular sectors they want access to or what tariffs they want reduced in those markets. But, as I said, at the end of the day DFAT is also running around with consultations over

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the top, which, hopefully, would capture those more strategic issues. But that is the process that we would use.

**The CHAIRMAN:** From what you have said so far, there seems to be a focus from the department on industry. I am just wondering whether you also look at the flip end—that is, what the consumer wants.

**Mr Backhouse:** The international consumer?

**The CHAIRMAN:** Or the Australian consumer, because at the end of the day these are about trade agreements that impact both ways.

**Mr Backhouse:** Australia has quite low tariffs across the board. The only tariffs that I know exist would be in textiles and clothing—it is quite low at about five per cent—and then automobiles. In terms of the consumers in Australia, and Western Australia in particular, they are free to determine priorities and what they want from those markets. It is not really something that we would have a say in. It is very difficult for us. I think the market determines what those consumers' preferences are, just because we have very low tariff falls in Australia. Where we are able to point out, say, Western Australian business interests—Western Australian businesses are also consumers, I guess—offshore would be if they say, “We have an interest in exporting lupins et cetera to the market. There are tariff barriers there. We have had a lot of difficulty; we are priced out of that market”, and then we would flag that with DPC or DFAT.

**The CHAIRMAN:** Does the department prepare a business cost calculator report?

**Ms Genoni:** No.

**Mr Backhouse:** The department does not calculate a business cost calculator report. I was very interested in following up on this issue when I had an indication of some of the issues that we raised. My understanding is that these tend to be put in place by the federal government and federal government agencies in relation to, by and large, domestic legislation—such things as Medicare reform, potentially the carbon tax. On these sorts of things, agencies would be asked to give a business impact assessment. In relation to treaties, going back to the political aspect, it would be very hard—this is more DPC's area—to calculate what is the business cost for a treaty related to the rights of the child or something like that. In terms of the economic aspects, again the FTA is about reducing regulation. There was an issue related to certificates of origins—whether these certificates should be dropped to reduce business compliance costs. But I think it was decided that there was no other avenue to determine the origin of goods from various countries, so they decided to keep that particular piece of paper. But the FTAs, ultimately, are about reducing business regulation, so we would not usually give a business cost calculator assessment.

**Hon NIGEL HALLETT:** Nathan, do you think you have achieved that in reducing business compliance?

**The CHAIRMAN:** That is a tough question.

**Mr Backhouse:** It is a tough question.

**Hon NIGEL HALLETT:** I am just putting my other hat on.

**Mr Backhouse:** From what I have seen, and from what I have seen with business, I think free trade agreements are important tools for governments, and particularly for the Australian government, trying to access markets with high-tariff barriers in our region. The business regulation related to those types of things—your bills of lading, your export documentation and those sorts of things—will always be quite difficult. I really think the cost, if I can put it in those terms, for business is really in trying to spend the time and effort in understanding what those FTAs really may mean potentially to their business. I think that that is a challenge for small businesses and medium businesses to understand what the ASEAN FTA means for them. I do not know how you can assist businesses. We run seminars on trying to tell them the potential benefits of FTAs, but, again, it is



not really our role as government to advise on personal business strategy internationally. We can provide some pointers and things to look at, which we do. CCIWA also does a very similar thing with its international trade days, so we try to assist as much as we can. I just think the amount of time and effort going through these tariff schedules, or “I’m an exporter of wood; does that qualify?”, is just a cost in terms of time for business that I do not think it is possible to avoid.

**Hon LINDA SAVAGE:** I am just going to pick up on the point that Adele made earlier about the focus on businesses in terms of who you consult with and the issue she raised about consumers. I just ask whether your concerns and consultation extend to, say, people in employment who obviously are very much impacted by free trade agreements; in fact, it can substantially alter the workplace or the employment of large groups? Is that an aspect that you consider?

**Mr Backhouse:** Yes, it is. It is an aspect that we do consider. I guess I would just ask for a bit more clarity as to what you mean.

**Hon LINDA SAVAGE:** I wonder which groups you might consult with in regard to that—employment groups, unions, any particular workforces that you see affected by a free trade agreement when you are doing your economic analysis.

