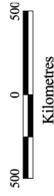


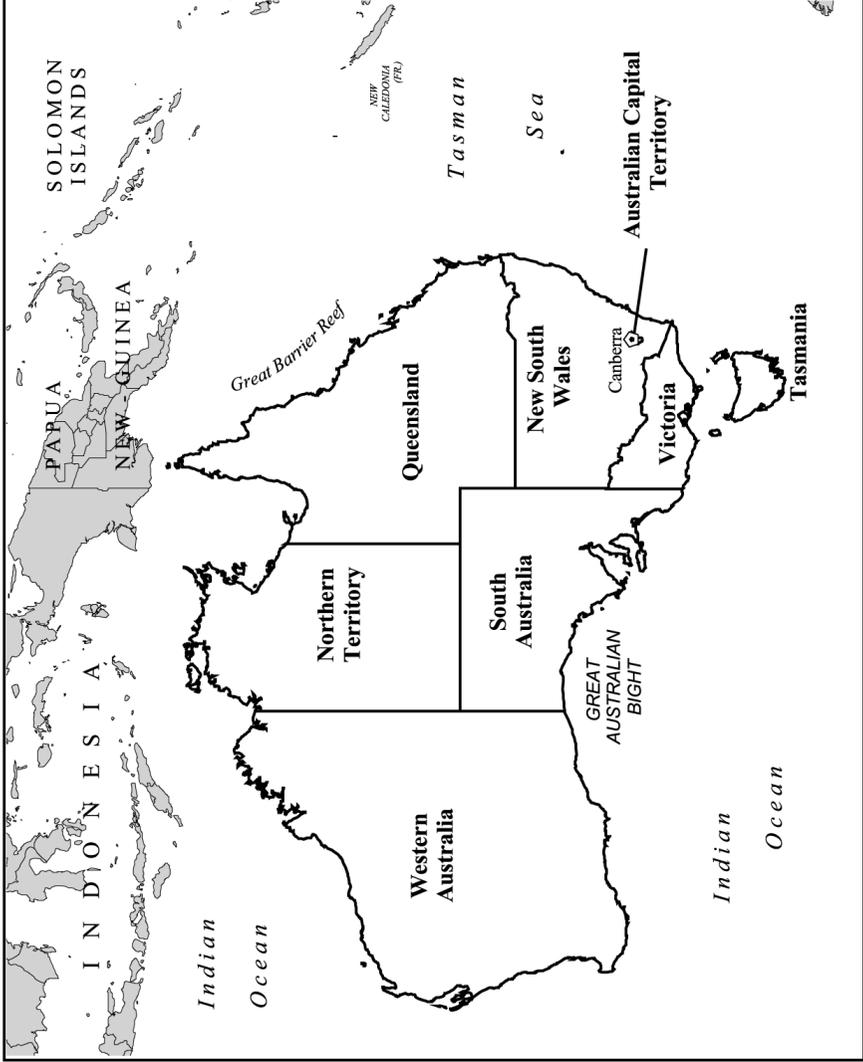
Australia

Capital: Canberra
Population: 20 Million
(2004 est.)

Boundaries and place names
are representative only and do not
imply any official endorsement.



Sources: CIA World Factbook; ESRI Ltd.;
Times Atlas of the World



Commonwealth of Australia

ANNE TWOMEY

Power over foreign affairs in Australia has been affected by Australia's colonial background.¹ Even after the Commonwealth of Australia was established in 1901 by the federation of Australian colonies, the treaty power was retained by the British government. It was later devolved upon the Commonwealth government. Although most states have overseas offices and enter into international arrangements concerning trade and exchanges of information and skills, they do not have international personality and play only a minor role in foreign affairs. Instead, the Commonwealth holds the key executive and legislative powers over foreign affairs. Once the Commonwealth enters into a treaty, it obtains the power to legislate to implement it, regardless of whether the treaty's subject matter falls within an area of traditional state jurisdiction. For this reason, the states have focused their attention on reforming the treaty-making process. Significant reforms were made in 1996, enhancing consultation, transparency, and accountability, but there is still room for improvement.

Australia has a largely homogenous population of 21,104,400 people² and has, for some decades, supported a policy of multiculturalism. Three-quarters of Australia's population were born in Australia. Of those born overseas, 24% came from the United Kingdom, 9% from New Zealand, 5% from Italy, and 4% each from China and Vietnam. Australia's indigenous people comprise just over 2% of the population.³

Although Australia's land mass is large, much of it is inhospitable desert. Australia is one of the most urbanized countries in the world, with three-quarters of the population living in urban areas, primarily on the eastern seaboard. New South Wales is the most populous state, with 6.8 million inhabitants; Tasmania is the least populous, with 482,000 inhabitants.⁴

Australia has the thirteenth-largest economy in the world.⁵ Its gross domestic product (GDP) per capita in 2006 was estimated at US\$35,311. Its main exports come from mining and agriculture. As a middle-ranking

nation with an efficient economy, Australia actively supports trade liberalization through the World Trade Organization (WTO).⁶

Australia is a federation comprising six states – New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia – as well as a number of self-governing and non-self-governing territories. Each state was a self-governing colony of the British Empire with its own legislature and government prior to federation in 1901. After federation, state governments and legislatures continued to operate, and state constitutions were preserved by Section 106 of the Commonwealth Constitution.

There are ten territories that fall under the constitutional responsibility of the Commonwealth government. Both the Northern Territory and the Australian Capital Territory (an area ceded by New South Wales to the Commonwealth for the establishment of the national capital, Canberra) are self-governing territories with their own legislatures and executives. One of Australia's seven external territories, the Australian Antarctic Territory, forms part of Antarctica.

REGIONAL CONTEXT

Border Issues

Australia, as an island nation, does not directly share borders with other nations (except in relation to the Australian Antarctic Territory). However, boundary issues have arisen in two contexts. First, there have been lengthy negotiations with Indonesia, Papua New Guinea, and more recently East Timor about the maritime boundaries to the north of Australia.⁷ Maritime boundary delimitations have also been negotiated with New Zealand, the Solomon Islands, and France.

Second, Australia has had problems with smugglers transporting asylum seekers by boat from Indonesia to Australia. Australia has removed from its migration zone certain Australian islands (i.e., islands to the north of Australia, some of which form part of the states of Queensland and Western Australia). "Unlawful noncitizens" who arrive on these islands cannot apply for visas for permanent residence and can be held offshore in detention while claims for refugee status are determined.

Regional Trade and Cultural Relationships

Australia has three main regional relationships. First, it has a close relationship with New Zealand. Australia and New Zealand entered into a Closer Economic Relations Trade Agreement in March 1983 to remove trade barriers between the two nations. The Commonwealth and most states have

enacted cooperative legislation concerning the recognition of regulatory standards adopted in New Zealand regarding goods and occupations.⁸

The 1973 Trans-Tasman Travel Arrangement permits Australian and New Zealand citizens to enter, live, and work in either country without applying to the authorities. Since 2001 New Zealanders have been granted a Special Category Visa upon entering Australia. In June 2005, 449,000 New Zealand citizens were living in Australia.

Second, Australia is also a leading power in the South Pacific. It focuses much of its aid on the South Pacific⁹ and has provided nations such as the Solomon Islands, Papua New Guinea, Tonga, and East Timor with police and military assistance where needed, as well as other forms of aid and investment. Australia is a member of the Pacific Islands Forum, which is the region's principal institution for cooperation in trade and economic issues, good governance, and security.

Third, Australia is engaged in the Asian region. Australia's closest neighbour is Indonesia, which has 223 million people. The primary Asian regional organization is the Association of South-East Asian Nations (ASEAN), established in 1967. Australia has not been admitted as a member of ASEAN but has, since 1974, been a "dialogue partner" of ASEAN. Annual meetings are held between ASEAN members and its dialogue partners. Australia and New Zealand are currently negotiating a free trade agreement with ASEAN. Australia already has free trade agreements with Singapore and Thailand, and it is negotiating one with Malaysia. Australia also has strong educational links with this area.

