M1997-01 Principles and Procedures for Commonwealth-State Consultation on Treaties

Description

Attention is drawn to the revised Principles and Procedures for Commonwealth-State Consultation on Treaties.

Function and Subject

National Engagement and Intergovernmental Relations (1)

National Partnerships and Agreements

Detailed Outline

I wish to draw to your attention to the revised Principles and Procedures for Commonwealth-State Consultation on Treaties. A copy of this document is attached for your reference.

The document was endorsed by the Council of Australian Governments (COAG) on 14 June 1996. It is the basis on which the Commonwealth will deal with the States and Territories on:

- international treaties; and
- other international instruments of sensitivity and importance to States.
In particular, the document outlines the processes for consultation and providing information.

The Commonwealth will provide States information on treaty negotiations by sending the Treaties Schedule and other information on current and forthcoming negotiations to The Cabinet Office.

The Commonwealth will also be preparing National Interest Analyses (NIAs) on all treaties. The Commonwealth will consult States at an early stage in preparing those NIAs on treaties in which States have a major interest. An NIA will accompany each treaty tabled in the Commonwealth Parliament. An NIA pro forma is attached as an appendix to the Principles and Procedures.

There are two main consultation mechanisms: The Treaties Council and the Standing Committee on Treaties (SCOT). The Treaties Council was set up by COAG and is made up of the Prime Minister and all Premiers and Chief Ministers. The Treaties Council will meet at least once a year, normally at the same time and place on COAG. Its first meeting will take place in 1997.

SCOT is made up of senior Commonwealth, State and Territory officers (from The Cabinet Office in the case of NSW) and meets at least twice a year to:

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

If the Commonwealth Government approaches you directly on matters associated with a treaty or other international instrument, I would ask you that you first consult with me or The Cabinet Office before putting forward a Government position.

Also, Cabinet may need to consider any significant strategic treaty matters, before a State position is put to the Commonwealth. In some cases, it will be more appropriate for me to deal with the matter at a Head of Government level.

Similarly, I would ask that your Departmental officers make sure that they clear their Department's position with The Cabinet Office before responding to any requests for comment.

I consider that this consultation is essential if New South Wales is to provide a coordinated response to the Commonwealth on treaty matters.
The Cabinet Office is also to co-ordinate representation by State officials at treaty negotiations. No Ministerial Council is to appoint representatives. If the issue of State representation arises, you should contact The Cabinet Office to discuss the appropriate action. It is also normal practice for the State Government whose officer is attending the negotiations to bear all costs. You should therefore not enter into a cost-sharing arrangement with other States or Territories.

Mr Peter Hendy, Policy Manager, Inter-Governmental and Regulatory Reform Branch of The Cabinet Office is the contact officer for treaty matters.

Please bring this Memorandum and the attached Principles and Procedures to the notice of all Departments and Authorities within your administration.

Bob Carr
Premier

Principles and Procedures for Commonwealth-State Consultation on Treaties

Part A: Introduction and Principles

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

1 Introduction

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

2 Instruments covered by these Principles and Procedures

2.1 These Principles and Procedures relate to treaties of sensitivity and importance to the States and Territories.
2.2 Treaties are multilateral, limited party (plurilateral and trilateral) or bilateral agreements which create legally binding obligations under international law. Treaties pertaining to matters of national security are excluded from these Principles and Procedures.
2.3 Having regard to these Principles and Procedures, the Commonwealth will inform the States and Territories of other international instruments where they cover matters of sensitivity and importance to the States and Territories such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.
3 Principles

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

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

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

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

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

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

Part B: Procedures

4 Information

4.1 The Commonwealth will inform States and Territories in all cases and at an early stage of any treaty discussions in which Australia is considering participation. Where available, information on the long-term treaty work programs of international bodies will be provided to the States and Territories.

4.2 There will be various ways in which information on treaty negotiations is provided to the States and Territories.

(a) Information about treaty discussions is forwarded to Premiers'/Chief Ministers' Departments or Cabinet Offices on a regular basis through the Department of the Prime Minister and Cabinet and the Treaties Secretariat of the Department of Foreign Affairs and Trade. One vehicle for making information about current treaties and negotiations available will be the Treaties Schedule.

(b) The Commonwealth will provide the States and Territories every six months with a list of current and forthcoming negotiations (forecasting 12 months ahead) and of matters under consideration for ratification, accession etc. Updates of this list will be provided at three monthly intervals.

