



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 12 March 2008

THURSDAY, 8 MAY 2008

CANBERRA

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**JOINT STANDING
COMMITTEE ON TREATIES**

Thursday, 8 May 2008

Members: Mr Kelvin Thomson (*Chair*), Senator Sandy Macdonald (*Deputy Chair*), Senators Bartlett, Birmingham, Bushby, Marshall, Sterle and Wortley and Mr Andrews, Mr Forrest, Ms Hall, Ms Neal, Ms Parke, Mr Simpkins, Mr Trevor and Ms Vamvakinou

Members in attendance: Senators Birmingham, Bushby and Sterle and Mr Andrews, Ms Hall, Ms Parke, Mr Simpkins and Mr Kelvin Thomson

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 12 March 2008

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Committee met at 10.03 am

CHAIR (Mr Kelvin Thomson)—As part of the committee's ongoing review of Australia's international treaty obligations, the committee will hear evidence on seven treaty actions which were tabled in the parliament on 12 March. Witnesses from various departments and organisations will be joining us for discussion on the treaties. I thank those witnesses for being available for this hearing. I should remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problem for witnesses it would be helpful if any issues could be raised now.

[10.04 am]

ROWLINGS, Mr William Murray, Chief Executive Officer, Civil Liberties Australia

WILLIAMSON, Mr Lance Brian, Director, and Webmaster, Civil Liberties Australia

Treaty on Extradition between Australia and the State of the United Arab Emirates

CHAIR—I call representatives from Civil Liberties Australia. Do you have anything to say about the capacity in which you are appearing before the committee?

Mr Rowlings—I am the CEO and a director of Civil Liberties Australia.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. If you nominate to take any questions on notice, please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. Thank you for your submission, which the committee has just authorised for publication. I invite you to make some introductory remarks before we proceed to questions.

Mr Rowlings—Thank you for the invitation to appear. We would like to highlight three issues arising directly from our submission. They relate to the minister's prerogative in this agreement and the model agreement to decide on whether or not extradition will be allowed; issues around the word 'torture' in this agreement and the model agreement; more generally, but also relevant to agreements of this particular nature, how the protections and standards appear to be moving further away from those in Australia; and, finally, issues relating to the death penalty and issues related to reports to this committee or to another appropriate place on the volume and type of extraditions and information and data informally exchanged by the Australian Federal Police and data on formal requests for criminal intelligence exchanges.

Before we make any specific comments, we would like to make it clear that it is not our intention to disparage the United Arab Emirates in what we say. What we have to say will be relevant to the UAE treaty in question but is more meant to reflect the generality of the expanding range of treaties being entered into, which are now close to 40, we understand.

In talking about ministerial prerogative, our paper makes clear that there are effectively no standard or guidelines by which the minister is to make a serious judgement as to whether or not a person is to be extradited from Australia. The minister is not obliged to consider evidence and has only to consider information. This is a very low standard of level of satisfaction that any case has actually been made out. In effect, the minister is acting in a similar role to a committing magistrate in Australia but without the person to be extradited receiving the benefit of any of the legal protections of someone in a committal procedure in a court of law in Australia. Such a person cannot argue their case and see or know what the information is that has been put before

the minister, and there is no mechanism for the person in question to receive any hearing to counter any allegations or to make a case for nonextradition.

We believe that JSCOT is in a position to review whether or not such a low standard of proof is appropriate for a likely major issue in relation to criminal law and subsequent punishment. We also believe that a person against whom allegations have been made should have some rights in Australia before he or she is extradited—not on the basis of evidence but merely of information.

We are also concerned that there is no requirement on the minister to consider whether torture is likely or possible in the pre-trial or trial phase of the legal proceeding in the country to which a person is being extradited. There is provision if torture would be a result of sentencing but the agreement is silent on pre-sentencing torture. We believe this is an oversight that JSCOT should ask to be amended in future agreements of this nature and in renegotiations of existing agreements already entered into. We also note that the likelihood of being subjected to torture pre-trial or during the trial is not a consideration for the minister in deciding on extradition. We believe JSCOT may well ask for a review of this issue and may wish to make a comment at a subsequent hearing.

What laws and standards apply? We are concerned to ensure that the standards, codes and laws under which both extradition and criminal intelligence exchanges will occur are not dropping or weakening. We raise this matter following our submission on the treaties with Indonesia and China. In both those cases, the laws, codes and practices of the countries concerned were at odds with Australia's, and sharia law did not apply throughout the countries in question. But in subsequent agreements, including this one, Australia appears to be accepting that sharia law can be the grounds for an extradition request.

While we make no comment on sharia law in the UAE and similar countries, we ask JSCOT to consider whether or not the expanding treaties are effectively introducing the reach of sharia law into Australia and whether amendments to the model treaty and this treaty are needed. If people can be extradited because of sharia law provisions without proof and solely on information supplied, it would appear that Australia's laws and standards have been significantly altered and changed in a way that most Australians would believe was not appropriate.

I will now talk about the death penalty issues. We ask JSCOT again to bend its mind to the issue of preventing the Australian Federal Police from effectively exporting the death penalty for Australians into overseas jurisdictions. We know that the committee itself has concerns in this area. Report 84 of the treaty tabled on 6 December 2006—the Indonesian treaty, in shorthand—said at page 24, item 4.25:

The Committee has considered these issues previously and is generally satisfied with the safeguards as they stand although it has some outstanding concerns that information shared lawfully under police-to-police cooperation may inadvertently result in the death penalty being carried out.

The reference is in the document we will submit to the committee.

In relation to intelligence and data exchange, we wish to revisit our continuing contention that the AFP should be formally restrained by words in this type of treaty and/or by formal instructions from the minister. We believe that the AFP should not be permitted to pass on

intelligence against Australians citizens which might result in their being subjected to the death penalty in a foreign nation if the intelligence in question or other information available to the AFP means that the Australian citizen could be charged in Australia with a similar or related offence. We believe that JSCOT should require words to be drafted so that future treaties and AFP guidelines reflect JSCOT's and CLA's concerns. In short, we ask this committee to clearly indicate that the AFP behaviour in exchanging intelligence, which resulted in three of the Bali nine being today on death row in Indonesia, was inappropriate and that it should not occur again.

Allied to this request, we also ask JSCOT to require an annual report from the Attorney-General's Department to indicate how many extradition requests have been received by Australia, how many have been acceded to, the outcomes on the person extradited in the country requesting extradition and associated information. Similarly, we ask JSCOT to require an annual report from the AFP on the number and types of intelligence and data exchanges with other countries, generalising where necessary, and the outcomes for people mentioned in those exchanges—in particular, and in detail, any court or jail outcomes relevant to Australians who have been the subject of AFP supplied intelligence. Thank you for the chance to raise these issues.

CHAIR—In your written submission you said:

... there have been instances in the recent past where government decisions have been made allowing the extradition of individuals to face charges that may attract the death penalty.

You then went on to discuss the Rivera case, and I was not sure that it bears out the statements. I wondered whether there were other cases or whether I had missed something in your contribution on that case.

Mr Rowlings—May we take that on notice? The drafter of our document, who is a lawyer and neither of us are, is not here. We could certainly take that question on notice and provide that information to you.

CHAIR—That is fine. Do other members of the committee have questions?

Mr SIMPKINS—Mr Rowlings, just to be clear, are there other examples that you can bring to us now or in the future where undertakings given to the Australian government have not been honoured by other countries with regard to the death penalty?

Mr Rowlings—There are none that I can bring to you immediately. We will check that. We are asking this committee to instigate a process where we will know that. You will know it and we will know it. At the moment there is no way that we can access that information. We need a committee of this nature to make that information public knowledge. As your questions indicate, it is important that these things are raised so that we know how many extraditions there were and to what countries, and what the outcomes are. At the moment there is no follow-up from these treaties as to what the outcomes are. Nobody reports on it that we are aware of.

CHAIR—In your evidence perhaps you gave your view about this, but we have been told that there is an international trend towards a 'no evidence' standard in relation to extraditions. Do you have a view about that international trend, and where do you think it ought to be going?

Mr Rowlings—I think that in our opening statement we made it clear that that is a very low standard on which to send somebody from this country—possibly a citizen of this country; certainly a resident of this country—to be put before a court where at least one year is the minimum jail term, because that is in the agreement, but quite possibly to face life in jail, 20 years in jail or, in some places, possibly the death penalty. That is an extraordinarily low standard by anyone’s consideration. So we think that there should be much more required and that a person has a right to give some evidence or some counterclaim to what is being said behind their back without their knowledge. They are not privy to any of the documentation. The documentation is not evidence; it is simply information. That is very unlike Australia—very un-Australian.

CHAIR—It is difficult either way, isn’t it? If they present evidence then the Australian authorities get lured into making an assessment of whether a person is innocent or guilty, but if you do not assess evidence then it is open to other governments to simply make claims, which could involve political prisoners and the like.

Mr Rowlings—It is wide open at the moment. It would impose a greater duty on the minister. But these are going to be very important decisions. They are not decisions that should be taken lightly—and I am sure they are not taken lightly, but they are not taken on the basis that we would normally consider to be Australian standards.

Mr Williamson—Mr Chair, you made the comment that it was a ‘no information’ standard that we were moving to. The issue becomes: what is ‘no information’ and what is the meaning of that? ‘No information’ could mean literally that, as opposed to no evidence—no information also. We have been arguing about the information standard itself, but as we have been seeing in these treaties over time there is a drift to change various standards—various ways they apply, where they apply and how they apply. The countries are applying, too, the standards of law in those countries. Those sorts of things are drifting. That is more the issue.

Senator BIRMINGHAM—It is the case that the country seeking extradition has to provide an assurance that the death penalty will not be pursued—is that not correct?

Mr Rowlings—I understand from the NIA that it is correct, yes.

Senator BIRMINGHAM—So, with regard to the issue of other examples of a state pursuing the death penalty subsequent to extradition, I would have thought that, whether or not we have a clear reporting mechanism back to Australia, there would actually have been a major public outcry and a major diplomatic incident if a country, having provided such assurance, were to go back on that assurance. So I would be surprised if we were to find cases where that had occurred.

Mr Rowlings—I would be surprised also in terms of the death penalty, but we are talking about any penalty beyond one year. What you are saying is that the extradition may have been given on this basis, but some other sentencing on some other issue could well have occurred. There is no follow-up to this extradition process that we are aware of. There is no responsibility on anyone to do anything. Nowhere in the agreement does it say that there is any reporting back, it does not appear to be an A-G’s responsibility to check that something has happened and we think that that is quite important. Otherwise we will never be able to answer your question.

Senator BIRMINGHAM—That is a slightly different matter that you are raising, then—that there is the potential for somebody, once extradited under one charge, to have a raft of other charges laid against them. That is the assertion you are making there.

Mr Rowlings—That is certainly a possibility. A further possibility in some countries would be that somebody extradited to one country is actually moved on to another country. Although that is not supposed to happen, it could quite easily happen. Once this person leaves Australia, absolutely nothing occurs to monitor the process. There is no mechanism whatsoever. There is certainly no reporting mechanism. So this committee is approving all of these documents, but we do not know what the outcomes are. The committee is raising concerns in some cases, but nobody knows what the outcomes are because there is no reporting on those. We think it is important that there should be.

Ms HALL—What I am hearing you say is that there is not enough transparency, there is not enough accountability and the reporting requirements are not strong enough. The message that you are trying to give us is that that needs to be incorporated into any decisions we make. Is that correct?

Mr Rowlings—We would hope that this committee would come up with something that solves that dilemma, which we think is a dilemma for the community and for this committee as well, because it is reviewing treaties but not knowing what the outcomes are and expressing reservations but not knowing if these things are occurring or not occurring—or what is occurring.