[11.30 am]

**Mr Backhouse:** We keep an open consultation process. Again, DFAT runs a community-wide consultation process that we are involved with. So we would listen to the views of the broader community in those consultation processes and consider them. I guess in terms of FTAs, again I would make the point that our tariff barriers are very, very low compared with some of the countries we are trying to access, such as Japan and China. Therefore, in terms of economic theory, the impact of an FTA would be very limited on the dynamics of the local workforce. I mean, the structure is already there, and we have very low tariff walls. If we had, for example, high tariff walls related to textiles—they are at five per cent, I think, but if we had something like 15 per cent, then in an FTA negotiation we would definitely consult with those textile manufacturers. But there are not really many, because they would be impacted if these tariff walls fall down. But I think that process is already happening.

**Hon LINDA SAVAGE:** There has been in the past. Are you saying now that is no longer an issue essentially when you are looking at this?

**Mr Backhouse:** That is right.

**The CHAIRMAN:** Lyn, can I just ask that same question of you in terms of whether the Department of the Premier and Cabinet prepares a business cost calculator report?

**Ms Genoni:** No. No business cost calculator report, or anything similar, is undertaken at the state level.

**The CHAIRMAN:** Do you provide information to the commonwealth to assist it to prepare its business cost calculator report?

**Ms Genoni:** The information we provide may well assist them in that, but not specifically, no.

**The CHAIRMAN:** Nathan, from the Department of State Development’s perspective, how frequent is it that WA would provide a legislative response to a treaty?

**Mr Backhouse:** In recent memory, quite rare. The most recent response that we gave would have been related to the India–Australia FTA consultations.

**The CHAIRMAN:** Lyn, did you want to add any comment to that question from a Department of the Premier and Cabinet viewpoint? The issue is that we seem to enter into an awful lot of treaties, and they do not always result in a legislative response, but sometimes that may be necessary. I am trying to gauge how frequently a legislative response from either the commonwealth or the states, or the states and the commonwealth, is required in relation to treaties.

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**Ms Genoni:** It is actually quite difficult to tell, because the commonwealth's policy is that action to bring a treaty into force is only taken after all the necessary legislation is in place. So, over a period of time, for all sorts of reasons, legislation gets reformed, amended, changed. So to actually link directly back to one treaty a particular legislative change is not that easy to do. Sometimes the commonwealth legislates unilaterally in their areas of responsibility. Also, they draw on a range of powers. They do not draw just on the treaties power. They draw on their trade powers and their corporations powers increasingly. Sometimes we have cooperative schemes. Sometimes states just adjust their legislation for their own reasons. So it is really difficult to actually ascribe a particular legislative change to a particular treaty.

The other thing is that in the treaty-making process, particularly when it comes to the human rights treaties, the effort on behalf of Australian delegations and negotiators is often to try to adjust the articles of the treaty to accommodate Australia's legislation, rather than the other way around. So with laws that are supposed to protect women and children from exploitation, for example, Australia has a pretty reasonable framework. It is more third-world exploitation that we are aiming for. There are articles that talk about how kids who are under age 13 should not be allowed to work. In Australia, kids aged 13 can work, provided it does not affect their schooling, provided they have proper supervision, and only for a certain number of hours. So it is not about changing our rules. It is more about adjusting the treaty to make sure that it fits our rules. It is kind of the other way around.

**The CHAIRMAN:** Lyn, recently the Governor of Queensland gave a speech at a parliamentary conference about treaties, which members of the committee attended. The Governor spoke about how compromises need to be made to articles in a treaty in order to resolve differences between the parties. What role does Western Australia play in resolving differences; how are you made aware of the need for such compromises; and, from WA's perspective, are the compromises obvious?

**Ms Genoni:** It is still a very limited role. Since the 1996 COAG decision to allow greater state and territory input into treaties, there are three ways the state can get involved. There is information, and that is largely through the SCOT process. There is consultation, and that is through the SCOT process, and to some extent through JSCOT, although, as we have already said, in terms of negotiating the treaty, that is pretty late in the process. Ministerial councils provide an opportunity for states and territories to have input, if indirectly, into those negotiations. So often issues will come to a ministerial council for discussion, and then there will be working groups, and that gets fed back into the commonwealth process and fed back into the negotiations. But it is a pretty arm's length sort of involvement.