In 2005 Australia also participated in the first East Asia Summit. This is a forum for dialogue to advance closer regional integration on economic and strategic issues. Australia's participation in this summit was accepted by ASEAN members only after Australia acceded to ASEAN's Treaty of Amity and Co-operation.¹⁰

Defence and Security Relationships

Australia's main security alliance is the ANZUS alliance with the United States. It is also a member of the Five Power Defence Arrangement, which facilitates defence cooperation with Malaysia, Singapore, New Zealand, and the United Kingdom. Australia was heavily involved in the negotiation of the Treaty of Rarotonga, which created a South Pacific Nuclear Free Zone in 1986.

Although not a member of ASEAN, Australia participates in the ASEAN Regional Forum, which was established in 1994. The forum comprises twenty-five countries in the Asia Pacific region, including the ten ASEAN members and the ten dialogue partners. It is the principal forum for security dialogue in Asia. It deals with such matters as regional antiterrorism efforts and disaster relief cooperation.

Participation in International Organizations

Australia participates in two areas of economic cooperation. To its east, Australia is a member of Asia-Pacific Economic Co-operation (APEC), which was established in 1989. Its aims are trade and investment liberalisation, business facilitation, and economic and technical cooperation. To its west, Australia participates in the equivalent, but less well-known, Indian Ocean Rim Association for Regional Co-operation, which was established in 1997. Australia is also an active member of many international organizations, including the United Nations, the Organization for Economic Cooperation and Development (OECD), the Commonwealth of Nations, and as noted above, the WTO.

THE CONSTITUTIONAL SETTING

*The Development of Australia's Foreign Affairs Powers*¹¹

The Commonwealth of Australia came into being on 1 January 1901. Prior to federation, the six Australian colonies were self-governing with respect to local matters,¹² but foreign policy was still regarded as an imperial matter and was controlled by the British government. The Australian colonies had no power to declare war, appoint diplomatic representatives, or enter into treaties on their own behalf (although after 1877 they could accede to commercial treaties entered into by the United Kingdom). They were not regarded as having an international personality.

Federation, in 1901, did not transform the Australian colonies into a sovereign nation. It merely joined six colonies into one larger federated colony.¹³ Political foreign policy was still conducted by the British government. The Constitution contained no express power to make treaties or any provision giving them binding effect. Instead, in Section 51 (xxix), the Commonwealth Parliament was authorized to make laws with respect to "external affairs." The word "external" was used to encompass relations within the empire as well as relations with foreign countries.¹⁴

After the First World War, the relationship between the United Kingdom and its dominions gradually changed. Australia became a member of both the League of Nations and the International Labour Organization (ILO), with full voting rights. It began, hesitantly, to develop its own foreign policy. At the Imperial Conferences of 1923 and 1926, the empire recognized the power of the dominions, including the Commonwealth of Australia, to enter into treaties on their own behalf. The Statute of Westminster 1931 increased Commonwealth legislative power by allowing the Commonwealth Parliament to make laws with extraterritorial effect and laws that amended or repealed British laws that had previously applied by paramount force. It did

not deal with the Commonwealth's executive power, and no formal change was made to the Commonwealth Constitution. Courts have, therefore, been obliged to give an expanded interpretation of the executive power in Section 61 of the Constitution in order to accommodate a treaty-making power that did not exist at federation.¹⁵ The power to declare war was first exercised by Australia in 1941, and Australia's first diplomatic representatives were appointed in 1940.

As this history shows, most powers in relation to foreign affairs were not made exercisable in Australia until well after federation and therefore devolved upon the Commonwealth rather than the states. The absence of any formal constitutional amendment effecting this change has meant that the Constitution has had to be reinterpreted by the courts to conform to reality. Although this has led to disputes about the extent of the Commonwealth's power, particularly in relation to the enactment of legislation that impinges on traditional areas of state jurisdiction, there is a general acceptance in Australia that the primary role in foreign affairs belongs to the Commonwealth.

Foreign Affairs and Commonwealth Executive Power

The power to enter into treaties, appoint diplomatic representatives, and generally conduct foreign policy is now recognized as finding its source in Section 61 of the Constitution, which makes the executive power of the Commonwealth exercisable by the governor general.¹⁶ The governor general's role is purely formal in this regard and is analogous to that of the queen in the United Kingdom. The governor general acts on the advice of Commonwealth ministers. In practice, executive power lies with the Cabinet, which undertakes major policy decisions.

Treaties are not self-executing in Australia. They must be implemented by legislation before they are binding under Australian law. Although there may be legitimate expectations, recognized by administrative law, that the Commonwealth government will take its treaty obligations into account when making administrative decisions, treaties do not have the force of law in Australia unless implemented by Commonwealth or state legislation.¹⁷

Foreign Affairs and Commonwealth Legislative Powers

The Commonwealth has a range of legislative powers to deal with external matters. Section 51 of the Constitution confers upon the Commonwealth Parliament the power to make laws with respect to various subjects, including trade and commerce with other countries, defence, external fisheries, naturalization and aliens, foreign corporations, immigration and emigration, and external affairs.

In addition, under Section 51 (xxxvii), state parliaments may refer matters to the Commonwealth Parliament, giving it power to legislate in relation to them. This mechanism was used to deal with the mutual recognition of standards and qualifications in New Zealand and Australia. Further, under Section 51 (xxxviii), the Commonwealth may exercise, at the request of state parliaments, any power that at the time of federation could be exercised only by the Westminster Parliament. This has been used to deal with Commonwealth and state powers with respect to the territorial sea.¹⁸

Defence Powers

Section 69 of the Constitution required that, after federation, state public-service departments concerning naval and military defence be transferred to the Commonwealth. This occurred on 1 March 1901. From that point, the states lost all power and involvement in defence matters. Section 114 of the Constitution prohibits the states from raising or maintaining any naval or military force without the consent of the Commonwealth Parliament. No such consent has ever been given.

Each state has its own police force but does not have any military or defence personnel. In accordance with an intergovernmental agreement, the state police forces and the Commonwealth armed forces hold regular joint training exercises focused on dealing with potential terrorist threats or civil disorder. Section 119 of the Constitution provides that the Commonwealth “shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.”

The Commonwealth’s power to legislate with respect to naval and military defence in Section 51 (vi) of the Constitution has been held by the High Court to expand in times of war and contract in times of peace.¹⁹ The High Court has recently interpreted it widely to support antiterrorism laws, despite its being implemented in a time of peace.²⁰

Section 68 of the Constitution vests control of naval and military forces in the governor general, a civilian, who acts on the advice of Commonwealth ministers. If the governor general dies or is otherwise absent or unavailable, the most senior state governor performs the governor general’s functions as administrator of the Commonwealth. Accordingly, from time to time, the titular control of the armed forces is vested in a state governor (albeit while acting in a Commonwealth capacity). Defence decisions are still made by the Commonwealth government.

The External Affairs Power

The external affairs power in Section 51 (xxix) has proved to be one of the most controversial powers in the Commonwealth Constitution. This is in

part the consequence of the way the federal system was established in Australia. The Constitution does not reserve specific subjects of legislative power for the states. Instead, it lists the legislative powers of the Commonwealth with respect to specific subjects. Most of these legislative powers are concurrent rather than exclusive. State constitutions confer plenary legislative power on state parliaments, subject to any express or implied prohibitions in the Commonwealth Constitution. Section 109 provides that where there is an inconsistency, the Commonwealth law prevails and the state law is ineffective to the extent of the inconsistency.

Early judicial attempts to read Commonwealth powers narrowly so that they would not impinge on matters impliedly reserved for the states (such as agriculture, land management, internal trade, and the criminal law) were overturned by the High Court in 1920.²¹ Since then, Commonwealth legislative power has been read broadly, and it is regarded as constitutional heresy to treat traditional areas of state legislative activity as reserved for the states.

Can the “external affairs” power be used to implement treaties on subjects that are “internal” to Australia and fall within traditional areas of state jurisdiction? This question remained unsettled until 1983, when the High Court held that once a bona fide treaty has been entered into by Australia, the Commonwealth Parliament has the power to legislate to implement the treaty obligations, subject to any express or implied constitutional prohibitions.²² The court was not prepared to draw distinctions based on whether a matter was domestic in nature or of international concern.