Mr Williamson—To answer your question, the governance around the treaties seems to cease at the point when a treaty or an extradition is enacted. From that point on, the governance appears to stop.

Ms HALL—And you are arguing for the governance to continue past that point?

Mr Williamson—Yes, for the governance to flow through so that we are—the community are, you are—aware of the consequences of what we are doing through our treaty processes.

Mr Rowlings—And that should inform future treaties. We would imagine that it would change the way you approve or do not approve future treaties.

Senator BIRMINGHAM—With respect to the issues of torture in pre-sentencing or pre-trial, are the provisions as you understand them in this draft treaty comparable to those in the UN model treaty?

Mr Rowlings—As far as I am aware, they are. A-G's would be able to answer that and they are appearing later. So far as we are aware, those are the normal things. It refers only to sentencing, and there is no mention in the NIA of any pre-sentencing torture likelihood. In some countries where we have treaties, and without being specific, it is not impossible that torture could occur.

CHAIR—In the last few days, the Attorney-General and the Minister for Foreign Affairs announced an intention to consider Australia's ratification of the optional protocol on that convention, so that might be relevant.

Mr Rowlings—But, again, the issue would not be solved there, because we are exporting people who are subject to that elsewhere, and we need reporting on whether or not things are occurring once that extradition takes place. I also make the point that this applies also to the exchange of criminal intelligence. Our remarks relate to that as well. There is no mechanism to know whether that is happening appropriately, because the AFP do not report on it. We think it is very important that they do. And this committee has never made clear that the Bali nine decisions were not acceptable to the Australian community, and we believe that they were not acceptable. We believe that, if that decision process occurred again, whoever made that decision should not make that same decision. However, we have heard that in semipublic forums the person who made that decision has asserted that he made the right decision and would make exactly the same decision again if the same situation arose.

Mr Williamson—To put that into a simple statement, effectively Australian officials should not enjoy the discretion of whether someone is exposed to execution. At the moment, that seems to be the issue.

CHAIR—Thank you very much for coming along, and we look forward to your response to the question which you took on notice.

[10.24 am]

CAMPBELL, Mr Bill, First Assistant Secretary, Office of International Law, Attorney-General's Department

MARSHALL, Mr Steven, Assistant Secretary, International Assistance and Treaties Branch, Attorney-General's Department

VALE, Ms Corinne, Senior Legal Officer, International Assistance and Treaties Branch, Attorney-General's Department

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

WHITE, Ms Rachel, Executive Officer, International Legal Branch, Department of Foreign Affairs and Trade

WHYATT, Mr Justin, Director, Middle East Section, Department of Foreign Affairs and Trade

Treaty between Australia and the State of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters

Treaty on Extradition between Australia and the State of the United Arab Emirates

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. At the conclusion of your evidence please ensure that Hansard has had the opportunity to clarify any matters with you. If you nominate to take any questions on notice please ensure that your written responses to questions reach the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make introductory remarks, if you wish to, before we proceed to questions.

Mr Marshall—I would like to thank the committee for the opportunity to appear before you this morning. As the chair foreshadowed, my opening statement relates to both of the treaties under consideration by the committee this morning. Establishing strong extradition and mutual assistance relationships with other countries is essential to the effective operation of Australia's criminal justice system and to the strengthening of Australia's capacity to combat transnational crime. International travel and modern technology are making it easier for criminals to plan and commit crimes across borders. In this environment it is important to strengthen our mechanisms for international cooperation, including through effective extradition and mutual assistance arrangements. The UAE is an important partner in the Middle East and in efforts to combat transnational crime, and, with this in mind, on 26 July last year Australia and the UAE signed two treaties. I will address the extradition treaty first.

Extradition relationships with other countries are an important component of the effective administration of criminal justice in Australia. These relationships enable us to cooperate with other countries, to fight crime and to prevent Australia from becoming a safe haven for persons accused of serious crimes in another country. Australia's legislative basis for extradition is set out in the Extradition Act 1988. Under this act Australia can make an extradition request to any country, but whether the request will be accepted will depend on the domestic laws of that country and any relevant extradition treaty. Australia can also consider requests from countries that are defined in the Extradition Act as being extradition countries. The UAE is not currently listed as an extradition country, except in relation to certain multilateral treaties to which Australia and the UAE are both parties. The treaty before the committee today will provide a mechanism to facilitate extradition between Australia and the UAE on a bilateral basis.

I will draw your attention to some key features of the treaty. It will impose obligations on both countries to extradite people for extraditable offences. Article 3 of the treaty defines an extraditable offence as one punishable under the laws of both states by imprisonment for a period of at least one year or a more severe penalty. This reflects the concept of dual criminality, which is a feature of most extradition treaties. As Civil Liberties Australia has pointed out, the treaty is a no evidence treaty. The no evidence standard of information is in line with the international trend towards simplifying and expediting extradition matters. It treats determination of guilt or innocence as fundamentally a matter for the courts of the requesting state; however, the treaty still requires the provision of sufficient information to determine that the person is sought in a legitimate pursuit of the enforcement of the criminal law and also to enable Australia to consider whether there is a basis for refusing the extradition request under the treaty.

Australia currently has 35 modern bilateral extradition treaties, only four of which require either prima facie evidence or reasonable grounds to be established to make a request; the others are all no evidence treaties. The treaty also includes numerous internationally accepted mandatory and discretionary grounds for refusing an extradition request. These include the ability to refuse a request for extradition where the offence for which extradition is sought carries a punishment that constitutes torture; where the person, on being extradited, would be liable to be tried by an extraordinary or ad hoc court or tribunal; or where the requested state considers that the extradition is unjust, oppressive or incompatible with humanitarian considerations. Also, in keeping with the Extradition Act, the treaty provides that extradition shall not be granted if the offence carries the death penalty, unless an appropriate undertaking is given.

I will briefly address the mutual assistance treaty. As the committee may be aware, mutual assistance is a formal government-to-government process countries use to provide and obtain assistance in criminal investigations and prosecutions. It can also be used to recover proceeds of crime. In Australia, the provision of mutual assistance is governed by the Mutual Assistance in Criminal Matters Act. With respect to the Civil Liberties Australia submission, mutual assistance is a separate matter from police-to-police assistance, which is cooperation provided by one country's police force to the police force of another country. Those matters regarding the informal exchange of information are not dealt with under either of the treaties before the committee today. They are governed by other protocols or understandings and are not a subject of the current treaties. Under our existing laws, Australia can make or receive a request for mutual assistance to or from any country. However, in the absence of a treaty, whether a request will be accepted will depend upon the domestic laws of the other country. To facilitate mutual

assistance, Australia has concluded 27 bilateral treaties and is also a party to a number of multilateral agreements that impose mutual assistance obligations.

As with the extradition treaty, the mutual assistance treaty provides various grounds for refusal of a request, including lack of dual criminality and prejudice to the safety of any person. The approach to the death penalty in the treaty is consistent with the legislative requirements in subsections 8(1)(a) and (1)(a) of the mutual assistance act, and the treaty allows Australia to refuse a request for assistance if the provision of assistance may result in the death penalty being imposed or executed. Both treaties enable Australia to refuse mutual assistance or extradition requests for political or military offences in circumstances where double jeopardy would apply or where prosecution is motivated by the person's race, sex, religion, nationality or political opinion.

In conclusion, the treaties have been framed to accord with the model treaties which Australia has been ratifying for some years, dating back to the late 1980s, many of which have previously been considered by the Joint Standing Committee on Treaties. I am more than happy to address specific questions, including any issues that might arise in relation to the submission from the Civil Liberties Australia, but other than that we are in your hands.

CHAIR—Two of the submissions we received made suggestions for changes or, effectively, recommendations. One was from Civil Liberties Australia, from whom we have just heard. In their submission, they gave us a set of proposals, including:

Assurances that are given regarding the extradition of individuals must have the 'character of an undertaking by virtue of which the penalty of death would not be carried out'—

and—

If a person provides information attesting against the effectiveness of the assurance the Minister must consider the evidence.

I do not know whether you have had the opportunity to see the proposals, but I invite you to comment on any of those recommendations or to take that on notice and give us a considered view about them.

Mr Marshall—We can follow up with something comprehensive in writing, but I have seen the Civil Liberties Australia submission—it was on the website. My view is that most of the concerns raised in that submission regarding how treaties are implemented in practice are met under Australia's domestic law and its regime. For example, with respect to the death penalty, my understanding is that the council wanted some indication that the minister would not be required to simply consider an undertaking on the face of it and that, if there were concerns about that undertaking, the minister would need to take that into account. That, as we understand it, is the law under current case law. The council's submission referred to a case known as *McCrea v Minister for Customs and Justice*, which involved a death penalty undertaking provided by Singapore in which the judge indicated that the minister would need to take into account the context of that undertaking.

Similarly, questions such as the right of the person sought to make representations to the minister are already covered in the judicial review requirements under section 39B of the Judiciary Act, under which ministers are required to accord natural justice to persons who may be affected by a ministerial decision. In practice, that means that, if a person is being sought for extradition, considered for surrender by the minister and wishes to make representations, those representations are put before the minister in a comprehensive submission which seeks to address all of the legislative requirements under the Extradition Act as well as relevant requirements under the treaty and then seeks a decision from the minister bearing that in mind. Those decisions are and have been appellable as a matter of law to the Federal Court, and there have been cases in which the courts have gone through the material that was put before the minister to ensure that due process and proper procedural considerations were taken into account.

CHAIR—The Tasmanian government also made some recommendations in commenting on those two treaties. They are relatively specific: article 5, paragraph 2, specifying which competent authority the case is to be submitted to in order to enable a person to be prosecuted; and details relating to penalties which have been imposed rather than penalties which may be imposed. Again, if you have not seen these yet, we will give you the opportunity to have a look at them and to comment on their specific proposals.

Mr Marshall—I would be happy to do that upon reviewing the comments from the government of Tasmania. One point that is worth bearing in mind, of course, is that treaties tend to be a relatively high-level document between countries because they form a bridge between different legal systems. Accordingly, sometimes it is not possible to include specificity as to which particular prosecuting authority a matter would be referred. But in the circumstances where Australia was to refer a matter to prosecution, that would be done in accordance with Australian law and would depend upon the actual offence for which prosecution was being sought.

CHAIR—You mentioned in your response to the issue of the Australian Federal Police and the Bali nine that mutual assistance is separate from police-to-police assistance and that these things are not subject to the current treaties. Is this because we choose to separate them and choose to treat this as not relevant?

Mr Marshall—I think it is more the case that international practice encourages informal police-to-police cooperation where this is permissible under the domestic laws of the relevant states. Organisations such as Interpol as well as bilateral informal arrangements between police agencies are dealt with not at a government-to-government level but are actually dealt with at an agency-to-agency level. So I do not think it reflects a definitive policy choice on Australia's part so much as it is actually taking into account the reality of how countries cooperate in investigating criminal activities. Mutual assistance tends to apply more relevantly to assistance where coercive measures may be sought, such as the execution of a search warrant or requiring someone to give evidence before a magistrate. In those cases where coercive powers are being exercised in Australia, the mutual assistance channel is the one which has to be followed.

Mr ANDREWS—Mr Marshall, you said that the minister's decision is appellable and there have been Federal Court cases where that has occurred. Are you able to give us a summary of the matters which the Federal Court has looked at in those cases and the parameters that the

Federal Court has provided in terms of guidance to the minister in making the decision through those appeals? You may want to take that on notice.

Mr Marshall—We would be able to do that. The details of any Federal Court judgement are obviously going to be defined by reference to the particular matters which the person raised in appealing against the minister's decision, but there is some guidance there and we can seek to simplify that for you.