The final way—this is pretty rare—is direct participation on delegations. So state and territory, and industry and other people, can be invited onto commonwealth delegations during the actual negotiating process; and that has happened. I am aware that on the Kyoto Protocol negotiations, for example, we had a WA delegate. On the rights of Indigenous peoples, we had a WA delegate. But when you have a WA government delegate, they represent all states and territories. They are not there representing Western Australia. They are there representing the composite views of states and territories. So, their role is to meet with the other states and territories, and work out what the issues are. They participate in the discussions, but they there as a source of information—they are not actually doing the negotiations—and then they feed that back. So, at any moment in time there might be a state and territory delegate on a particular set of negotiations. It might not be a Western Australian delegate, but at least there is an opportunity for WA to get involved; and that is through the JSCOT process.

**The CHAIRMAN:** When the commonwealth has entered a treaty, what process does the department go through to determine whether existing Western Australian law needs to be modified in any way, and do you consult with parliamentary counsel to make that determination?

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**Ms Genoni:** Well, during that process, the commonwealth might seek the advice of particular states and territories to understand how their laws work in a particular area and to understand whether or not there might need to be some change. To some extent, if that happens, DPC would get the advice of the State Solicitor General and the Attorney General. But, by and large, in practice those issues do not really come through DPC. They are more handled through the Attorney General, that ministerial council, and those officials. So by the time it comes to us, a lot of those issues and details have already been significantly worked through. We are starting to see articles where they have already worked through what the implications on state law might be; and of course they do not actually ever ratify until all the laws are in place.

**The CHAIRMAN:** Can I ask the question in reverse? If a minister wants to introduce a new piece of legislation or amend existing legislation, does your unit have a role to provide advice to that minister or that department in relation to any breaches with treaty obligations that might be involved in that legislation, assuming that there are?

**Ms Genoni:** That would not come to us. That would probably go through either the Solicitor General or the Attorney General. It is legal advice at that stage.

**The CHAIRMAN:** So there is not a mechanism to cross-check against treaties in terms of developing new legislation? I would be surprised if government departments would automatically go the Attorney General's office when they are drafting legislation, because that is not usually what they do.

**Ms Genoni:** Well, the Solicitor General would provide that kind of advice—his office; certainly not us.

**The CHAIRMAN:** Just from your perspective, how frequently would you say that treaty ratifications necessitate a Western Australian legislative response? I think you have pretty much answered that, but can you summarise it briefly?

**Ms Genoni:** I did check with the Attorney General's Office to see whether, over a 15-year period, they had examples of cooperative legislative schemes that they could directly ascribe to treaties, and they could come up with only three over that 15-year period. Two of them are currently before the Western Australian Parliament—one is the Electronic Transactions Bill 2011, and one is the Commercial Arbitration Bill 2011—and one is some international wills uniform law work, which is in the pipeline; it has not come through as legislation yet. So it is quite rare.

**The CHAIRMAN:** The remainder of the questions that the committee has relate specifically to the treaty that the committee is currently looking at, and that is an agreement for the establishment of an international anticorruption academy as an international organisation. Nathan, I am not sure how involved the Department of State Development would be with such a treaty, but if you have any comment that you would like to provide to the committee in relation to this treaty from your department's point of view, we would be happy to hear it; and, if you do not, we would be happy to let you go now if you would like, or you can stay for the remainder of the hearing. We will leave that to you.

**Mr Backhouse:** Sure. We have had a look at this agreement, but there is no real comment that we would make from DSD's perspective.

**The CHAIRMAN:** Okay. Is there any concluding comment that you would like to make?

**Mr Backhouse:** No. That covers everything. Thank you very much for the opportunity to present today, and I am happy to follow up on any questions in the future.

**The CHAIRMAN:** Thank you very much. We will just give you a few minutes to leave, unless you want to stay.

**Mr Backhouse:** I am happy to stay, if it is quick.

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**The CHAIRMAN:** There are quite a few questions, so I am not sure that it is going to be all that quick! Lyn, I understand you have actually been provided with an outline of the questions that we will be asking.