In a series of subsequent cases, the High Court developed and refined the limits of the external affairs power with respect to treaty implementation. It is not necessary that the whole of a treaty be implemented. Legislation that partially implements a treaty will be supported by Section 51 (xxix) but not if the implementation is so selective as to deny the law the character of a measure that implements the treaty and not if, in combination with other provisions, the law is substantially inconsistent with the treaty.²³ The treaty itself must impose sufficiently precise obligations, rather than mere aspirations that could be implemented by a variety of possibly contradictory measures.²⁴ The means chosen by the Commonwealth Parliament to implement the treaty must be “reasonably capable of being considered appropriate and adapted to implementing the treaty.”²⁵ This is sometimes interpreted as requiring reasonable proportionality between the object of the treaty and the means used to implement it. If a Commonwealth law is unnecessarily wide in its purported implementation of a treaty, it may be struck down.

The effect of the High Court’s interpretation of Section 51 (xxix) is that the Commonwealth government, by entering into a treaty, may increase the scope of its power to legislate in relation to any subject, as long as its legislation implements the treaty. The Commonwealth may also have the

power to legislate to implement the recommendations of international bodies or to legislate with respect to matters of international concern.²⁶ The consequence has been that through the ratification of treaties, the Commonwealth Parliament has gained new powers to enact laws with respect to human rights, industrial matters, environmental protection, and land management.

The High Court has also interpreted the external affairs power widely with respect to nontreaty matters. In 1991 it held that Section 51(xxix) supports legislation with respect to persons, places, matters, and things that are geographically external to Australia.²⁷ It therefore supports legislation on subjects such as crimes that occur outside Australia and external petroleum exploration, regardless of the validity of any treaty on the subject.²⁸ A challenge to the breadth of this interpretation recently attracted some support, but a majority of the High Court upheld the broad “geographical externality” interpretation.²⁹

State Foreign Affairs Powers

The states do not have an international personality³⁰ and cannot enter into treaties on their own behalf.³¹ The extent of their powers to enter into agreements of less than treaty status and to participate in international affairs remains uncertain.³² As a matter of theory, some observers would deny that the states have any such power,³³ but as a matter of practice, states do from time to time enter into memoranda of understanding and other agreements of less than treaty status with national or subnational governments. The most internationally active states are those, such as Queensland and Western Australia, that are trying to expand their export markets and that are therefore seeking cooperation with foreign governments as well as business.

The types of international agreements that states enter into tend to concern matters in which the states have particular expertise. States have entered into memoranda of understanding with neighbouring countries and subnational governments on subjects such as training on bushfire prevention, preservation of flora and fauna, and cooperation in academic and applied research. For example, states such as Western Australia with expertise in agriculture in dry climates and desertification have entered into agreements with countries that have similar climates.³⁴ States have also entered into agreements concerning areas of trade, industry, and technology where they are seeking to develop markets or expertise. For example, in 2007 the Queensland government entered into an agreement with the US state of South Carolina on cooperative development in biotechnology.³⁵

In many cases, agreements may be overseen by state governments and signed by a state premier, but they are actually made between agencies or

institutions at a lower level. See, for example, the following agreements in which the Queensland government participated in 2007: a memorandum of understanding between the Queensland Mater Hospital and the Central Java Department of Health, which provides for cooperation in health administration and the exchange and training of staff; an accord between the Queensland Department of Primary Industries and Fisheries and the University of KwaZulu-Natal, South Africa, for exchanges of information and expertise; and an agreement for cooperation in international research between the Queensland Climate Change Centre of Excellence and the Walker Institute for Climate System Research at the University of Reading in the United Kingdom.³⁶

In most cases, such agreements are not legally enforceable and merely require states or their institutions to make best endeavours or to open avenues for future projects. In some cases, the agreements are contractual in nature and are enforceable as a matter of private law. In other cases, the status of these agreements remains unclear.³⁷

Some foreign relationships relate to the geographical location of the jurisdiction concerned. For example, the Northern Territory entered into a memorandum of understanding with Indonesia on economic development cooperation in 1992 because of its proximity to Indonesia. It later entered into memoranda of cooperation with the Indonesian province of East Kalimantan in 2000 and with the province of Bali in 2001. These agreements pave the way for increased cooperation on infrastructure development, mining, transportation, agriculture, tourism, education, industry, fishery management, and communications.

In 1995 the Northern Territory entered into another major memorandum of understanding with the Philippines. The Northern Territory now participates as a development partner with one of the ASEAN Growth Areas, being invited to meetings of senior officials on trade matters. These agreements have resulted in exchange visits of government delegations, increased trade opportunities, including access to key trade exhibitions, and the promotion of joint projects in areas such as air and sea linkages and educational exchanges between universities. Even though the Northern Territory does not have the status of a state, it is still a self-governing territory with its own legislature and executive, and its efforts to interact with neighbouring countries have been rewarded with a degree of international recognition and significant trade advantages.

The Constitution does not deny the states legislative powers with respect to external affairs. States often legislate to give effect to treaties. Before entering into a treaty, the Commonwealth and the states sometimes agree that it will be implemented by state legislation because the states have the most appropriate institutions or mechanisms to do so. However, if a state law is inconsistent with a valid Commonwealth law, the Commonwealth law

prevails under Section 109 of the Constitution. Further, if state legislation attempted to confer treaty-making powers upon the state executive, the validity of such legislation would be highly questionable.³⁸

Some doubts existed in the past about whether the Australian states have the power to legislate with extraterritorial effect. The High Court accepted that the states have such a power but required that there be a connection or nexus between a law with extraterritorial effect and the state that enacts it.³⁹ In 1986 this was confirmed by Section 2(1) of the Australia Acts 1986 (Cth) and (UK), which declares that the states have such a power but maintains the need for a nexus.⁴⁰ State laws with extraterritorial effect most commonly apply in other states but have in the past applied to offshore waters or to sailors on ships outside the state that have been registered in the state.⁴¹

Section 2(2) of the Australia Acts declares that the legislative powers of each state include those that the Westminster Parliament might have exercised in relation to the state before the enactment of the Australia Acts. This was intended to remove any remaining colonial constraints on state legislative power. The Commonwealth, however, was concerned that this provision might be used by the states to support claims to exercise powers associated with national sovereignty. After a great deal of negotiation, a proviso was added to Section 2(2) that “nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.” This proviso leaves open whether or not the states have such powers. It simply clarifies that Section 2(2) does not enlarge such powers if they already exist.

INTERGOVERNMENTAL RELATIONS IN FOREIGN AFFAIRS

Consultation with the States on Treaty Making

Consultation with the states, prior to the Commonwealth entering into treaties that affected the states, was undertaken as a matter of course throughout most of the twentieth century.⁴² Consultation tended to occur through existing federal-state ministerial councils, such as the Standing Committee of Attorneys-General and the Council of Nature Conservation Ministers.⁴³ The Commonwealth would not ratify treaties concerning subjects of traditional state jurisdiction until all the states agreed. This resulted in a low rate of ratification of ILO conventions and human rights treaties.⁴⁴

In October 1977 the Commonwealth and the states agreed on a set of principles for treaty making. These principles provide for: consultation with states early in treaty negotiations, consultation regarding the implementation

of treaties, a first option to the states to legislate to implement treaties within areas of state jurisdiction, the representation of states in delegations to international conferences, and the inclusion of federal clauses in treaties in appropriate cases.⁴⁵

More formal guidelines, known as the Principles and Procedures for Commonwealth-State Consultation on Treaties, were adopted at a premiers' conference in June 1982. These were revised in 1991 and again in 1996 following reforms to the treaty-making system. On each occasion, the revised Principles and Procedures were adopted by an intergovernmental forum, formerly known as the Premiers' Conference and now known as the Council of Australian Governments, which comprises the heads of government of the states, territories, and Commonwealth.

Initially, the Principles and Procedures merely required the Commonwealth to provide information on proposed treaty action to the state premiers' departments. Substantive discussions were left to ministerial councils. The Principles and Procedures provided that the Commonwealth should take into account state views in formulating Australian policy in treaty negotiations and, in appropriate cases, should include state representatives in delegations to international conferences and treaty negotiations. On numerous occasions, state representatives have attended treaty negotiations of significance to the states.⁴⁶ For those negotiations that they are able to attend, the states agree among themselves on who will represent them. The states pay the costs of their own representatives.

The Principles and Procedures expressly state that the purpose of inclusion of state representatives on delegations "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."⁴⁷ However, states do make valuable contributions to treaty negotiations, particularly when the negotiations concern subjects that fall within their expertise.