Mr ANDREWS—Presumably, in advising the minister, the department would be saying to the minister that there are such and such Federal Court cases that have been decided and, even if they are decisions at first instances—as probably most are—nonetheless, this is an indication of the way in which the Federal Court currently interprets the law?

Mr Marshall—We would be happy to take that on notice.

Mr ANDREWS—I presume that the dual criminality provision would not preclude other charges being brought in the country to which the person was extradited?

Mr Marshall—The dual criminal provision governs the offences for which the person may be extradited. There is a separate provision regarding speciality, in article 14 of the treaty, which effectively provides that the requesting state cannot pursue criminal action for the prior commission of other offences without the consent of the requested state.

Mr ANDREWS—So, hypothetically, if person X's extradition is sought from Australia on the grounds of a particular charge, if the UAE then sought to refer an additional charge, that could not be done without the consent of the minister in Australia?

Mr Marshall—Correct.

Mr ANDREWS—What mechanism, other than the terms of the agreement, could preclude that, or are we simply relying upon the terms of the agreement?

Mr Marshall—As far as UAE's obligations are concerned, they are what is reflected in the agreement—that is, what UAE has undertaken to us. I am not in a position to say exactly how the UAE would give effect to that under law. Under our extradition legislation, Australia has a provision which effectively implements any speciality undertaking that we might make so that Australian authorities are precluded from going outside the terms of that, but, in essence, in the treaty the UAE is required to undertake not to have the person punished for offences other than those for which extradition was granted.

Mr ANDREWS—Does not the expression in article 14 'an offence' relate to sharia law?

Mr Marshall—It may incorporate sharia law where the relevant offence is one that has been established under sharia law. My understanding is that in the UAE there is a blend of sharia law and a federal penal code. However, those matters which sharia law might regard as being offences, but which are not offences under Australian law, would not be subject to extradition and therefore would be excluded by the rule of speciality.

Mr ANDREWS—Just so that I am clear about this, your evidence is that if a person was charged under the federal criminal code—that may not be the appropriate term but I am referring to the federal penalties in the UAE—then upon extradition that person could not be charged with some other offence under sharia law.

Mr Marshall—Yes, that is the effect of the treaty. It is the offences for which they are sought. When extradition is granted, the surrender warrant would identify the offences for which extradition has been granted.

Mr ANDREWS—I notice that the gentleman who represents Civil Liberties is shaking his head at that. I am not asking him to answer now but he might want to take that matter on notice if they are providing us with some further information. I have just one last question. I did not take this down quickly enough. You said that only four of a certain number of treaties require more than information. What was the total number?

Mr Marshall—Four of our treaties, and there are 35 extradition treaties.

Mr Campbell—I just wanted to say something about the evidence given by Civil Liberties Australia about the question of a torture before prosecution takes place in the country to which they are extradited. Can I say it now?

CHAIR—Fire away.

Mr Campbell—I think the point was made that the treaty provides for an exception to extradition when the penalty that is involved amounts to torture, but the question was asked: what about a situation where a person is tortured before the trial, or something like that? I wanted to draw the committee's attention to another international obligation that we have under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, article 3 which says that no state—and that includes Australia—shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. That obligation clearly covers the circumstance where somebody might be tortured beforehand, as opposed to as the penalty.

Ms PARKE—Civil Liberties Australia also raised the issue that the Australian government's involvement in extradition basically ends at the point of extradition. What is the Australian government's obligation in relation to extradited persons? What follow-up is done in relation to extraditions and in relation to the provision of mutual legal assistance?

Mr Marshall—There is no formal regime for follow-up reflected in our treaties or reflected in our practice. When it comes to extradition of Australian nationals, Australia has consular responsibilities and has the ability—and in practice it does this—to follow up the situation of the person who is being returned. However, when you have a circumstance whereby someone might be travelling through Australia and is sought for extradition, say, from the country in which they are a citizen, we do not have a mechanism in which we actually continue to check the prison conditions in which the person is being kept or continue to check on the processes that have been undertaken. In effect, Australia accepts the undertaking of the relevant country and that is where it stands. I am not aware of countries that actually do have a monitoring mechanism that goes beyond the one that I have referred to—that is, in relation to their own nationals whereby, when

a person goes back, the country actually requires further information regarding the progress of the case. Some might say that that is really a matter for the sovereignty of the other country, once Australia has accepted the other country's undertaking that certain protections will be afforded to the person.

Ms PARKE—When you have a case of Australia having an international obligation to ensure that it is not extraditing a person to a situation where they may be subjected to the death penalty or torture, surely that brings upon Australia an obligation to ensure that that is not in fact happening.

Mr Marshall—The obligation applies at the time the decision to extradite is made. The act provides that the minister must be satisfied by virtue of an undertaking that the person will not be subject to the death penalty, or the minister must be satisfied that the person will not be subject to torture. In terms of follow-up, I just make the point that there is no regime for that at the bilateral level and I am not aware of other countries that do have such a regime. I would imagine that doing that might well complicate the conclusion of extradition treaties because some countries, irrespective of their human rights records, get very sensitive about matters that they regard as going to their sovereignty or their own processes.

Ms PARKE—I actually do not think it would be unreasonable, in cases of extraditions—and there are not so many that happen every year—for a country to provide a report each year to the country from which it has received extradited people as to what happened to those persons.

Mr Marshall—It is effectively a matter of policy. All I can do is outline the factual issues that would arise in relation to the provision of such undertakings and note that it would be a fairly novel procedure at the bilateral level. It is not something I am aware of countries having engaged in.

Ms PARKE—Yes—just because it has not been done does not mean it is not a good idea.

Mr Marshall—Sure. Having said that, I note that the committee had earlier pointed out that there would be a hue and cry if it ever became obvious that a country had breached an undertaking. I am not aware, in any of the cases in which the death penalty or torture allegations have been raised, of those undertakings or guarantees having been breached. I cannot say that we have investigated every case, because we have not, but we have not been put on notice that there has been a problem in relation to any of the extraditions that have been granted by Australia.

Ms PARKE—I hear what you are saying. My concern is that a person who is extradited to a country where there is a significant possibility of being subjected to torture—in the form of floggings, amputation or other such things—is not necessarily going to be in a position to be able to raise a hue and cry about their position. They may not have the same access to human rights organisations and things that people in Australia would have.

Mr Marshall—Agreed. One might also note that, in those circumstances one might doubt the veracity of any monitoring provision that the country provides. For example, if we were to say, 'Can you promise that you didn't torture this person this year,' for the remainder of their sentence—or even if you sought an assurance that the person was still alive—I am not sure as to

how much an undertaking in those terms would go beyond an undertaking that is provided at the start of the process.

Ms PARKE—I do not know that you would be requiring them to make a promise or a certification that there was no torture but simply provide a report as to the end result of their matter: the person was sentenced, is spending this amount of time in jail, or whatever.

Senator BIRMINGHAM—Just to clarify, you stated that you are not aware of any incidents where the death penalty or torture provisions, or undertakings, have been breached. Are you aware of any incidents where the provisions of article 14 and speciality have been breached by any countries to which people were extradited?

Mr Marshall—No, I am not aware of any. If the person were an Australian, we would almost certainly have heard of it. I am aware that there have been occasions when the relevant country has sought a waiver of the speciality requirement, which indicates that at least the contracting country regards that requirement as a serious one. As I say, under Australian law the authorities would be precluded from going outside the terms of speciality without the consent of the other state.

Senator BIRMINGHAM—Has Australia granted that waiver?

Mr Marshall—I do not know how much detail I could actually provide in relation to specific cases, but I am aware of circumstances in the past where Australia has granted a waiver. There have been a number of criteria that have been examined. It is a matter for the relevant administering minister—and in that case I think it was the former Attorney-General—but it involves consideration of factors such as whether or not the requesting country might have been aware of the conduct comprising the offence at the time, what the reasons were for which the offence was not applied for formally as part of the extradition, as well as the views of the fugitive.

Senator BIRMINGHAM—Acknowledging that you may not be able to give specific detail of cases, could you take on notice and provide some general information on the terms under which such waivers might be granted and the countries to which such waivers may have been granted?

Mr Marshall—I am happy to take that one on notice.

Senator BIRMINGHAM—Thank you. Which are the four countries with which we have treaties where prima facie evidence or a higher standard of evidence is required?

Mr Marshall—One of them is the United States, which requires reasonable probable cause as the ground there. South Korea has a similar requirement. Israel, I believe, has a requirement for a prima facie case, as well as Hong Kong, and that reflects their domestic legal requirements.

Senator BIRMINGHAM—So that reflects the domestic legal requirements as against the fact that peace treaties may have been negotiated at an earlier time, when obviously we are now pursuing this no-evidence approach or information-only approach?

Mr Marshall—It definitely reflects a constitutional requirement in the case of the United States. In the case of Hong Kong, it reflects a basic principle of their law. We negotiated a protocol with Hong Kong on the prima facie case aspect, which was presented to this committee last year. It was clear then that Hong Kong did not wish to go beyond that in the case of incoming requests. I am afraid that I would need to check up on the situation with Israel, although the treaty in that case is relatively old. As for South Korea, that was a 1991 treaty which was post-Australia adopting the no-evidence model, so I can only surmise that it would have been because South Korea regarded that as important under its law.

Senator BIRMINGHAM—Does the administration of requests under those treaties pose any greater difficulties for the government than under the information-only treaties or no-evidence treaties?

Mr Marshall—I think that it would be correct to say that the Australian government has since 1985 adopted the no-evidence standard on the basis that it would greatly facilitate not only the conclusion of extradition treaties but also the effective handling of individual cases. The short answer is: it does make it administratively and legally a lot more expeditious to conduct an extradition because you do not have the problems associated with ensuring that documentary material produced under the requirements of an entirely different legal system accord with Australia's legislative requirements for admissibility of evidence.

Senator BIRMINGHAM—Would extraditions under the proposed treaty be possible relating to charges under sharia law?

Mr Marshall—Yes, if the charges relate to offences which would be criminal offences under Australia's law.

Senator BIRMINGHAM—Are there examples of this in other treaties?

Mr Marshall—I can take on notice the extent to which sharia law might apply in relation to some of our extradition partners. Clearly it does in relation to a number of our multilateral partners, but I would need to take on notice the question for bilateral partners. I suppose the point about the treaty is not necessarily whether it is sharia law or the federal penal code or the law of a given federated state within the UAE; the treaty is designed, in effect, to accommodate the legal system of another state and have some flexibility in circumstances where their legal system might have a series of elements.

Senator BIRMINGHAM—And, for offences where flogging is the penalty under sharia law, would the process for that be that an undertaking be given that such a penalty not be applied or would we simply not extradite for such offences?

Mr Marshall—If no undertaking could be given, we would not extradite. It might be the case that with some offences there are a range of penalties—imprisonment plus whipping, for example—and in a case like that it might be that we would say, 'We are not prepared to extradite the person unless you undertake that the only applicable penalty shall be imprisonment.' There might be cases where we are told the only penalty for that offence is whipping, in which case we would say we are not in a position to extradite.

Senator BIRMINGHAM—Finally, one last question: how does this treaty apply to Defence personnel who may be serving in the UAE?

Mr Marshall—The treaty does not exclude such persons from potentially being subject to an extradition request—that is, if they come back here and are then sought for extradition. But the question of the status of our forces in the UAE would, I think, be covered under other international arrangements. So I think the question is really whether or not persons within the UAE would be subject to criminal prosecution in relation to their conduct.

Senator BIRMINGHAM—Do we have a status of forces agreement with the UAE?

Mr Marshall—I am not aware of one. I can take on notice the detail of that. I should also point out the treaty does have an exception for offences which are purely military offences; extradition is not available for those.

Senator BIRMINGHAM—Thank you.