(c) National Interest Analyses (NIAs) will be prepared by the Commonwealth for all treaties. States and Territories will be consulted at an early stage in the preparation of NIAs in relation to those treaties in which they have a major interest. NIAs will be finalised in time for tabling in Parliament. NIAs will represent the best understanding of the Commonwealth at the time they are prepared. A National Interest Analysis which includes the elements in the NIA pro forma (Appendix I) will
accompany each treaty tabled in Parliament.
(d) the Commonwealth will whenever practicable provide States and Territories with a report on the
outcome of international negotiating sessions which are of sensitivity and importance to the States
and Territories. These may be provided on a confidential basis.
4.3 The provision of the above information will not affect the flow of information on treaties to the
States and Territories which occurs on an ongoing basis from the time that negotiations begin.

5 Consultation mechanisms
The Treaties Council

5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers.
The Treaties Council will have an advisory function.

5.2 The role of the Treaties Council is to consider treaties and other international instruments of
particular sensitivity and importance to the States and Territories either of its own motion, or where a
treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of
COAG or by SCOT. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council.
The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.

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

Standing Committee on Treaties

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

- decide whether there is a need for further consideration by the Treaties Council, a Ministeri
  Council, a separate intergovernmental body or other consultative arrangements;

- monitor and report on the implementation of particular treaties where the implementation of
  the treaty has strategic implications, including significant cross-portfolio interests, for States
  and Territories;

- ensure that appropriate information is provided to the States and Territories; and

- co-ordinate as required the process for nominating State and Territory representation on
delegations where such representation is appropriate.
5.5 In identifying treaties and other international instruments of particular sensitivity and importance to the States and Territories, the Committee should have regard to their potential to affect the finances or current or future policy decisions of the States and Territories or the need for State and Territory participation in implementation, including legislation.

Ministerial Councils and other consultation mechanisms

5.6 Subject to any recommendation of the Standing Committee, as a general practice, consultation will be conducted by the functional Commonwealth/State and/or Territory Ministers for Departments concerned. Exceptions will exist where there are significant cross-portfolio interests.

5.7 In general, existing Commonwealth/State and Territory Ministerial Councils and consultative bodies will be used as the fora in which detailed discussions of particular treaties and other international instruments take place.

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

5.9 The protocols relating to the operation of Ministerial Councils will apply to these consultations - including those relating to Representation of Constituent Governments and Liaison between Councils (Commonwealth-State Ministerial Councils, A Compendium, May 1994).

6 Participation on International Delegations

6.1 In appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters. Subject to any special arrangements, the purpose is not to speak for Australia, but to ensure that the States and Territories are well informed on treaty matters and are always in a position to put a point of view to the Commonwealth. However, State and Territory representatives will be involved as far as possible in the work of the delegation.

6.2 The States and Territories will normally initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State and Territory interests in mind.

6.3 Unless otherwise agreed, the costs of the State and Territory representatives are a matter for State and Territory governments.

7 Implementation

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

8 "Federal - State" Aspects

8.1 The Commonwealth does not favour including federal clauses in treaties and does not intend to instruct Australian delegations to seek to include them. In the Commonwealth’s view, the international community sees the pursuit of federal clauses in treaties generally as an attempt by the "Federal State" to avoid the full obligations of a party to the treaty. The Commonwealth’s experience at a number of International Conferences has shown that these clauses are regarded with disfavour by almost the entire international community. Further, its experience is that a federal clause tailored to the needs of one federation will be unacceptable to other federations. The Commonwealth believes that instructing an Australian delegation to press for a federal clause only diverts its resources from more important tasks.

8.2 The Commonwealth does not object to Australia making unilaterally a short “Federal Statement” when it signs or ratifies certain appropriate treaties, if this statement clearly does not affect Australia obligations as a party. An "appropriate" treaty would be one where it is intended that the States and Territories will play a role in its implementation. An appropriate form for a statement like this is at Appendix 2.

8.3 The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States and Territories accord with the mandatory provisions of the treaty. However, where a suitable "territorial units" federal clause is included in a treaty, the possibility of Australia acceding only in respect to those States and Territories which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.

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

Appendix 1

National Interest Analysis Pro Forma
Date of proposed binding treaty action
Date and explanation of binding treaty action e.g. definitive signature, ratification, exchange of notes etc.
Date of Treaty tabling
Date when the treaty will be tabled with this NIA.

Reasons for Australia to Become a Party to the Treaty

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

**Obligations**

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

**Costs**

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

**Future Protocols etc.**

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

**Implementation**

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

**Consultation**

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

**Withdrawal of Denunciation**

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

**Appendix 2**

**Federal Statement Example**

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central and State and Territory authorities.
The treaty will be implemented throughout Australia by the Federal, State and Territory governments, according to their respective constitutional powers and arrangements concerning the exercise of these powers.

Overview

Who needs to know and/or comply with this?

AR Details

Date Issued

Jan 22, 1997

Review Date

Dec 31, 2014

Replaces


Replaced By


Contacts

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