In July 1991 a Special Premiers' Conference agreed to establish a Standing Committee on Treaties (SCOT) and to revise the Principles and Procedures. The revised version was adopted in 1992. It provided that SCOT would comprise senior officials from the Commonwealth, states, and territories and would meet at least twice a year to:

- identify treaty and other international negotiations of particular sensitivity or importance to the states and propose an appropriate mechanism for state involvement in the negotiation process;
- monitor and report on the implementation of particular treaties where implementation of the treaty has strategic implications, including significant cross-portfolio interests, for states; and
- coordinate as required the process for nominating state representation on delegations where such representation is appropriate.⁴⁸

The Commonwealth secretariat for SCOT is based in the Department of the Prime Minister and Cabinet. However, it also includes representatives of both the Department of Foreign Affairs and Trade and the Commonwealth Attorney-General's Department. Representatives of other Commonwealth departments (such as those concerning the environment, agriculture, and transport) attend when necessary.

At first, in practice, SCOT did not prove to be an effective consultation mechanism. Rather, it was a clearing house for information and facilitated little discussion of matters such as the implementation of treaties. The states remained unhappy about the level of consultation on treaties.⁴⁹

The 1996 Treaty Reforms

Unease about the lack of accountability in treaty making grew in the early 1990s.⁵⁰ The subject was referred to the Commonwealth Parliament's Senate Legal and Constitutional References Committee, which in 1995 produced a unanimous report, *Trick or Treaty?* It recommended major reforms to the treaty-making system,⁵¹ most of which were later adopted. The states joined together to make a unanimous submission to the Senate committee. They argued for:

- greater transparency – through the publication of treaty-impact statements showing the benefits and costs of entering into a treaty;
- greater consultation – through improvements to the functioning of SCOT;
- greater political accountability – through the establishment of a Treaties Council comprising the heads of government of the Commonwealth, states, and territories to deal with sensitive treaty issues at the political level; and
- greater involvement of the Commonwealth Parliament – through the formation of a parliamentary committee to monitor and review the treaty-making process and, most controversially, by giving each house of the Commonwealth Parliament a power to veto a treaty or propose reservations to it.⁵²

The states did not seek a direct veto over treaties because they knew this was unachievable. Instead, they sought Commonwealth parliamentary involvement so that if a treaty were objectionable to the states, they would have a reasonable chance of convincing the Senate (which is usually not controlled by the government) to reject it.

In 1996 the Commonwealth agreed to publish treaty-impact statements, which it called national-interest analyses. It also agreed to set up a database of treaties to which Australia is a party and to provide greater information on treaties to the public. The Commonwealth agreed to improve consultation

with the states through SCOT, including the provision of a schedule every three months that lists current and forthcoming treaty negotiations and matters under consideration for ratification.

The Commonwealth also agreed to establish a Treaties Council consisting of the prime minister, state premiers, and territory chief ministers. The revised Principles and Procedures (adopted by the Council of Australian Governments in June 1996) state that the Treaties Council is to meet at least once a year and that its role is to consider treaties of importance to the states, either of its own volition or when these are referred to it by any jurisdiction. However, since 1996 the Treaties Council has met only once, in November 1997. States have sought to refer treaties to it on a number of occasions,⁵³ but the Commonwealth has refused to convene it. The Treaties Council is generally regarded as a failure.

On the subject of parliamentary scrutiny, the Commonwealth agreed to establish a Joint Standing Committee on Treaties (JSCOT). This parliamentary committee has now been operating for eleven years. Each treaty is tabled in Parliament at least fifteen (or in some cases, twenty) parliamentary sitting days before ratification. The treaty and its national-interest analysis is then subject to scrutiny by JSCOT, which can call for public submissions and can hold public hearings before issuing its report. Although JSCOT is controlled by government members, it has often been critical of government consultation with the states and others, and it has caused and policed improvements to the consultation process.⁵⁴ It has tended, however, to focus on procedural problems rather than on substantive policy concerns. The committee has only once recommended against ratification of a treaty,⁵⁵ and its recommendation was accepted by Parliament. Whereas some have criticised JSCOT's effectiveness,⁵⁶ others have praised its role in publicizing information about treaties and treaty negotiations.⁵⁷

As for a parliamentary power of veto over the ratification of treaties, the Commonwealth decided to defer consideration of this recommendation. It determined that the other reforms should first be given a chance to operate, as this might resolve concerns about treaty making without the need to take this further step. After a review of the treaty-making process in 1999, the Commonwealth decided that no further reforms were required.⁵⁸ A minor change in the treaty-tabling practice was made in 2000: the consultation period between tabling and ratifying treaties of major political, economic, or social significance was increased from fifteen to twenty sitting days (which is approximately eight weeks).

States and Treaty Implementation

Given the uncertainty about the scope of the external affairs power prior to 1983, the Commonwealth tended to take a cautious approach to the

implementation of treaties. Where a treaty affected areas of state legislation, the Commonwealth would ratify the treaty only if the states supported ratification or if state laws were otherwise already consistent with the treaty. The Commonwealth regarded the states as under an “honourable obligation not to amend the law so as to infringe the convention save after consultation with the Commonwealth.”⁵⁹

Treaties ratified by Australia have often been implemented by the states.⁶⁰ This was due not only to uncertainty about the scope of the external affairs power but also to administrative efficiency and convenience. Existing state bodies and systems were used to implement treaties rather than duplicate them at the Commonwealth level.⁶¹

In some cases, states went further in treaty implementation than the Commonwealth chose to go itself. The Commonwealth Parliament amended the Racial Discrimination Act 1975 (Cth) in 1983 to make it clear that the Commonwealth law was not intended to override state legislation on racial discrimination that furthered the objects of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and was capable of operating concurrently with the Commonwealth law.⁶²

The 1982 version of the Principles and Procedures contemplated the inclusion of federal clauses in treaties⁶³ and gave states the first opportunity to implement treaty obligations by their own legislation where treaties would affect traditional areas of state responsibility. In 1983 the Hawke Labor Government rejected the use of federal clauses. It favoured the making of a short federal statement upon ratification. It also rejected the notion that the Commonwealth should legislate to implement treaties only once states had failed to do so. Although the Commonwealth agreed to consider relying on state legislation, it reasserted its power to legislate to implement treaties when it so chose.

The Commonwealth has often asserted that any laws inconsistent with a treaty must be amended before the treaty is ratified.⁶⁴ In practice, this is not always the case. Inadequate consultation with states on the meaning and effect of treaty obligations may mean that inconsistent state laws are not identified. Further, many treaties, especially those concerning human rights,⁶⁵ are not expressly implemented by legislation. The Commonwealth relies on the absence of conflicting state or Commonwealth laws. This can give rise to difficulties. First, states must be aware of all existing treaty obligations when enacting laws in the future, although this is a Herculean task for which they are not resourced. Second, the interpretation of treaty provisions changes over time, so a law that was consistent with a treaty at the time the treaty was ratified may later be considered in breach of the treaty as reinterpreted. Where a state law is identified as being inconsistent with Australia’s treaty obligations, the state may not necessarily agree to amend it. The Commonwealth may then choose to legislate to override the state law.