Senator BUSHBY—Mr Marshall, we have heard that there is no formal follow-up process where guarantees or undertakings have been given. If the Australian government became aware of breaches or apparent breaches of those guarantees or undertakings, would we have any recourse or process to follow?

Mr Marshall—I think ultimately the recourse available is the same as would normally be available in relation to most international agreements, which is that there would be the option of withdrawing from the treaty. Of course, representations could also be made at the diplomatic level, particularly in circumstances where the conduct of the other country was regarded as being in breach of international law. But, other than that, I am not aware of any formal mechanisms through which the Australian government could actually take action.

Mr Campbell—Could I add that there are certain mechanisms that may be available in the event of a breach of international law by another country. One would be taking an international legal case against them in the International Court of Justice, for example, should the UAE accept the jurisdiction of the International Court of Justice. Another mechanism might be for Australia to make a complaint against that country to the committee established under the UN International Covenant on Civil and Political Rights and ask them to look at the matter—although I am not sure whether the UAE is a member of the covenant.

Senator BUSHBY—Thank you. I have a general question, in a sense: have there been any cases of applications for extradition or actual extradition between Australia and the United Arab Emirates, and, further, are there any cases that might be pending if the treaty goes through?

Mr Marshall—The answer to both questions is no. Negotiations for this actual treaty commenced back in 1995 and then they were delayed for some years due to a range of factors, so it was not motivated by a particular case. I am not aware of any pending cases involving the UAE.

CHAIR—Thanks very much for coming along. If you could get back to us on some of the issues raised in the course of the discussion, that would be greatly appreciated.

Mr Marshall—Thank you.

[10.59 am]

CAMPBELL, Mr Bill, First Assistant Secretary, Office of International Law, Attorney-General's Department

EASEY, Dr John Frederick, Senior Adviser, Australian Nuclear Science and Technology Organisation

McINTOSH, Mr Steven, Senior Adviser, Government Liaison, Australian Nuclear Science and Technology Organisation

BIGGS, Mr Ian David Grainge, Assistant Secretary, Arms Control and Counter-Proliferation Branch, Department of Foreign Affairs and Trade

KING, Mr Christopher David, Executive Officer, Arms Control Section, Arms Control and Counter Proliferation Branch, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

Fourth Amendment to Extend the 1987 Regional Cooperative Agreement for Research, Development and Training Related to Nuclear Science and Technology

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. If you nominate to take any questions on notice, please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I now invite you to make some introductory remarks before we proceed to questions.

Dr Easey—I would like to briefly outline the purpose and scope of the Regional Cooperative Agreement for Research, Development and Training Related to Nuclear Science and Technology. The stated purpose of the RCA is to promote and coordinate cooperative research, development and training projects in nuclear science and technology. This intergovernmental agreement is the longest running and most extensive regional cooperative arrangement of its type, not only in the Asia-Pacific region but globally. It has been in existence since 1972—36 years—and embraces the 17 major countries in our region, ranging from Mongolia in the north to New Zealand in the south and from Pakistan in the west to Japan in the east. Because of its success, it has been used as a model for regional agreements established in Latin America in 1984 and in Africa in 1990.

The RCA operates under the aegis of the International Atomic Energy Agency, which provides the secretariat to administer the program. Over the years, as the RCA member states' capabilities and capacities to use nuclear technologies have increased, the program has matured and moved from being largely focused on capacity building to being one that applies appropriate nuclear

technologies to assist in addressing and providing environmentally sustainable solutions to development problems and challenges of collective importance.

The 2007-08 program has the major emphasis distributed as follows: seven projects in health care, three in industry, three in agriculture, three in the environment and one each in radiation protection and energy. The annual budget of the RCA for the 2007-08 cycle is approximately \$6.17 million, of which around 80 per cent is provided by the International Atomic Energy Agency through their Technical Cooperation Fund. The remainder is sought through extra-budgetary support from donors in the region. Australia has been a long-term major extra-budgetary donor to the RCA. Australia's extra-budgetary financial support, which to date totals just under \$7 million, has been provided through AusAID, with other Australian agencies, particularly ANSTO, providing considerable in-kind assistance in terms of expertise, training and access to specialised facilities.

I would like to touch briefly on a couple of aspects of the current RCA program to illustrate the nature of the cooperative projects. In the healthcare area, nuclear techniques are used in medicine for a wide range of applications, from the diagnosis of disease to the treatment of cancer. Current RCA projects are helping to improve, upgrade and accelerate the training of medical personnel across the region in specific areas of need. Australia has been able to provide significant inputs in the healthcare area. We are leading projects for the distance assisted training of nuclear medicine technologists and the development of a distance learning course for medical graduates entering the speciality of oncology, as well as a program to establish regional approaches on the education and training of medical physicists, including the improvement and upgrading of safe operating practices and technical standards in the region.

In the environment area, the focus is on pollution of the air, of drinking water and of the oceans. Member states are gaining skills and expertise in the use of nuclear techniques to study urban air pollution and, especially, to characterise the nature and sources of each component in airborne particulate matter. Advanced isotope hydrology technologies are being transferred to the region so that they can be used to assess, manage and prevent further degradation of groundwater quality in selected urbanised and industrial areas. Nuclear techniques have also an important role in the monitoring and management of the marine coastal environment. The activities undertaken in the industry sector are being used for troubleshooting and to improve and optimise industrial processes, with consequent flow-on benefits to the environment and to the utilisation of resources.

Australia's technical support of the RCA has focused strongly on projects in the area of radiation protection infrastructure, environment, health care and industrial applications of radioisotopes. In addition, Australia has been playing a lead role in the development of management strategies to enable the RCA member states to take on more responsibility for the development and implementation of the program.

In conclusion, I believe there is ample evidence of the value of the membership of the RCA for Australia. It is an effective and visible vehicle for the discharge of our obligations and commitments under article IV of the nuclear non-proliferation treaty. The strong focus of the RCA program on the peaceful applications of isotopes and radiation to development and environmental sustainability offers clear benefits to the peoples of developing countries in our region. On the practical side, the extensive networking that occurs between the counterpart

agencies engenders a cooperative atmosphere that assists mutual understanding and facilitates regional contacts across a wide range of science and technologies and beyond. Much of Australia's strong regional profile in nuclear science and technology is a result of the efforts that have been invested in the support of the RCA for more than 30 years.

Finally, I would like to advise that, of the 17 RCA member states, 13 have now notified the International Atomic Energy Agency that they have accepted the fourth extension of the 1987 RCA agreement, currently being considered by this committee.

ACTING CHAIR—Why has it taken us until now to seek to extend the agreement, given all the benefits you have outlined?

Mr McIntosh—Frankly, it has partly been a matter of a shift in responsibility for treaty action within the Australian bureaucracy. The previous extensions were done by DFAT; this time they have gone to ANSTO. Our learning curve has meant that it has perhaps taken a little longer than anticipated. Also, the election slowed things down. We were ready to go to JSCOT at about the time of the election. It is bureaucratic issues like that.

ACTING CHAIR—Are the other three countries that have not yet extended expected to extend?

Dr Easey—The three remaining countries are New Zealand, Mongolia and Thailand, I believe. They are all expected to advise of their acceptance of the extension. There has been no signal that any of the signatories to the third extension are not going to proceed with the fourth. It is just that sometimes there are bureaucratic difficulties in getting the agreement.

Ms HALL—I note that in your submission you state that this agreement contributes to nuclear nonproliferation. I also note that some of the members that have signed up to it have not signed the nuclear non-proliferation treaty. Do you believe that signing the extension to this agreement will help to facilitate nuclear nonproliferation? If so, how? Could you also inform me of how it contributes to the non-proliferation regimes. Maybe you could give me some background and then tell me how you can facilitate those other members signing up.

Mr Biggs—There are two aspects to the non-proliferation system—two complementary bargains. One is that the nuclear weapons states commit themselves to abolishing nuclear weapons and the non-nuclear weapons states commit to not acquiring them. There is a second and less well known bargain in the system which is administered through the IAEA, and that is that, in exchange for not acquiring nuclear weapons, non-nuclear weapons states are guaranteed access to nuclear science and technology for peaceful purposes. In the shorthand of the NPT system, these are called article IV obligations, and the RCA is one of the main mechanisms by which Australia fulfils its article IV obligations for the transfer for peaceful purposes of nuclear technology and applications. The NPT system is under constant stress, of course, but the expectation of non-nuclear weapons states that they will have access to this technology is constantly being thrown at the NPT system as one of the reasons for their continuing to accept safeguards, for their continuing to be part of the non-proliferation system.

At the moment we have PrepCom—the preparatory committee on the NPT review process—happening in Geneva, and a great deal of the pressure that is placed on member states of the NPT

concerns the fulfilment of article IV obligations and the expectation that states will have access to nuclear technology for peaceful purposes. The membership of the RCA is slightly different from the NPT because it is open to all members of the International Atomic Energy Agency, which includes non-NPT parties, but the institutional connection with the RCA is to the IAEA, and that is how they have that entitlement to participate in RCA meetings.

Ms PARKE—I note that ANSTO has been quite vocal in promoting development of nuclear energy in Australia. How does that role fit in with its role in relation to the RCA?

Mr McIntosh—I think they are quite distinct. As Dr Easey outlined in his opening statement, the vast majority of RCA projects are in non-energy related areas, and even the one that is energy related is more in scoping what you would need to do if you were going to have nuclear energy—in terms of what you need to have for your grid, what sort of regulatory structures you would need to have in place and so on. So I do not think that there is any relationship at all, and that is a project in which we are not active. So there is no relationship between questions of domestic use of nuclear energy and the RCA. We have certainly never seen it in that way.

Senator BUSHBY—I understand that Australia may have provided some financial or in-kind assistance towards the objectives of the treaty.

Mr McIntosh—Yes, that is correct.

Senator BUSHBY—Would you outline the extent of that assistance?

Dr Easey—Australia has proposed, over the years, packages of assistance to the program, starting from 1979. They are generally projects of three years duration. They have to be approved by the RCA member states. All decisions in the RCA are taken by consensus, and we then prepare a proposal which goes to AusAID—and before that went to AIDAB—for financial support.

Senator BUSHBY—So where we provide financial support it comes through AusAID or AIDAB, you said.

Dr Easey—Basically, we put the proposal to the development aid agency here. The funding that they provide has gone into the IAEA system, and then it has been administered by the IAEA.

Senator BUSHBY—And that is done in three-year programs, you say?

Dr Easey—In the past that has been what has gone on. That does not necessarily mean that that would be what we might propose for the future. What has happened is that, as the RCA program has developed, we have been looking at having longer projects. Typically in the past the lifetime of an RCA project was about two years. Now we are looking at five years plus, because what we are trying to do is have fewer projects but greater impact. For that we have longer running projects. So, although we have had three-year projects in the past, we would almost certainly be looking at longer term projects which have a greater impact.

Senator BUSHBY—That does not come from your budget, though; it comes from other budgets.

Dr Easey—The umbrella funding, if you like, comes from the development agencies, but as I mentioned there is an enormous amount of in kind contribution that comes from ANSTO and other agencies, because our staff go as experts and lecturers and we do not recover the cost of their salaries. That is a significant in kind contribution. Of course, there is access to specialised facilities at ANSTO as well, which again is not costed into the program.

Senator BUSHBY—Have the efficiency dividends harmed your ability to provide that in kind assistance in any shape or form?

Dr Easey—I really would not like to immediately comment on that.

Mr McIntosh—I suspect it is too early to say. Historically we have not had an efficiency dividend applied until, perhaps, the budget coming up. The consequences of that for our budget are yet to be assessed.

Senator BUSHBY—I might ask you questions about that in future estimates, then.