[11.45 am]

**Ms Genoni:** Yes, I have.

**The CHAIRMAN:** In relation to the treaty that we are currently looking at, article 1(1), could you explain the phrase “full international legal personality”?

**Ms Genoni:** No, I could not. All of these questions, bar one, are all legal questions asking for legal advice, legal interpretation. It is not something we provide. It is not something we do. Really, these should all be directed to the Office of International Law in the commonwealth. It is not a state —

**The CHAIRMAN:** But in terms of providing advice to the commonwealth from the state’s perspective, would the department not need to get an understanding of the legal, as well as economic and legislative, implications of the treaty for the state, and would you not normally get advice?

**Ms Genoni:** Not necessarily, no. As we indicated before, the process that we go through is that we—as it happens we did get this one; we sent it out to the relevant agencies. No agency has identified any issues or problems. So, as far as we are concerned, that is the end of the matter. We do not do our own independent analysis and research on the treaties; we provide sort of a coordination function. We do a crosscheck with state government policy and state government priorities and concerns and so on. We make sure that it gets to the right people in the relevant agencies. I could not tell you—Holly probably could—the agencies that actually, in this case, were contacted and given the opportunity to provide comment. We rely on them to do that kind of analysis.

**The CHAIRMAN:** In this case, on this particular agreement, there were no issues raised by any government agency?

**Ms Genoni:** That is right; no issues were raised.

**The CHAIRMAN:** Do you then write to the commonwealth to advise them that the state has no comment?

**Ms Genoni:** Yes, normally we do. It would appear—we checked our records—on this occasion we might have overlooked sending that information back. We checked the records. We did actually request agencies for comment, did not receive any comments, and so normally it would have just been an email back to the contact point in the commonwealth saying “no problems or issues raised by Western Australia”. That is exactly what has happened with the other jurisdictions, and that is what they have reported.

**The CHAIRMAN:** So I can get a better understanding of the time lines involved here: when did that email go out to agencies in Western Australia to provide comment and how long did they have to comment?

**Ms van der Gaag:** We were consulted by the commonwealth in February of this year, so an email was sent out in early February. I think we gave agencies about a month to respond.

**The CHAIRMAN:** Was there any follow-up with agencies when no response was received?

**Ms van der Gaag:** There were several follow-ups.

**Ms Genoni:** They usually confirm that they have no comment rather than they just have not got to it or something.

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**The CHAIRMAN:** Lyn, I think you said earlier that there was one question that you felt you could provide an answer to. I am wondering if you could identify it for me so I will not go through asking all the questions until we get to it!

**Ms Genoni:** It is part of an answer. Question 13: “Was this ever a consideration in negotiations and would DPC consider making such a recommendation to SCOT?” No, it was not raised by any of our agencies and so no, we did not raise it through SCOT.

**The CHAIRMAN:** One further question from me: could you see any obstacle to the department providing a copy of the advice it provides to SCOT and/or to JSCOT to this committee?

**Ms Genoni:** We would have a problem with the advice to SCOT because that is discussions and negotiations that are within government. That information is usually provided to us on a strict confidentiality basis. The reason for that is that a lot of those negotiations are still in train. They are kept strictly confidential by the commonwealth. If we breached that confidentiality, we would pretty quickly not receive any further information.

**The CHAIRMAN:** Is there an agreement that you can point to, to base that need for confidentiality?

**Ms Genoni:** Can we take that on notice? I think there is. I am sure we could find it for you. It is probably in the handbook.

*[Supplementary Information No 1.]*

**The CHAIRMAN:** We will take that as question on notice 1. You can come back to us and confirm if there is an issue of confidentiality in providing the department’s advice to SCOT, the basis that that claim is being made.

**Ms Genoni:** Yes.

**The CHAIRMAN:** In relation to the advice provided to JSCOT, do you want to take that on notice as well? I appreciate you might need to double-check with the director general.

**Ms Genoni:** Yes. It may not have the same level of confidentiality but we will check that for you.

*[Supplementary Information No 2.]*

**The CHAIRMAN:** I was wrong; I thought this was going to take quite some time, but it did not take much time at all. Lyn and Holly, thank you very much for your time, particularly given it was at short notice. We appreciate your time. We may be seeing more of you in time to come. Thank you very much.

**Hearing concluded at 11.51 am**

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