For example, in March 1994 the United Nations (UN) Human Rights Committee published its view, in *Toonen v Australia*, that Australia was in breach of its obligations under the International Covenant on Civil and Political Rights (ICCPR). The offending law was a Tasmanian law that made it a criminal offence to have sexual intercourse with any person “against the order of nature,” including consensual homosexual intercourse. The UN Human Rights Committee concluded that this state law breached the right to privacy under the ICCPR.⁶⁶ As the Tasmanian government refused to repeal its law, the Commonwealth Parliament enacted the Human Rights (Sexual Conduct) Act 1994 (Cth), which nullified the effectiveness of the Tasmanian law, rather than implementing the right to privacy in the ICCPR. After an unsuccessful legal skirmish,⁶⁷ Tasmania eventually repealed its law.⁶⁸

The *Toonen* case arose because Australia had ratified the First Optional Protocol to the ICCPR, allowing complaints to be taken by individuals to the UN Human Rights Committee. This placed states in a vulnerable position when complaints were made about the application of state laws. The states have no standing in the hearing of such complaints; only the views of the Commonwealth and the complainant are heard. In *Toonen*, although the Commonwealth did include some Tasmanian representations in its general submission to the committee, the Commonwealth agreed with the complainant on most significant points, such as admissibility, despite Tasmanian protests.⁶⁹

The Commonwealth has not always legislated to override state laws that conflict with treaty obligations. State and territory laws concerning the imprisonment of children were alleged to breach Australia’s obligations under the Convention on the Rights of the Child,⁷⁰ but the Commonwealth took no action. In 1999 the Commonwealth contended that the plans of New South Wales to open a medically supervised drug-injection centre breached Commonwealth obligations under narcotic drugs treaties. The International Narcotics Control Board was also critical of the proposal. The state disagreed, producing opinions of eminent international lawyers that the state’s proposal was consistent with Australia’s treaty obligations and indicating that it would challenge the validity of any Commonwealth legislation to block its proposals. The Commonwealth retreated, and the centre opened in 2001 for a medically supervised trial, which has since been extended.⁷¹

State Concerns with the Current System

States have long been concerned about the impact upon them of the Commonwealth’s ratification of treaties. The subject matter of the most controversial treaties has changed over time from resource issues in the 1970s to environmental protection in the 1980s, human rights and industrial

relations in the 1990s, and free trade agreements in the 2000s. All have had important impacts on state laws and policies.

At a seminar in March 2006 to mark the tenth anniversary of the 1996 reforms to the treaty-making process, state representatives accepted that the reforms had greatly improved the process. Subsequent experience had also led to improvements. For example, the problems that occurred during the negotiation of the Australia-United States Free Trade Agreement have not been repeated in more recent free trade negotiations.⁷²

However, the states still have some concerns. First, the states want all consultation to take place initially through the premier or the premier's department in order to ensure a "whole of government" approach from each state. Second, states want to be consulted earlier and to receive drafts of the national-interest analysis earlier in the negotiations rather than at the time the treaty is tabled and ready for ratification. Draft national-interest analyses would help the states to identify the potential effects of treaties on them and allow states to raise matters of importance during the negotiation phase. Third, the states want the Treaties Council to be convened when they wish to refer matters to it. They also want a permanent secretariat to be established for the Treaties Council.⁷³ Finally, the states want greater consultation about the proposed implementation of treaties. They are particularly concerned about how the different free trade agreements are to be given effect by the states and about whose responsibility it is to identify and rectify inconsistencies with treaty obligations.

DOMESTIC AND INTERNATIONAL MANIFESTATIONS OF STATE GOVERNMENT DIPLOMACY

State Bureaucracy and Foreign Affairs

States do not have government departments dedicated to foreign affairs. The subject of foreign affairs is usually dealt with initially by the intergovernmental relations area of the premier's department in each state and then by the department that deals with the substantive subject matter, such as the environment. There are no available figures as to the money and resources dedicated to dealing with foreign affairs matters, as they may be dealt with by any number of government departments and agencies as well as by officials such as the Crown solicitor and parliamentary counsel.

Due to their more limited resources, states pick and choose the subjects to which they will devote their resources according to their particular interests. The states usually agree among themselves in advance on which state will take the lead in relation to a particular treaty or will seek to send a delegate to a negotiation session. Party-political differences rarely affect state cooperation on such matters, particularly at the officials' level.

State and Commonwealth Interaction over Foreign Affairs

Most interaction between the Commonwealth and the states concerning treaties occurs among officials. Political involvement tends to occur only when action is needed to resolve a deadlock or when a treaty is particularly politically sensitive. Despite the failure of the Treaties Council, state ministers may still be involved in briefings on the negotiation of treaty issues but on an ad hoc, unstructured basis. Premiers and state ministers of trade and procurement were briefed on the negotiation of the Australia-United States Free Trade Agreement, as it had a significant impact on state laws as well as state government procurement.

The Commonwealth also seeks state assistance to prepare reports for international bodies on the implementation of particular treaties (such as the ICCPR and the CERD) in Australia. States may be affected as well by the findings of international dispute-resolution bodies.

State governments tend to cooperate with the Commonwealth's Department of Foreign Affairs and Trade (DFAT) concerning international matters. Overseas visits of state officials, ministers, and members of Parliament are arranged in cooperation with DFAT, and guidelines are issued to state governments about official contact with foreign states.⁷⁴ Policies concerning foreign aid and cultural matters are primarily developed by the Commonwealth through its agencies. States tend to cooperate with these policies,⁷⁵ although they occasionally fund their own programs. States are sometimes called upon to provide police or medical personnel to neighbouring countries in response to emergencies. For example, in June 2006 Victoria sent twenty-three police officers to East Timor, in addition to the forty to sixty Victorian officers serving in international deployment forces in the Solomon Islands, Jordan, and elsewhere.⁷⁶ Other states also sent significant numbers of police officers to East Timor and the Solomon Islands. South Australia provided medical and evacuation support to East Timor and sent medical personnel to Banda Aceh after the Boxing Day tsunami of 2004.⁷⁷

DFAT has an office in each state capital. These offices deal primarily with passport issues but also provide a liaison with state ministers, parliamentarians, and officials.⁷⁸ On the whole, interaction between the Commonwealth and the states regarding foreign affairs occurs through the central areas of DFAT in Canberra and through the Department of the Prime Minister and Cabinet.

State Parliaments and Foreign Affairs

State parliaments do not often become involved in foreign affairs. The most common involvement is through speeches made during the general

debate at the adjournment of each sitting day, which may be on any subject. Members of Parliament then sometimes speak on foreign matters that are of particular significance to ethnic groups within their electorates or on topical matters of public affairs. Motions of condolence are often passed in response to international tragedies such as the Boxing Day tsunami or the London bombings of 2005.⁷⁹ Such speeches or debates tend not to be noticed outside the state parliament, although on rare occasions they may give rise to a diplomatic controversy, such as a resolution of the New South Wales Parliament commemorating the Armenian genocide of 1915–18.⁸⁰ State parliaments also occasionally discuss international matters that have a more direct impact on state policies, such as climate change and the attraction of skilled workers from overseas.⁸¹

Members of state parliaments also take study tours abroad through the Commonwealth Parliamentary Association.⁸² Sometimes parliamentary committees travel overseas to collect information for particular inquiries. Delegations of parliamentarians have also visited sister-states. These trips tend to come to prominence not because of state involvement in foreign policy but because of allegations of wasted taxpayers' money. Occasionally, delegations of state parliamentarians are invited by foreign governments to visit their countries for diplomatic reasons. For example, after a delegation of South Australian parliamentarians was invited to Taiwan by the Taiwanese government, the South Australian House of Assembly passed a motion supporting the maintenance of the status quo with respect to the relationship between Taiwan and its neighbours. The parliamentarians noted Australia's "one China policy" and saw their visit as an unofficial means to develop economic and cultural contact between Australia and Taiwan.⁸³

Issues concerning treaties sometimes come before state parliaments. From 1974 to 1977 Queensland had a Treaties Commission, which advised the Queensland Parliament concerning treaties. It ceased to operate in 1977 when the Commonwealth's Principles and Procedures on treaty consultation came into effect. In 2001 the Queensland premier agreed to table in Parliament communications from JSCOT about a proposed treaty action as well as national-interest analyses.⁸⁴ The Queensland Parliament also considered establishing a treaties committee but decided against this, as it can refer treaty matters to existing committees once they have been tabled in Parliament.⁸⁵

In Victoria a parliamentary committee was established in 1996 to deal with federal-state relations. Its first report was *International Treaty Making and the Role of the States*, which recommended greater state parliamentary scrutiny of treaties.⁸⁶ The committee was later abolished after a change of government, and no treaties committee was established. Its recommendation that treaties be tabled in the Victoria Parliament was followed until 2001, after which it lapsed.⁸⁷

State Policies and Foreign Affairs

From time to time, state government policies, or indeed the views of state political leaders, have interfered with Australian foreign policy. The former Queensland premier Sir Joh Bjelke-Petersen tended to make statements about foreign policy matters, either to annoy the Commonwealth or to protect Queensland's trade interests, or both. Examples include Queensland's support for South Africa's former apartheid regime, support for recognition of Taiwan, and threats to deny coal licences to Japanese companies because of agricultural trade issues.⁸⁸ State "nuclear-free" policies have previously led to attempts to prevent nuclear-powered United States naval vessels from docking in state ports.⁸⁹ In November 2006 state attorneys general signed the Fremantle Declaration in support of a fair trial for an Australian detainee at Guantanamo Bay.