Senator STERLE—I want to continue, Dr Easey, on Senator Bushby's line of questioning. You did say in your opening statement that there is funding that comes from the International Atomic Energy Agency, out of Vienna.

Dr Easey—Yes.

Senator STERLE—So Australia funds them, and then funds flow on to you. How much did you say comes from the IAEA?

Dr Easey—For the current two-year cycle, it is just over \$6.17 million.

Senator STERLE—And that two-year cycle finishes when?

Dr Easey—That will finish at the end of 2008. Unfortunately, there is a perturbation in the system for the next cycle because there is an alignment of the IAEA's budgetary system, and there is going to be a three-year cycle which runs from 2009 to 2011. The system will then get back into two-year cycles.

Senator STERLE—So we go from two to three to two.

Dr Easey—Yes.

Senator STERLE—Okay. What was that five-year cycle you were talking about?

Dr Easey—That is in the projects. We are putting up for approval by the IAEA board projects which are longer than two-year cycles. It is possible to get approval for projects now, and there has been a change in philosophy by the TC department and also by the RCA member states in having a longer term look at the program. As part of the medium-term strategy which was

implemented by the RCA last year, that was one of the moves forward for the medium term—that we would move to a smaller number of projects with greater impact. Associated with that, these projects would last for a lot more than the two-year term.

Senator STERLE—Thank you. These are my last questions, Chair. Was the \$6.17 million for the current two-year cycle a substantial increase from the last two-year cycle?

Dr Easey—The level is about the same. There is no amount of money which is guaranteed by the IAEA for the RCA program. There is, if you like, competitive bidding between all of the technical cooperation projects which are put up to the International Atomic Energy Agency for funding. These are looked at on their merit. Some are fully funded, some have partial funding from the International Atomic Energy Agency and the remainder are put out for extrabudgetary funding from other donors. Some projects, even though they have technical merit, may be beyond the available resources of the IAEA, and they will be put as extrabudgetary projects which can be picked up by other donors.

CHAIR—As there are no other questions, thank you very much for coming along.

Dr Easey—I have brought with me some additional material. There are success stories and brochures. I also have interactive CDs from one of the medical programs. There are 18 of each. I hope that will provide some additional interest to the committee. Thank you.

CHAIR—You are too kind.

[11.21 am]

WATERS, Ms Catherine, Manager, Legal Affairs and Co-production, Australian Film Commission

DOOLEY, Mr Grant Martin, Director, China Economic and Trade Section, Department of Foreign Affairs and Trade

MILTON, Mr Ben, Director, International Law Section, International Legal Branch, International Legal Division, Department of Foreign Affairs and Trade

RAYNER, Mr Peter, Director, Malaysia, Brunei and Singapore Section, South-East Asia Division, Department of Foreign Affairs and Trade

GLENN, Ms Raelene, Assistant Manager, Film Incentives and International Section, Film and Creative Industries Branch, Department of the Environment, Water, Heritage and the Arts

RICHARDS, Mr Stephen, Manager, Film Incentives and International Section, Film and Creative Industries Branch, Department of the Environment, Water, Heritage and the Arts

YOUNG, Mr Peter, Assistant Secretary, Film and Creative Industries Branch, Department of the Environment, Water, Heritage and the Arts

Agreement between the Government of Australia and the Government of the Republic of Singapore Concerning the Co-production of Films

Film Co-production Agreement between the Government of Australia and the Government of the People's Republic of China

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal hearing of the parliament and warrants the same respect as proceedings of the House of Representatives and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. If you nominate to take any questions on notice, please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make some introductory remarks before we proceed to questions.

Mr Young—Thank you very much. Australia's International Co-production Program for films has been in existence since 1986. In that time that program has enabled the support of approximately 100 co-produced film and television productions worth over \$900 million. The objectives of this program are, broadly, to increase the output of high-quality productions through allowing the capacity for greater equity investment from partner countries, to open up new markets for Australian films, to share the risk and cost of film production, to enable the interchange of creative talent and skills and to strengthen diplomatic ties while creating

employment opportunities for Australian practitioners in this important industry. Through these agreements the industries and filmmakers of the participating countries can improve the quality and competitiveness of their productions by allowing for a pooling and exchange of creative and financial elements which may not otherwise occur.

There are currently eight film co-production arrangements in place—six treaties and two memoranda of understanding. The proposed treaties with China and Singapore will be the ninth and 10th of these arrangements. Under these agreements, projects approved are granted national status in both partner countries, which gives them access to benefits usually reserved for films wholly or substantially produced within one of the partner countries. Co-producers may apply for whatever assistance and support measures are available to the local screen production industry in each country.

In general, co-productions will have larger budgets than Australian films on their own and it is hoped in many cases this will translate into greater potential for success. The benefits which are available in Australia to films approved under co-production arrangements include the possibility of attracting direct investment from government screen agencies, tax incentives—notably, the recently introduced producer offsets for Australian films—and, in the case of television programs, qualification as Australian program content for the purposes of the Australian Content Standard for commercial television broadcasting.

National benefits are also available in China and Singapore respectively as a result of these proposed agreements. In the case of China, approved projects can be treated as national films, which will afford them preferential access to China's distribution and exhibition sectors. China has quite a strict foreign film quota of 20 films per annum and these films will be able to bypass that. The agreement will also facilitate government approvals for location filming for co-productions, provide access to studio facilities at reduced rates and allow for more favourable revenue sharing arrangements from distribution and box office takings. In the case of Singapore, official co-productions will be treated as local content for the purposes of Singapore's audiovisual regulation, and will also be eligible for direct investment through Singapore government funding programs.

In the past Australia has emphasised, through its co-production agreements arrangements with European countries—and comparable countries such as Canada and New Zealand. The move towards the Asian region provides an opportunity for Australian filmmakers to gain access to these important markets. We understand that several film projects are already in development, which could potentially make use of one or other of these agreements. That concludes my opening remarks. My colleagues and I will be happy to answer any questions.

Senator BIRMINGHAM—Could you take me through the competent authority as named under the Chinese agreement in particular, and what the nature and role of that authority is?

Mr Young—Certainly. The competent authority, which currently is the Australian Film Commission but from 1 July 2008 will be Screen Australia, is the government agency which is responsible for the approval of films under the treaty itself. So it will assess—

Senator BIRMINGHAM—I am more interested in who the Chinese government's competent authority is please.

Mr Young—That is the Film Bureau under the State Administration of Radio, Film and Television in China.

Senator BIRMINGHAM—Is that a body that plays a role in the censorship of films in China or television productions in China?

Mr Young—Yes, it does.

Senator BIRMINGHAM—I see that there were some issues that arose during negotiations of this; that originally the Chinese government wanted to put a clamp on a film being shown anywhere if they were unhappy with it, and eventually we agreed that it would only be a restriction on the film being shown in China. Does that really meet with the objects of this program to have more liberal broadcasting arrangements?

Mr Young—I think that the producer of a film hoping to make use of a co-production arrangement will always understand that those films will need to comply with the laws of the prospective partner countries in that agreement. It is certainly correct, as you say, that one of the issues in negotiation was about the capacity for films not eventually approved as co-productions to be exhibited at all. Again as you say, it was important that that capacity outside China was not restricted. I would also say that it is a consistent philosophy which has been applied in the negotiation of treaties that countries are allowed to exercise their domestic laws in relation to their films as they see fit.

Senator BIRMINGHAM—Did the government make a representations seeking to have the 20-film cap on foreign films that are able to be shown in China changed during these negotiations?

Mr Young—No, Senator, because we would consider that to be a broader issue which, if it were to be considered by the government, would be done in the context of broader trade negotiations. These agreements apply solely to how films are categorised as co-productions.

Senator BIRMINGHAM—Do we seek to encourage the Chinese to relax the conditions they may apply on the approval of such films at all during these negotiations?

Mr Young—That is not specifically raised during negotiations because, again, that would be seen as using the umbrella of these negotiations as an opportunity to press for other changes to Chinese law.

Senator BIRMINGHAM—I have just one more area—the comparative financial benefits of production between Australia and China, or Australia and Singapore. Obviously the former government introduced some very generous tax arrangements, which you spoke of before, to stimulate the Australian film industry, which were very welcome last year. But would you expect more work to be flowing from China to Australia, and Singapore to Australia, or vice versa, in terms of the economic benefits of these arrangements?

Mr Young—I think that we would expect an increase in production levels in both countries. What the co-production agreement can do is make the difference between a film being made and not being made at all. My assessment would be that there would be some films which would not

be able to proceed without such an agreement, so in that case the employment generated through the presence of the co-production agreement would be there. In a number of cases I would imagine that it would not be a question of the film being made solely as an Australian film on the scale intended to be made by the filmmaker, but instead they would try for co-production because that would mean the possibility to export work offshore. My perception would rather be that the film would have to be made smaller in size to be made successfully in Australia.

Mr Richards—The agreement relies on the principle of balance over time as well. It looks at not exactly equal contributions necessarily for every production—so we are looking at a financial contribution and a creative contribution—but over a period of time the range of films that are produced under the film co-production agreement should provide approximately equivalent benefits, financially and creatively, to the film industries of both countries.

Senator BIRMINGHAM—How many other such agreements do we have?

Mr Young—Eight, Senator.

Senator BIRMINGHAM—How long have they been in force?

Mr Young—Varying lengths of time, from 1986 until the last one, which was with Germany, which was concluded in 2001.

Senator BIRMINGHAM—It is obviously the view of the officials that they have provided said benefits of increased levels of production and co-production in both countries?

Ms Waters—I have looked at statistics just recently on that. For example, for our three major co-production partners, which have historically been Canada, France and the United Kingdom, we looked at the projects made under those treaties in the past five years and there is a good equivalence in terms of financial contribution and creative contribution and use of Australia and the other country for production. So we have found that the program has been able to maintain a very good balance, and I would expect that would be the case also for these new proposed agreements.

Senator BIRMINGHAM—Lastly, was there any consultation with human rights bodies or other bodies that may have an interest in freedom of speech issues in China or Singapore?

Mr Young—Not specifically. There was consultation with the film and television production industry.

Ms PARKE—I note that Singapore sees itself as a regional media hub. How does this sit with the significant restrictions on freedom of speech in that country? Do you see any censorship concerns in relation to both China and Singapore, particularly in light of the two-stage approval process for these films? I note that they have to be approved at the initial stage, before filming goes ahead, and then at the end, after the film is made. Is there potential for significant investment to have been made and then at the end for it to be kyboshed because they do not like some aspect of the film?

Mr Rayner—On the first part of your question, I believe that this current agreement does not touch on domestic media issues in Singapore. As you rightly state, there are limitations on foreign participation, and there remain limitations under the Singapore-Australia Free Trade Agreement.

Ms Waters—I would just add some information about the approval process that would apply for the proposed agreements as well as the existing ones. There is a provisional approval stage at which the program is assessed before it goes into production—and that would occur in Australia and in the other country. Any issues that the other authority had with the script would be raised at that time—for example, in the case of China—so that the producers would have the opportunity to amend the script. Then, at the final stage, once the film had been made, it would be assessed again to ensure compliance with the script that had been approved. So it would be very unlikely that, if the filmmakers had made the film in accordance with the approved script, the film would not be approved.

Senator BUSHBY—The NIA states that the costs associated with the administration and funding of the agreements would be met from existing resources. Mr Richards suggested that there would probably be some financial contributions to some of the co-productions. I am interested in hearing what sort of money you were talking about there. Also, given that you are adding another two countries to the suite of countries that we have these treaties with, presumably that means more productions that you need to provide funding for. Does that mean that you will be taking resources away from moneys you were using in the other countries before? How are you going to manage that?