The states have also been active on climate change and the establishment of an emissions trading system due to the Commonwealth's previous refusal to ratify the Kyoto Protocol of the United Nations Framework Convention on Climate Change. The states have consulted with like-minded subnational entities, such as the US state of California, in preparing their response to climate-change issues. Victoria, New South Wales, and South Australia entered into a Declaration of the Federated States and Regional Governments on Climate Change in 2005 with other subnational states including California, Quebec, Bavaria, Scotland, Catalonia, and Sao Paulo. The newly formed Council for the Australian Federation, comprised of state premiers, agreed on 13 October 2006 to develop a dialogue between constituent governments in Australia and the United States on policies to address climate change.

State premiers and ministers travel overseas from time to time at government cost. Such trips often involve the announcement of an overseas contract, or a policy to acquire technology or infrastructure (such as trains or water-recycling technology) from the visited country, or a cooperation agreement. For example, in 2005 the Queensland premier opened the Australian International School in Sharjah, United Arab Emirates, which is staffed by Queensland teachers and teaches the Queensland government curriculum. Ministers may also take part in fact-finding missions, attend conferences, or lead trade delegations abroad, such as the BIO 2007 biotechnology fair in Boston. In some cases, states will cooperate and agree not to compete with each other for particular contracts or international events.⁹⁰ In other cases, the states do compete against each other, especially in relation to trade and commercial matters, such as securing the head office of an international corporation or an international sporting event.

Municipal governments have become involved, through the Commonwealth Local Government Forum Pacific Project, in international local

government development projects that provide technical support in Papua New Guinea, Fiji, Kiribati, and Vanuatu. Many local councils are also closely involved in East Timor through the East Timor Friendship Relationship Program. Its aim is to build capacity through skills development and material aid. Activities include the provision of teachers and project workers, the creation of scholarships, the training and exchange of personnel, study tours, and the provision of material aid, such as education materials, medical equipment, and sewing machines, as well as financial support. The lord mayors of Sydney and Melbourne also attended the C40 Large Cities Climate Summit in New York in May 2007, and the lord mayors of the Australian state capitals all met with the prime minister in 2007 to discuss climate-change concerns. Some local councils remain nuclear-free zones,⁹¹ although their resolutions tend to note their limited powers and responsibilities with regard to the subject and are directed at objecting to the storage and transportation of nuclear or radioactive materials in the municipality, except when used for medical or technological purposes.⁹² Their focus tends to be local rather than international.

On the whole, foreign policy issues rank quite low on the list of matters that concern the states and voters in state elections. When global issues such as climate change and terrorism are raised during state elections, the focus tends to be on what the state government itself can do to deal with them. There is generally no expectation that states will have any diplomatic role in dealing with international problems. Domestic matters such as health, transport, education, and law and order are the primary concerns of state ministers and the electorate. The greatest controversy about state involvement in foreign affairs usually arises in relation to the costs of overseas travel by ministers and accusations that they should instead be at home dealing with local problems.

Official Representation of States Overseas

Prior to federation, the Australian colonies were represented in the United Kingdom by agents-general. Some states continue that representation today.⁹³ Agents-general are accorded a level of consular status⁹⁴ due to the longstanding independent relationship between the states and the United Kingdom. State representatives in other countries are not granted diplomatic status.⁹⁵ In 1972–73 New South Wales had ninety staff in the office of its agent-general, Queensland had thirty-four, and Western Australia had thirty.⁹⁶ The size and nature of state representation in London has since been reduced drastically. Tasmania and New South Wales abolished their offices altogether. Other states now use their agents-general as representatives in Europe as well as the United Kingdom.

States have also long had trade and tourism representation abroad.⁹⁷ The first formal overseas state office was opened by New South Wales in New York City in 1958, with offices following in Tokyo and other locations.⁹⁸ The level of representation, and its location around the world, has waxed and waned over time depending on economic and political conditions.⁹⁹ In some cases, formal state offices are established and staffed with state public servants. In others, local people are asked to represent state interests when they arise, or services are bought from the Commonwealth's Austrade on an ongoing or case-by-case basis. It is therefore extremely difficult to make meaningful comparisons of the extent and cost of state representation abroad.¹⁰⁰

State overseas offices fill a number of functions, including promoting the state as a tourist destination, promoting it as a location for business headquarters or holding conferences and special events, promoting state exports and culture (such as music and literature), seeking foreign investment, developing collaboration between institutions, universities, and corporations, attracting skilled migrants, and promoting trade. Although there are not great cultural differences between the states, sometimes states will attempt to promote a particular identity. For example, Queensland has promoted itself as the "Smart State" in concert with efforts to build up its biotechnology sector.

According to available information, in 2006 the overseas representation of Australian states was as follows:

New South Wales: trade – none; tourism – Auckland, Los Angeles, London, Tokyo, Hong Kong, and Singapore.

Queensland: trade – London, Los Angeles, Beijing, Shanghai, Guangzhou, Hong Kong, Taipei, Tokyo, Osaka, Riyadh, Abu Dhabi, Seoul, Jakarta, and Bangalore; tourism – Munich, London, Auckland, Los Angeles, Taipei, Hong Kong, Shanghai, Singapore, Tokyo, and Seoul.

South Australia: trade – London, Dubai, Hong Kong, Jinan, Shanghai, and Singapore; tourism – Singapore, Hong Kong, Germany, United Kingdom, France, Italy, Japan, New Zealand, and the United States.

Tasmania: trade – none; tourism – London, Toronto, and Auckland.

Victoria: trade – London, Dubai, Frankfurt, Chicago, New York, San Francisco, Bangalore, Hong Kong, Nanjing, Shanghai, and Tokyo; tourism – London, Frankfurt, Hong Kong, Shanghai, Singapore, Tokyo, Auckland, and Los Angeles.

Western Australia: trade – London, Shanghai, Hangzhou, Mumbai, Chennai, Jakarta, Tokyo, Kobe, Kuala Lumpur, Dubai, Seoul, Taipei, Bangkok, and Los Angeles; tourism – Shanghai, Munich, Tokyo, Seoul, Auckland, Singapore, and London.

The wide variation in level of representation is largely explained by economic factors. Some states with strong export growth need to seek new markets, while those with more established markets do not. New South Wales, for example, decided it was more efficient to run regular trade missions and purchase services from Austrade than to have its own permanent representation abroad.

Sister-State Relationships

The states have formed “sister-state” relationships with a number of other sub-national jurisdictions. These relationships are often formalized by a memorandum of understanding that provides the framework for cultural, educational, sporting, and youth exchanges or for trade and business relationships. In some cases, the relationships have ceased to be active. According to available information, in 2006 these relationships included the following:

New South Wales: Guangdong Province, China; Tokyo Metropolitan Government, Japan; California, United States; Special Territory of Jakarta, Indonesia; and Seoul, South Korea.

Queensland: Saitama Prefecture, Japan; Kyonggi Province, South Korea; Province of Central Java, Indonesia; Municipality of Shanghai, China; and South Carolina, United States.

South Australia: Okayama Prefecture, Japan; Chungcheong Province, South Korea; and Shandong Province, China.

Tasmania: Fujian Province, China.

Victoria: Aichi Prefecture, Japan; Busan Metropolitan City, South Korea; Jiangsu Province, China; and Scotland, United Kingdom.

Western Australia: Hyogo Prefecture, Japan; Zhejiang Province, China; East Java Province, Indonesia; and Tuscany Region, Italy.

In addition, there are many sister-city relationships throughout Australia. For example, Sydney has the following sister-cities: San Francisco, Nagoya, Wellington, Portsmouth, Guangzhou, and Florence.

CONCLUSION

Australia’s states have little involvement in foreign affairs. Their interests, however, may be seriously affected by Commonwealth foreign activity. In particular, the ratification of a treaty by Australia can result in the Commonwealth Parliament gaining additional powers to legislate in traditional state areas. The states, therefore, have sought to ensure that their interests are represented in treaty making. Great steps were made in the transparency and accountability of the treaty-making system in 1996, but there is still room for improvement.

The underlying complaint of the states is that Commonwealth bureaucrats treat consultation as a tiresome procedure and do not make a genuine effort to use state involvement and expertise to improve both the treaty-making process and its outcomes. Although the procedural reforms protect state interests, attitudinal reform would be in the interests of the whole of Australia.

NOTES

- 1 For further background on Australia, see Cheryl Saunders, "Commonwealth of Australia," in John Kincaid and G. Alan Tarr, eds, *Constitutional Origins, Structure, and Change in Federal Countries*, 12–47 (Montreal and Kingston: McGill-Queen's University Press, 2005); John Williams and Clement Macintyre, "Commonwealth of Australia," in Akhtar Majeed, Ronald Watts, and Douglas Brown, eds, *Distribution of Powers and Responsibilities in Federal Countries*, 8–33 (Montreal and Kingston: McGill-Queen's University Press, 2006); Cheryl Saunders and Katy Le Roy, "Commonwealth of Australia," in Katy Le Roy and Cheryl Saunders, eds, *Legislative, Executive, and Judicial Governance in Federal Countries*, 37–70 (Montreal and Kingston: McGill-Queen's University Press, 2006); and Alan Morris, "Australia," in Anwar Shah, ed., *The Practice of Fiscal Federalism: Comparative Perspectives*, 44–72 (Montreal and Kingston: McGill-Queen's University Press, 2007).
- 2 Projected estimate of the Australian Bureau of Statistics as at 4 October 2007.
- 3 Dennis Trewin, *Yearbook, Australia 2006* (Canberra: Australian Bureau of Statistics, 2006), 121, 134.
- 4 *Ibid.*, 105, 117.
- 5 *Ibid.*, 74.
- 6 *Ibid.*, 80.
- 7 See, for example, Treaty on Certain Maritime Arrangements in the Timor Sea, 12 January 2006.
- 8 See, for example, Trans-Tasman Mutual Recognition Act 1997 (Cth); and Trans-Tasman Mutual Recognition (New South Wales) Act 1996 (NSW). Western Australia is the only state that has not enacted such legislation.
- 9 Trewin, *Yearbook, Australia 2006*, 84–5.
- 10 See a copy of the treaty and the exchange of letters in the AUSTLII Australian Treaty Series Database at: <http://138.25.65.50/au/other/dfat/treaties/2005/30.html> (accessed 5 July 2008).
- 11 See generally, D.P. O'Connell, "The Evolution of Australia's International Personality," in D.P. O'Connell, ed., *International Law in Australia*, 1–33 (Sydney: Law Book Co., 1965); J.G. Starke, "The Commonwealth in International Affairs," in Justice Else-Mitchell, ed., *Essays on the Australian Constitution*, 2nd ed., 343–74 (Sydney: Law Book Co., 1961); Leslie Zines, "The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth," in Leslie Zines, ed., *Commentaries on*

- the Australian Constitution*, 1–50 (Sydney: Butterworths, 1977); Cheryl Saunders, “Articles of Faith or Lucky Breaks?” *Sydney Law Review* 17 (1995): 149–76, at 154–7; and Anne Twomey, “International Law and the Executive,” in Brian Opeskin and Don Rothwell, eds, *International Law and Australian Federalism*, 69–76 (Melbourne: Melbourne University Press, 1997).
- 12 Although self-governing, the states remained subject to the Colonial Laws Validity Act 1865 and could not enact laws that were repugnant to British laws of paramount force.
 - 13 Starke, “Commonwealth in International Affairs,” 345.
 - 14 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 684–5; and *Victoria v Commonwealth* (1996) 187 CLR 416, 482.
 - 15 See the similar problem faced by Canadian courts, discussed in the chapter on Canada in this book.
 - 16 See generally, Zines, “Growth of Australian Nationhood,” 1–50.
 - 17 *Minister for Immigration and Ethnic Affairs v Teoh* (1996) 183 CLR 273, since limited by *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
 - 18 Coastal Waters (State Powers) Act 1980 (Cth); and Coastal Waters (State Title) Act 1980 (Cth).
 - 19 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1; *Stenhouse v Coleman* (1944) 69 CLR 457; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
 - 20 *Thomas v Mowbray* (2007) 237 ALR 194.
 - 21 *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129.
 - 22 *Commonwealth v Tasmania* (1983) 158 CLR 1.
 - 23 *Victoria v Commonwealth* (1996) 187 CLR 416, 459.
 - 24 *Ibid.*, 486.
 - 25 *Ibid.*, 487.
 - 26 *Ibid.* See also the debate on “international concern” in *XYZ v Commonwealth* (2006) 80 ALJR 1036.
 - 27 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
 - 28 *Horta v Commonwealth* (1994) 181 CLR 183.
 - 29 *XYZ v Commonwealth* (2006) 80 ALJR 1036.
 - 30 *New South Wales v Commonwealth* (1975) 135 CLR 337, 373.
 - 31 See John Trone, *Federal Constitutions and International Relations* (Brisbane: University of Queensland Press, 2001), 32, and the sources listed there.
 - 32 O’Connell, “Evolution of Australia’s International Personality,” 16; John Ravenhill, “Australia,” in Hans J. Michelmann and Panayotis Soldatos, eds, *Federalism and International Relations*, 77–123 (Oxford: Clarendon, 1990), 83. For contrasting views, see *First Report of the Queensland Treaties Commission*, 1 December 1976, reprinted in Australian Constitutional Convention, *Report of the External Affairs Subcommittee to the Standing Committee*, 129–239 (Brisbane: Government Printer, September 1984); and Henry Burmester, “The Australian States and Participation in the Foreign Policy Process,” *Federal Law Review* 9 (1978): 257–83, at 259–62.

- 33 *New South Wales v Commonwealth* (1975) 135 CLR 337, 506.
- 34 See, for example, agreements with Libya, referred to in Burmester, "Australian States," 264; and Ravenhill, "Australia," 101–2.
- 35 Queensland, *Trade Mission Report*, June 2007.
- 36 Queensland, *Trade Mission Report*, April 2007 and June 2007.
- 37 Henry Burmester, "Federalism, the States and International Affairs – A Legal Perspective," in Brian Galligan, ed., *Australian Federalism*, 196–217 (Melbourne: Longman Cheshire, 1989), 202.
- 38 *Ibid.*, 203.
- 39 *Pearce v Florenca* (1976) 135 CLR 501.
- 40 *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1.
- 41 *Ibid.*
- 42 A.H. Body, "Australian Treaty Making Practice and Procedure," in D.P. O'Connell, ed., *International Law in Australia*, 52–64 (Sydney: Law Book Co., 1965), 54.
- 43 Burmester, "Australian States," 281.
- 44 Kenneth Bailey, "Australia and the International Labour Conventions," *International Labour Review* 54 (1946): 285–308, at 289–90; *First Report of the Queensland Treaties Commission*, 196–203; and Mary Crock, "Federalism and the External Affairs Power," *Melbourne University Law Review* 14 (1983): 238–64, at 246.
- 45 Burmester, "Australian States," 281. See also the discussion of the Principles and Procedures in Saunders, "Articles of Faith or Lucky Breaks?" 162.
- 46 For example, Queensland represented the states at the negotiation of the European Union Mutual Recognition Agreement and at the negotiation of a free trade agreement with the United Arab Emirates; the Western Australian solicitor general participated in negotiations on the maritime boundary with Indonesia; Victoria sent a representative to WTO negotiations in Hong Kong; and both New South Wales and Queensland sent representatives to the negotiation of the Rome Statute of the International Criminal Court.
- 47 Council of Australian Governments, *Communiqué*, 14 June 1996, Attachment C, para. 6.1.
- 48 Commonwealth, DFAT, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (Canberra: DFAT, August 1994), Annexure, 27.
- 49 Commonwealth, JSCOT, *Report 78: Treaty Scrutiny – A Ten Year Review* (Canberra: Commonwealth Parliament, September 2006), 12, and per Mrs Judge at 75–6.
- 50 See Philip Alston and Madelaine Chiam, eds, *Treaty-Making and Australia – Globalisation versus Sovereignty?* (Sydney: Federation Press, 1995), where these concerns are discussed throughout.
- 51 Commonwealth, Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Canberra: Commonwealth Parliament, November 1995), 300–4.
- 52 *Ibid.*, 210, 223–4, 252, 260.
- 53 Commonwealth, JSCOT, *Report 78*, per Mrs Judge at 76, noting that Western Australia had asked on four occasions for the Treaties Council to be convened, and per

Mr Roberts at 68, noting that the Queensland premier had also tried to refer treaties to it.