Mr Young—In terms of the approval process, we do not assess that the extra workload required would be significant. It may be that a film producer might choose to do a co-production through one of these countries rather than through another country, for which the benefits might not be considered to be as great. Questions about whether the film agency would choose to invest in a film are ones that arise in the case of Australian films—whether or not they are through a co-production arrangement. One of the anticipated effects of a producer offset is that there may be an increase in co-production films, although there might also be an increase in films which do not proceed through co-production. With the impending merger of the existing film agencies into Screen Australia, it is also expected that there is the potential to handle any increases in the workload that might be required from the agency being in what we might consider to be a very positive position of having to make difficult decisions on good projects.

Senator BUSHBY—So, essentially, you are saying that administratively you will be able to cope with it but, in terms of actually providing funding assistance for co-productions, it will be a competitive process and you will just have to choose the ones that you choose—that you will not necessarily be able to finance any more co-productions; it will just be where you finance those?

Mr Young—That is correct.

Mr ANDREWS—Mr Young, you referred to consultation with the industry. Do I take it that the industry is content with these proposed arrangements?

Mr Young—We have detected very strong support for the proposed arrangements, especially from producers because they see the capacity to utilise these agreements to inject significant additional resourcing into their projects.

Mr ANDREWS—Does that include independent filmmakers?

Mr Young—Yes.

Mr ANDREWS—Can I take you to article 8 in the China agreement and article 12 in the Singapore agreement, both of which relate to the entry of foreign nationals into Australia pursuant to the agreements. What is the position in relation to the granting of visas for people in that category?

Mr Young—Article 8 includes the requirement that ‘nationals and residents’ coming to Australia ‘comply with the relevant laws relating to entry and stay’. There is nothing in these agreements that affects the operation of existing immigration law.

Mr ANDREWS—So the normal process of national security checks and the like will be carried out and these provisions will not override any of those other arrangements?

Mr Young—That is correct.

Mr ANDREWS—Secondly, in relation to the same articles, what is the situation with the wages and conditions of overseas workers coming to Australia under these agreements? Do they have to meet Australian requirements?

Mr Richards—In relation to actors, that is a matter ultimately negotiated between the producers and the actors. In relation to crew, it is our understanding that that is the case and that the Media, Entertainment and Arts Alliance is consulted on the terms and conditions for entering crew.

Mr ANDREWS—If I could take that further, under a 457 visa, for example—there are other visas, but let us take that as just one comparable example—there is a minimum pay threshold which is required to be paid. For example, if someone comes in as a gaffer on a crew under this arrangement, will they have to meet the minimum threshold requirements or could they be subject to a lesser amount of pay because they are, for example, a Chinese national working on a film under a co-production agreement in Australia?

Mr Richards—That may be something we need to take on notice in terms of the specifics of the Department of Immigration and Citizenship’s processes there. That is a matter that they deal with—the production companies seeking to import those crews.

Mr ANDREWS—I would be grateful, Mr Richards, if you could obtain that advice.

CHAIR—If there are no other questions, thank you very much for coming along.

Mr Young—Thank you, Chair.

[11.43 am]

BEYNON, Ms Nicola, Wildlife and Habitats Program Manager, Humane Society International

Amendments to Appendices I and II of the Convention on International Trade in Endangered Species of Wild Flora and Fauna

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. At the conclusion of your evidence, please ensure that Hansard has had the opportunity to clarify any matters with you. If you nominate to take any questions on notice, could you please ensure that your written responses reach the committee secretariat within seven days of your receipt of the transcript of today's proceedings. I invite you to make some introductory remarks before we proceed to questions.

Ms Beynon—Just by way of background, Humane Society International is a conservation and animal protection organisation. We have been operating in Australia since 1994. We are the international arm of the Humane Society of the United States, which is the world's largest animal protection organisation, with 10 million members. We have programs internationally and a national office here in Australia. The Australian office has worked on CITES for over 10 years now and we regularly attend the CITES meetings as an advisor on the Australian delegation. We have a history of working very cooperatively with the Australian government on this treaty, and we have great respect for what they have tried to achieve and for what they have actually achieved at CITES, particularly for marine species threatened by trade, with the exception of the issue that we bring to you today.

CHAIR—In that submission you have indicated a concern about what you might describe as a watering-down of the proposal to list the entire family of sawfish so that the one species, the freshwater sawfish, can be collected and sold by a single exporter. You might want to tell us just a little bit more about the basis of that concern.

Ms Beynon—That is correct. At the last CITES meeting in the Hague in June last year, the United States and the Kenyan governments went to the conference of the parties with a proposal to list the entire family of sawfish on appendix I of CITES. Appendix I prohibits trade, and it is for species that are particularly threatened, where it is not appropriate to have trade in that animal. The United States and the Kenyan governments felt that the whole family of sawfish should receive this level of protection. That was widely supported by the CITES secretariat, by the Food and Agriculture Organisation, the World Wide Fund for Nature, TRAFFIC and the IUCN, the world conservation union which is a coalition of government and scientific experts who draw up the red list of endangered species every year.

That proposal from the US and Kenya was very widely supported in terms of its scientific and policy merit. However, the Australian government then sought to amend that proposal to down-

grade the proposed protection for the freshwater sawfish *pristis microdon*, for the Australian population. As far as the Humane Society International could ascertain, that was for the sole benefit of one trader in north Queensland, to facilitate his ongoing export business of sawfish to aquaria internationally. This is despite the trade into aquaria for this species being an increasing concern. So the Humane Society International was very disappointed with the Australian government's move to down-grade the protection that was available and widely supported for this species.

It is classified as critically endangered by the IUCN. There is very little information about the species, to be able to determine that trade can take place sustainably. It is naturally rare. It has been threatened by fishing, particularly net fishing. It is a species that lives up estuaries and river systems. It is vulnerable in terms of its biology. It is from the large shark family and typically this class of animals is slow to breed. They do not cope with hunting and pressure; they are slow to breed and they cannot replenish their numbers. So we agreed with everybody who said that this is an animal that is not appropriate for trade.

We would like to recommend that the committee recommends that the government does not support the listing of *pristis microdon* on appendix II of CITES but instead elects to take stricter domestic measures for this species, and to treat it as if it had been listed on appendix I, as we feel that that should have been the circumstance in the Hague back in June. We would also like to recommend that the committee recommends for the future, that the Australian government goes back to CITES at their next meeting in 2010 to propose the Australian population of *pristis microdon* be put on appendix I with the rest of its family.

CHAIR—Your submission says that the exporter for whom the exemption was granted was given a spot to the Australian government delegation to the CITES conference. There is an inference of undue influence there, I guess. Is there anything further you want to say about that?

Ms Beynon—It is correct that he was. The government will invite stakeholders onto the Australian delegation. We are a stakeholder from the conservation perspective, so we will often attend on the delegation. But, yes, in this instance, a representative from a wildlife trade industry went on the delegation. That is not so unusual. We might not be that comfortable with it, but I am not suggesting that there is that much impropriety with it.

CHAIR—The EPBC Act lists the freshwater sawfish as 'vulnerable'. The IUCN describes them as 'critically endangered'. Can you tell us something about the difference? Do you have a view about the status of the species?

Ms Beynon—There is sometimes a discrepancy between what the IUCN will recommend for a species and that does not always get reflected when things trickle down to national legislation. In this instance, IUCN has said that the species globally is critically endangered. I went and looked at the IUCN's category last night to make sure that that applied to the Australian population as well, and it does. That is what the IUCN says. I think our legislation might just need a bit of time to catch up with that recommendation from the IUCN.

Ms PARKE—I note that the IUCN has also written about the similarity of sawfishes to each other, and so therefore the difficulty of distinguishing between parks and trade, and enforcement, is problematic. Do you see that as one of the problems?

Ms Beynon—Yes, that is true. At CITES they will often recommend that species that look like other species should also be listed on the same appendix. It helps with enforcement issues. When you have species that look similar on different appendices or some not on appendices at all, it does open up enforcement difficulties for customs officials, and potential loopholes for trade to occur. Yes, it would be much neater administratively if they were all on the same appendix.

Mr SIMPKINS—Who else was on the delegation apart from the officials and the exporter?

Ms Beynon—Humane Society International had a spot on the delegation as well. There might have been a representative from the states and territories; there usually is.

Mr SIMPKINS—State officials, federal officials, HSI and the exporter; that was it?

Ms Beynon—I believe so. I was not present at the time but I believe that was the situation.

Mr SIMPKINS—Is the Australian freshwater sawfish species the same as what can be found overseas?

Ms Beynon—Yes. It has a range beyond Australia.

Mr SIMPKINS—So when we talk about the export of 11 of these things last year or in recent history—

Ms Beynon—Yes, it has taken place over the last six months, since the CITES meeting in June.

Mr SIMPKINS—Why have they been exported? What benefit would people say that that has achieved?

Ms Beynon—Part of our argument and our concern with this is that in getting the appendix II listing for the species the government suggested an annotation to the listing which said that the export could occur to acceptable and appropriate aquaria for conservation purposes. In our view, display of threatened species in aquaria around the world does not necessarily have a return to conservation in the wild back in Australia. The benefit back to Australia is negligible and intangible.

We note that the memorandum of understanding between the Australian government and the receiving aquaria for those exports did not seek to obtain some conservation return back in Australia or financial assistance for conservation programs in Australia. The argument is that if you display an animal in aquaria there is an educative benefit to the public, but when it comes to very threatened species, where trade in them is risky for that species, that is where you will draw the line and say, 'It is not appropriate to have the species displayed in that way because it threatens them back home.'

Mr SIMPKINS—So your view of this is that the 11 fish that have been exported were exported just for display purposes?

Ms Beynon—Yes.

Mr SIMPKINS—And there is no evidence that breeding or any other sort of conservation return was involved with this export?

Ms Beynon—To my knowledge there is not an intent to breed them. I might be incorrect there. However, I would say that if they are bred it would be for ongoing display in aquaria rather than for rehabilitation and release back to the wild in Australia, and therefore there would not be a conservation benefit to the wild if they are bred overseas.

Mr SIMPKINS—There are just a couple more things. With regard to habitat, are we talking about Northern Australia or all the way around?

Ms Beynon—Northern Australia. It would be Northern Australian rivers.

Mr SIMPKINS—Sorry; it is probably here in the notes, but how many do you think there are?

Ms Beynon—It is difficult to know. It is difficult to quantify the actual numbers in the population. What has been recorded is the decline from when they have been caught incidentally in fishing nets or by any targeted fishing. We have seen the declines in the species. So, while we cannot put absolute numbers on how many are left, the declines have been documented. The suspicion is that the populations that are surviving in Australia are quite isolated now. This is part of the problem; there is not a lot of knowledge about the numbers left of this species to be able to do what we would consider to be valid non-detriment findings. When a species is traded now under this exemption the government has to do a non-detriment finding, which is an assurance to the receiving government that there will not be a detriment to the wild population. We would say that there is scant information available to be able to do that for this species.

Ms HALL—I was also concerned about a number of issues that have been raised in relation to the granting of that exemption. I note that in your submission you also said that you were concerned about the language that was used, that it was language that had not previously been incorporated or defined by either CITES or Australian legislation and that you thought that it may lead to damaging precedents. Could you expand on that for me, please.

Ms Beynon—Thank you for reminding me. Yes, that is very concerning. The annotation uses language like ‘appropriate and acceptable aquaria for primarily conservation purposes.’ Now, ‘appropriate’ and ‘acceptable’ are quite subjective terms, as you know, and ‘primarily conservation purposes’, as a concept, has not been defined or interpreted by CITES. There are no resolutions that have been passed at CITES to explain what that would mean. As the Australian government has been interpreting that term ‘display in aquaria’, it seems that we have to accept that that is primarily for conservation purposes. I am afraid that we as conservationists, and many conservation organisations, would not accept that that is a genuine conservation purpose. We can see, with the adoption of the language with regard to this species, that other countries could now come forward at future meetings and propose that their populations of a certain species be put on appendix II with similar annotations to help facilitate trade to benefit particular domestic interests that countries have at home. It is creating a loophole.