- 54 For an analysis of the committee's early reports, see Anne Twomey, "Parliament's Role in Treaty Making and External Affairs," in Geoff Lindell and Robert Bennett, eds, *Parliament – The Vision in Hindsight*, 37–92 (Sydney: Federation Press, 2001), 86–9; and Trone, *Federal Constitutions*, 36.
- 55 Commonwealth, JSCOT, *Report 11* (Canberra: Commonwealth Parliament, November 1997), 13–14, regarding the Agreement on Economic and Commercial Cooperation with Kazakhstan.
- 56 Ann Capling, "Can the Democratic Deficit in Treaty-Making Be Overcome?" in Hillary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, eds, *The Fluid State – International Law and National Legal Systems*, 57–79 (Sydney: Federation Press, 2005), 74–7; Commonwealth, JSCOT, *Report 78*, per Devika Hovell at 59–61.
- 57 Joanna Harrington, "The Role of Parliaments in Treaty-Making," in Hillary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, eds, *The Fluid State – International Law and National Legal Systems*, 34–56 (Sydney: Federation Press, 2005), 47.
- 58 Commonwealth, DFAT, *Review of the Treaty Making Process* (Canberra: DFAT, August 1999).
- 59 Geoffrey Sawer, "Australian Constitution Law in Relation to International Relations and International Law," in D.P. O'Connell, ed., *International Law in Australia*, 35–51 (Sydney: Law Book Co., 1965), 46–7.
- 60 See Stuart Harris, "Federalism and Australian Foreign Policy," in B. Hocking, ed., *Federal Relations and Federal States*, 90–104 (London: Leicester University Press, 1993), 95; and the examples listed in Trone, *Federal Constitutions*, 59–62.
- 61 Sawer, "Australian Constitutional Law," 47.
- 62 The retrospective application of this provision was held to be invalid by the High Court in *University of Wollongong v Metwally* (1984) 158 CLR 447, but its prospective operation remains effective.
- 63 Such clauses are discussed in detail in W. Bush, "Aspects of Involvement of Australian States with Treaties," in Australian Constitutional Convention, *Report of the External Affairs Subcommittee*, 85–95 (Brisbane: Government Printer, September 1984), 86–93; and Brian Opeskin, "International Law and Federal States," in Brian Opeskin and Don Rothwell, eds, *International Law and Australian Federalism*, 1–33 (Melbourne: Melbourne University Press, 1997), 13–16.
- 64 Commonwealth, DFAT, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (Canberra: DFAT, August 1994), para. 56.
- 65 See, for example, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child, parts of which are implemented through provisions in a range of state and Commonwealth Acts, and parts of which are merely implemented through the absence of infringing legislation.
- 66 See further Anne Twomey, *Strange Bedfellows: The UN Human Rights Committee and the Tasmanian Parliament* (Canberra: Parliamentary Research Service, 1994).

- 67 *Croome v Tasmania* (1997) 191 CLR 119.
- 68 See generally, Hillary Charlesworth, "International Human Rights Law and Australian Federalism," in Brian Opeskin and Don Rothwell, eds, *International Law and Australian Federalism*, 280–305 (Melbourne: Melbourne University Press, 1997), 295–7; Victoria, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (Melbourne: Victorian Parliament, 1997), paras 2.21–2.26; and Hillary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *No Country Is an Island* (Sydney: University of New South Wales Press, 2006), 54.
- 69 Twomey, *Strange Bedfellows*, 18.
- 70 Hillary Charlesworth, "Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia," in Philip Alston and Madelaine Chiam, eds, *Treaty-Making and Australia – Globalisation versus Sovereignty?* 129–40 (Sydney: Federation Press, 1995), 133.
- 71 Charlesworth et al., *No Country Is an Island*, 17–19.
- 72 Commonwealth, JSCOT, *Report 78*, per Mr Roberts at 66.
- 73 See the discussion of all these points in *ibid.*, per Mr Roberts at 64–8; and per Mrs Judge at 75–9.
- 74 See, for example, New South Wales, Premier's Department Circular No. 98–12, "Contact with Department of Foreign Affairs Overseas Posts and Guidelines for Contact with Foreign States," 19 January 1998.
- 75 See further Ravenhill, "Australia," 101.
- 76 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1780.
- 77 South Australia, *Parliamentary Debates*, House of Assembly, 6–7 June 2006 and 8 March 2007.
- 78 Peter Bassett, "The Australian Federal System and Foreign Policy," in *Australian Foreign Affairs Record* 55 (1984): 322–4, at 324. Note, however, the comment on the ineffectiveness of state offices in Ravenhill, "Australia," 92.
- 79 See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 22 February 2005 and 19 July 2005.
- 80 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 April 1997, 7742.
- 81 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1754, on migration.
- 82 In New South Wales each member may take one study tour during his or her time as a member of Parliament. Study tours are more frequent at the federal level.
- 83 South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2006. State parliamentarians and state ministers are generally not used as an informal diplomatic resource by the Commonwealth.
- 84 Commonwealth, JSCOT, *Report 78*, per Mr Roberts at 65–6.
- 85 Queensland, Legal, Constitutional and Administrative Review Committee, Report No. 22, "The Role of the Queensland Parliament in Treaty Making," April 2000, 9.
- 86 Victoria, Federal-State Relations Committee, *International Treaty Making*.
- 87 See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 20 April 1999, 409; 16 December 1999, 1286; 1 June 2000, 2164; 31 October 2000, 1243; and 16 August 2001, 9.

- 88 Crock, "Federalism and the External Affairs Power," 243; Peter Boyce, "International Relations of Federal States: Responsibility and Control," in Michael Wood, Christopher Williams, and G. Campbell Sharman, eds, *Governing Federations: Constitution, Politics, Resources*, 187–98 (Sydney: Hale and Iremonger, 1989), 190.
- 89 Burmester, "Australian States," 258; Ravenhill, "Australia," 103; Allan Gyngell and Michael Wesley, *Making Australian Foreign Policy* (Melbourne: Cambridge University Press, 2003), 181.
- 90 Most states entered into the Interstate Investment Co-operation Agreement of 2003, which was intended to restrict the use of selective assistance to attract investment. However, as not all states entered the agreement, it has not been effective.
- 91 See, for example, resolutions of the Randwick City Council (NSW), the Town of Vincent (WA), and the Hobsons Bay City Council (Vic).
- 92 See, for example, resolutions of the City of Subiaco (WA) and the Hawkesbury Council (NSW), the latter declaring itself a "nuclear free and genetically engineered free zone."
- 93 See Agent-General for Queensland Act 1975 (Qld); Agent-General Act 1901 (SA); Agent-General's Act 1994 (Vic); and Agent General Act 1895 (WA).
- 94 Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 (UK), Section 1(2)(b); and Commonwealth Countries and Republic of Ireland Diplomatic Immunities Order in Council 1971 (SI 1971 No. 1237).
- 95 Crock, "Federalism and the External Affairs Power," 244; Boyce, "International Relations," 191.
- 96 G. Campbell Sharman, "The Australian States and External Affairs: An Exploratory Note," *Australian Outlook* 27 (1973): 307–18, at 313.
- 97 Sawer, "Australian Constitutional Law," 38.
- 98 Ravenhill, "Australia," 97–8.
- 99 For descriptions of state representation abroad at different times, see Sharman, "Australian States and External Affairs," 314–15; Burmester, "Australian States," 273; Crock, "Federalism and the External Affairs Power," 244; Boyce, "International Relations," 98–9; and Harris, "Federalism and Australian Foreign Policy," 98.
- 100 See the attempt to do so by a South Australian Parliamentary Committee in 2001: South Australia, Economic and Finance Committee, 35th Report, *South Australian Government Overseas Offices* (Adelaide: South Australian Parliament, October 2001), 13–17. See also Sharman, "Australian States and External Affairs," 314–15; and Ravenhill, "Australia," 98–9.