Ms HALL—So you would see that this could significantly weaken the protocols that are in place at the moment?

Ms Beynon—I think it is more—

Ms HALL—It has the potential.

Ms Beynon—It has the potential, yes. For species that are listed now, we could see proposals in the future to downgrade them with similar annotations. It is a practice that we do not think should be encouraged and that we do not think the Australian government should be promoting through its own behaviour with its own listings.

Ms HALL—I note from your comments to the previous member that there has been no indication that a breeding program has been introduced with the export of these freshwater sawfish.

Ms Beynon—Not to my knowledge. I would have to go back and check what was intended in the ambassador agreement between Australia and the recipients.

Ms HALL—It might be useful if you were to forward that to us.

Senator STERLE—I really am struggling with this. There is a species that is endangered—and I will be interested to hear from the department next. If it is endangered—and in your submission, in your words, the process was sabotaged—why the hell would the Australian delegation take that position? Don't hold back, Ms Beynon. Give it to us as you think it is.

Ms Beynon—The way we see it, there is one commercial operator, and we think he successfully lobbied the then minister, Minister Turnbull, to not allow the proposal to go forward as the US and Kenya had proposed. He was a successful lobbyist. He protected his commercial interests and the government went to CITES and facilitated that for him.

Senator STERLE—You cannot be any more honest than that. Thanks, Ms Beynon.

CHAIR—If there are no other questions, thank you very much for coming along, Ms Beynon.

[12.01 pm]

O’SULLIVAN, Ms Jane, Acting Director, International Wildlife Trade Section, Department of the Environment, Water, Heritage and the Arts

SMITH, Ms Kerry, Assistant Secretary, Wildlife Branch, Department of the Environment, Water, Heritage and the Arts

CHAIR—We will take further evidence on the amendments to which I have referred previously. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I invite you to make some introductory remarks before we proceed to questions.

Ms Smith—The Convention on International Trade in Endangered Species of Wild Fauna and Flora, known as CITES, regulates trade in species to ensure they do not become endangered due to international trade. The convention came into force on 1 July 1975 and Australia ratified on 29 July 1976. The level of protection provided by CITES is dependent on the appendix under which the species is listed. Appendix I listed species are endangered and can generally be moved internationally only for non-commercial purposes such as research and conservation breeding, although there is an aspect where commercial trade can take place.

Appendix II listed species are species that could become endangered if trade is not regulated. Trade is regulated through a permit system whereby the exporting country must assess that trade in the species will not be detrimental to the survival of the species in the wild before approving export. Appendix III listed species are species which any party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation and as needing the cooperation of other parties in the control of trade.

Australia implements CITES domestically through the Environment Protection and Biodiversity Conservation Act 1999. The CITES appendices are amended from time to time to reflect the changing conservation needs of species. The convention allows parties to make reservations regarding listings. Until a party withdraws the reservation, it is treated as a state not a party to the convention with respect to trade in that species.

The national interest analysis that we have provided examines the amendments to the appendices made at the recent 14th conference of the parties for CITES, held in June 2007. At that conference of the parties, there were 15 amendments to appendices I and II, together with a number of annotations. The amendments to the annotations are minor and technical in nature, aimed at clarifying identification for Customs officers and will have no additional regulatory cost to industry. The national interest analysis also outlines the consultation process undertaken with respect to the amendments. Extensive consultation was held with other Commonwealth agencies, states and territories, industry and non-government organisations.

Amendments to appendices I and II automatically come into force 90 days after the conference of the parties. So these amendments came into force on 13 September 2007. Because the automatic entry requirement did not allow sufficient time for the required tabling period of 20 days for the NIA, the previous minister wrote to the former chair of JSCOT in April last year to provide the full list of amendment proposals and to advise that the normal tabling period could not be achieved.

CHAIR—The HSI has a reputation for temperate and moderate language—amongst conservation organisations—but it used words like ‘groundbreaking proposals sabotaged’, ‘damaged Australia’s reputation’ and ‘disingenuous’. Do you have any comment on what the HSI had to say about the fact that the freshwater sawfish was put in a different category?

Ms Smith—At the CITES conference of the parties, the sawfish listing proposed by the US and Kenya was discussed. As HSI pointed out, Australia proposed that pristis microdon—one sawfish species—be placed on appendix II rather than appendix I with an annotation, which has already been discussed. To get through CITES, that had to have a two-thirds majority of the parties present and voting, which it received. I think it is fair to say that there was agreement to Australia’s argument that our freshwater sawfish populations are more robust than those in other countries. I think we would agree that other countries’ populations have in many cases been decimated. Perhaps partly because our populations are in very wild and fairly inaccessible country, ours have been less subject to ravage. Therefore, the argument was that they were more robust and that small exports for the purposes of the annotation would not be detrimental to the survival of the species.

As I said, normally, changes to the appendices take effect 90 days after going through the COP but, in the situation that Australia was in with the freshwater sawfish, we in fact ensured that the export that was referred to before that occurred last year—in fact six freshwater sawfish were exported—was subject to a non-detriment finding, and that was done even prior to the 90-day period. We ensured that the CITES requirements were implemented prior to them really having to be. So we went above and beyond what was required in the legislation and a non-detriment finding was prepared. Another thing that was not normal is that we put it on the website and consulted the public on that non-detriment finding, and HSI was one of the organisations that was consulted. As well as that, an ambassador agreement has to be prepared for exports of Australian listed species. That was prepared and was put up for consultation. The comments of HSI and others were taken into account and, indeed, the ambassador agreement was changed on the basis of that.

CHAIR—Turning from their language to yours, terms like ‘appropriate’ and ‘acceptable’ or ‘primarily conservation purposes’ have been challenged as highly subjective and—as I think Jill Hall mentioned—new language for CITES and the EPBC Act. Do you have any response to that?

Ms Smith—Yes. Whilst the language may seem subjective, and I guess one could argue that in some ways it is, something that we do all the time in the department is assess exports of Australian native species, for instance, which may not be CITES listed. We have strict requirements for exports of Australian native live animals, and we always do facility assessments of where they are going to ensure that those places that they are being exported to are adequate both in terms of the physical aspects of the facility but also that they are going to look after the

behavioural and other requirements of whatever species it is. So we are very used to doing facility assessments, and that kind of language—‘appropriate’ and ‘acceptable’—is what we are used to dealing with all the time.

CHAIR—My other question is about this issue of conservation return or conservation obligations. It is suggested that there is presently no intention to have a conservation return of sawfish to the wild and there is no attempt being made to place conservation obligations on the exporter or importing aquaria. Is that right?

Ms Smith—I guess that is a judgement about what conservation is. Clearly, HSI is arguing that education is not conservation. The position that the department took is that education is a legitimate and, in fact, very important aspect of conservation. The requirements that were placed on the receiving institutions and the exporter through the ambassador agreement were quite detailed on the educational aspects in terms of conservation that they had to utilise. There were pages of requirements for signage talking about the freshwater sawfish species, how it is endangered in some parts of the world and that kind of thing. It is fairly standard in the movement of animals between zoos internationally. Some argue against this, obviously, but some argue that it is really important to have some animals being seen by people and to have signage that tells people about the problems they are having in the wild, the need to conserve them, the requirements that they have et cetera—and that was the aspect of this export that was deemed conservation.

CHAIR—Okay.

Ms HALL—Regarding the sawfish, I would like you to convince me that there was a scientific study undertaken that underlay the decision that you made, and I want you to convince me of the scientific veracity of that study that determined that the Australian freshwater sawfish was robust enough to be classified in the way it has been classified.

Ms Smith—A study had been done by CSIRO, and the outcome of that was a recommendation that taking up to 10 sawfish annually from the wild would be sustainable.

Ms HALL—But there have been 11.

Ms Smith—No. There were six last year, not 11. As I said, we also had a non-detriment finding prepared, which is what CITES uses all the time. The basis of CITES trade is non-detriment findings. We ensured that the non-detriment finding was done in accordance with the IUCN guidelines. So that actually went above and beyond what would normally be required.

Ms HALL—Do you have any information on the actual numbers of freshwater sawfish in the rivers in Northern Australia?

Ms Smith—As Ms Beynon said, there is no categorical number, as with most species. Usually, assessments are made on species numbers and population size on the basis of habitat. But, in terms of the work that had been done, it was fairly clear that freshwater sawfish were being found in many rivers in Northern Australia and found quite readily. So, on the basis of that, it was—

Ms HALL—Can you provide this committee with that evidence, please.

Ms Smith—Certainly.

Ms PARKE—Can you comment on this statement by the Species Survival Network, which is one of the bodies that recommended supporting the inclusion of the sawfish in appendix I of CITES:

- All sawfish species are Critically Endangered and their exploitation is driven by various forms of international trade—

including ‘trade in living specimens for aquariums’. Clearly, they do not see the educational value or benefit of protecting the species.

Ms Smith—No, but, as I said, there are differences of opinion on the value of that. But we argued, and we believe, that the Australian populations are more robust than overseas populations, and I think others accepted that.

Ms PARKE—We look forward to seeing the evidence upon which that assessment was based. I know that the HSI people did not make any allegation of any impropriety in having this particular trader on the delegation, but I ask whether that is our normal practice. I would understand if you had industry representatives generally, as you would have environment representatives generally, on the delegation, but to have as a part of the Australian delegation a specific trader who basically has a conflict of interest in this matter—don’t you see any issue with that? Is that a common thing?

Ms Smith—It is a very standard practice. We sought expressions of interest to be on the Australian delegation from a wide range of environment groups and industries. The delegation was approved by the minister and, clearly, the people who would want to be on the Australian delegation are the people who have an interest in what is being discussed. We particularly targeted our invitations at both environment groups as well as people from both the fishing and the timber industries, because both had a number of issues on the CITES CoP agenda. But no interest was expressed other than from those who ended up on the delegation.

Ms PARKE—Thank you.

Mr SIMPKINS—So six have been exported since this change occurred?

Ms Smith—Yes.

Mr SIMPKINS—How do you know there were six?

Ms Smith—Because we approved the permit.

Mr SIMPKINS—Okay. So each individual export was the subject of a departmental approval?

Ms Smith—Yes.

Mr SIMPKINS—A minister did not need to sign off on that?

Ms Smith—No.

Mr SIMPKINS—There are 10 allowed per year; is that the rule?

Ms Smith—No, it is not a quota. As I said, there is a CSIRO scientific estimate that up to 10 would be sustainable, and the non-detriment finding also states that. So it is not a quota but obviously it would be up to the decision maker at the time. But I would suspect that it would be highly unlikely for any more than 10 to be approved.

Mr SIMPKINS—Do you have any idea of where each individual fish was taken from?

Ms Smith—Not precisely—we could find that out. They were from Queensland waters but I am not sure precisely where.

Mr SIMPKINS—But there is the understanding that you can find these freshwater sawfish—freshwater sharks, I guess, are what we are really talking about—across the whole northern end of the country—that is, Western Australia, the Northern Territory and Queensland?

Ms Smith—I could not guarantee that you could find them everywhere there because the surveys have not been done, as we talked about before. I guess the other thing is that both the Northern Territory and the Queensland governments have until recently allowed a bycatch of sawfish through natural fishing, and the bycatch is an indicator that there are sawfish in a number of river systems up in the Northern Australian area.

Mr SIMPKINS—Which countries have they gone to and where would they be found now?

Ms Smith—Do you mean the live ones, the six?

Mr SIMPKINS—Yes.

Ms Smith—They have gone to aquaria in the United States and France. I think there are three different institutions.

Mr SIMPKINS—So they are basically at commercial aquaria for viewing by members of the public?

Ms Smith—I would have to take that question on notice in order to tell you whether they are public or private aquaria. But, again, through CITES, trade between zoos and aquaria is a fairly standard thing and indeed is not considered commercial in the way that we interpret CITES. So it is the end use that is the issue.

Mr SIMPKINS—Do you have any idea how much is generated per fish? Is that something that the department might know?

Ms Smith—Not per fish. I understand that it was worth about \$100,000 per annum to the company that had previously exported them, but I am not sure how much per fish.

Mr SIMPKINS—So the figure was about \$100,000 for the six.

Ms Smith—I do not know the figures on what they received for those fish.

Ms PARKE—Who does the assessment on which are appropriate and acceptable aquaria, and is there any follow-up as to what happens to those animals once they have been sent?

Ms Smith—The department does the assessment and, as part of the ambassador agreement, there are requirements in terms of what happens to progeny and that kind of thing, and in general the animals can certainly be checked up on.

Ms PARKE—They can be or they are?

Ms Smith—It depends on what you are talking about in terms of which species. We often will check up on a number of Australian native species. No, it is not a requirement that they be, but they often are.

Ms PARKE—Thank you.

Senator BIRMINGHAM—I note that under the proposed changes one species of alligator and one species of bear grass are being transferred from appendix I to appendix II. Is this an indication that when these changes take place it is commonplace for species within an overall category to perhaps be broken up, depending on the issues and individual circumstances of those species?

Ms Smith—It is fairly common. There are a number of species listed on CITES in different appendices dependent on the populations and the robustness of those populations.

Senator BIRMINGHAM—In these instances, do you know if the proposed changes were at the instigation of a particular country advocating those changes, or would they have come more generally?

Ms Smith—They would have been instigated by the countries concerned. The way CITES works is that countries put proposals to the conference of the parties but, as I mentioned before, two-thirds of the members have to agree to that. So the argument has to be put and it has to be accepted.

Senator BIRMINGHAM—Obviously these ones were species that had been listed on appendix I already and were to be shifted to appendix II. The species of sawfish we were discussing were not listed at all prior to now, were they?

Ms Smith—That is right.

Senator BIRMINGHAM—The freshwater sawfish and all other sawfish categories would be receiving a higher level of protection as a result of this than they did previously?

Ms Smith—Yes.

Senator BIRMINGHAM—Thank you.

CHAIR—Thank you very much for coming along.

[12.22 pm]

KING, Mr Warren, Director, Japan Section, Department of Foreign Affairs and Trade

LIN, Ms Katy, Desk Officer, International Law Section, International Legal Branch, Department of Foreign Affairs and Trade

ABHAYARATNA, Mr Thomas, Analyst, Costing and Quantitative Analysis Unit, Tax Analysis Division, Department of the Treasury

JACOBS, Mr Martin, Manager, Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury

POOK, Mr Martin, Analyst, Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury

RAWSTRON, Mr Michael, General Manager, International Tax and Treaties Division, Department of the Treasury

TRIGG, Mr Greg, Senior Adviser, Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury

Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. If you nominate to take any questions on notice, please ensure that your written responses to questions reach the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I now invite you to make introductory remarks, if you wish to, before we proceed to questions.

Mr Rawstron—Thank you. We welcome the opportunity to present to this committee the benefits to Australia of the proposed convention with Japan. The proposed treaty is a modern, comprehensive tax treaty intended to update and enhance the existing tax treaty arrangements with Japan. The proposed treaty is generally consistent with Australia's other recent tax treaties. Changing business operations, the significance of a trade relationship and the age of the existing agreement between the two countries prompted a complete treaty revision.

The proposed treaty includes a number of changes from the existing treaty—for example, changes to withholding tax limits on dividends and royalties are reduced; provision of a limit on gross distributions from real estate investment trusts. The exemptions available for interest withholding tax are expanded to include the Australian Export Finance and Insurance Corporation and the public authority that manages the investments of Australia's Future Fund. In addition, the Japan Bank for International Cooperation and the Nippon Export and Investment

Insurance are given exemptions. Anti-treaty-shopping provisions are included in relation to withholding tax rates on dividends, interest and royalties, and the inclusion of a comprehensive limitation on the benefits clause will ensure that the treaty benefits pass only to qualified persons. Consistent with our approach in recent treaties, rules to prevent tax discrimination are included. In addition, the proposed treaty will cover taxes on capital gains and there is a comprehensive article dealing with the alienation of property.

Except in the cases of fraud or evasion, the proposed treaty will have a time limit of seven years for the commencement of transfer pricing audits. The proposed treaty also includes an updated information exchange article reflecting the current OECD standards. Its operation is extended to cover all Japanese taxes and all Australian federal taxes and clarifies that bank secrecy does not limit information exchange. In addition to an updated article covering taxation of business profits from natural resource activities, building sites and the operation of substantial equipment, new rules to deal with the taxation of income derived through business trusts is included in the proposed treaty. The treaty also prevents double exemption of income derived by temporary residents.

The proposed treaty action will reduce tax impediments to the cross-border movement of people, capital and technology between Australia and Japan and facilitate cooperation between the taxation authorities to reduce fiscal evasion. It will provide increased legal and fiscal certainty for commerce between the two countries. Reductions in withholding taxes will provide long-term benefits for business through lowering the costs of intellectual property, equity and finance for the expansion of Australian business.

Before I conclude I would like to update the material presented in the regulation impact statement and the national interest analysis, tabled 12 March 2008. First, at page 11 of the RIS and paragraph 16 of the NIA, Treasury outlined the estimated impact of the first round effects on the forward estimates at \$350 million. This has in fact been revised down over the forward estimates to \$345 million to reflect the impact with timing changes on the collection of withholding taxes for real estate investment trusts. These will be taxed on an assessment basis rather than from 1 January 2009. Second, there is an updated trade figure reflecting recent ABS data on trade in services that was released on 6 May 2008. The two-way trade with Japan was worth \$54.5 billion in 2007, up from \$50 billion in 2006-2007 financial year, as outlined in the RIS. We therefore recommend that members of the committee support the treaty action as proposed.

CHAIR—Thank you. Are there any questions?

Mr ANDREWS—You said the exemption is now extended to EFIC and the Future Fund authority. What other entities are covered by it?

Mr Rawstron—The provisions of the treaty generally provide exemption to organisations carrying out government functions. The old treaty with Japan was largely silent about which institutions fell within the purview of that provision. Obviously the Reserve Bank of Australia and the normal central bank functions are generally considered exempt. In this treaty we wanted to provide clarity about what organisations were exempt and for that we made room for the Future Fund and EFIC. We also included JBIC, which is Japan's quasi-government export bank

that invests overseas and I understand is quite interested in investing in Australia. We also provide exemption for NEXI.

So that would apply to any other agency which fell within the general article, which I think from reference is article 11. Basically, it exempts interest derived by a contracting state or a political subdivision et cetera of bodies exercising government functions. As I understand it, it is left to the actual competent authorities—that is, the taxation authorities of each of the jurisdictions—to assess applications. So, if there were a new government body, say, which is not mentioned here and which in the future wanted to seek exemption, it would simply seek the approval of the National Tax Administration in Japan—and vice versa; a Japanese body would approach the Australian Taxation Office to seek to access the exemption in this particular article.

Mr ANDREWS—Secondly, with regard to the cost to the forward estimates—which was the figure of \$345 million, revised down—is there any projected ballpark figure about what the advantage to us is?

Mr Rawstron—That is a very difficult question to answer, mainly because it is very difficult to untangle the general economic activity in the economy from particular movements in the tax system. So we can certainly measure, for example, the cost to revenue of reducing withholding taxes, because we have some information we can make some modelling assumptions on, but, in terms of measuring the consequences of that for the second-round effects, Treasury does not model the second-round effects because of their complexity. But, if you look at the trading relationship between Australia and Japan, it is significant. It is our No. 1 export market. It is the second-largest overall trade and investment relationship of all Australia's economic relationships around the world. Basically, from the discussions and consultation we had with industry when we were putting the treaty together and consulting with business, it is quite clear that there is an expectation of enhanced investment in Australia from the Japanese sector, particularly in natural resources.

Mr ANDREWS—I will approach the question in another way, then. Do you have any estimate of what the costs to the equivalent forward estimates in Japan are?

Mr Rawstron—What the treaty would cost Japan?

Mr ANDREWS—Yes.

Mr Rawstron—I do not think we have that information, but it will cost them money because, for example, under the old treaty Japan did not include petroleum resource rent tax. So a Japanese company operating in Australia gets hit with the PRRT. It is not credited with that back in Japan, so it would be doubly taxed. This treaty actually recognises that for the first time. Japan had to give up some taxing rights in that respect. As in any negotiation, it is a bit of a balancing act. We obviously want certain things for our businesses, they want certain things for their businesses and we try to negotiate a deal which, for both countries, is a win-win. Businesses on both sides of the relationship will face greater certainty about who has the right to tax, greater certainty around resolving disputes about tax and lower withholding taxes more generally. We have also enhanced the capability of the tax administrations to ensure that there is a degree of comfort around the fact that companies or individuals are paying their fair share of tax.

Ms PARKE—It is noted that the existing, 1969 agreement was regarded as being out of date and as no longer adequately reflecting the current tax treaty policies of Australia. How many other older tax treaties are out there that need to be revised, and is that on foot?

Mr Rawstron—This would be, from memory, the oldest one we have not updated. It is from 1969; it came into effect in 1970. I am just trying to remember if there are any older ones than this one—I am trying to cast my memory back—but let me check rather than give you the wrong information. In terms of our significant economic relationships, this is the oldest one. It is quite surprising that it has taken so long for both countries to actually update it. We have always had it on the agenda but, as in any negotiation, we required the other side to be willing to negotiate. I think Japan decided a couple of years ago that the economic relationship was critical—particularly, I presume, on the resources side—and that it was that that finally turned their interest to updating the treaty. This is the oldest among our most significant economic relationships. There are probably others—there might be one or two, I guess—that might be in the vicinity of 30 years old, but they are not as significant in terms of economic relationships.

Mr Jacobs—Germany is one.

Mr Rawstron—Germany is another one as well, but that has been under negotiation for a very long time. If you require further information, we can certainly take the question on notice. Would you like us to do that?

Ms PARKE—Yes, please.

Mr Rawstron—We can certainly provide that to you.

Senator BIRMINGHAM—On a similar angle to that raised before, with regard to other most favoured nations where we might be needing to undertake or change arrangements with regard to withholding tax to make them similar to this, how many other nations are there? Are there any other cost estimates on those?

Mr Jacobs—We have nine MFN obligations that are outstanding. One will be completed when the France treaty is enacted by France. It has passed through our parliament but it is awaiting France to ratify. So we have eight other countries with which we have MFN obligations where we provide a lower withholding tax rate or a non-discrimination article.

Senator BIRMINGHAM—So there are eight others, and France is already—

Mr Jacobs—France is already in the process and there are eight others.

Senator BIRMINGHAM—Japan and another seven still be negotiated?

Mr Jacobs—No, Japan is not one. Sorry, there are eight other countries.

Senator BIRMINGHAM—Aside from France, there are no others that have got to this stage?

Mr Jacobs—If you are talking about the current program of future treaties, the government has announced negotiations with New Zealand and we have currently held the first round of those negotiations with New Zealand.

Senator BIRMINGHAM—And that is the only one of the other—

Mr Jacobs—The government is currently determining the priority for future negotiations.

CHAIR—As there are no other questions, I thank you very much for coming along. Resolved (on motion by **Mr Hale**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.37 pm