



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 20 August 2009

MONDAY, 7 SEPTEMBER 2009

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

THIS TRANSCRIPT HAS BEEN PREPARED BY AN EXTERNAL PROVIDER

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

<http://www.aph.gov.au/hansard>

To search the parliamentary database, go to:

<http://parlinfoweb.aph.gov.au>

**JOINT STANDING
COMMITTEE ON TREATIES**

Monday, 7 September 2009

Members: Mr Kelvin Thomson (*Chair*), Senator McGauran (*Deputy Chair*), Senators Birmingham, Cash, Farrell, Ludlam, Pratt and Wortley and Mr Briggs, Mr Forrest, Ms Hall, Mr Murphy, Ms Neal, Ms Parke, Mr Simpkins and Ms Vamvakinou

Members in attendance: Senators Cash, McGauran, Pratt and Wortley and Mr Forrest, Ms Hall, Mr Murphy, Ms Neal, Ms Parke and Mr Kelvin Thomson

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 20 August 2009

WITNESSES

ATFIELD, Mr Michael John, Senior Adviser, Department of the Treasury	10
BROWN, Mr Colin, Manager, Costing and Quantitative Analysis Unit, Tax Analysis Division, Department of the Treasury	10
BURDON, Mr Ben, Assistant Secretary, Americas, North and South Asia, and Europe, International Policy Division, Department of Defence	18
CAREY, Mr Michael Andrew, Senior Legal Officer, Directorate of International Government Agreements and Arrangements, Defence Legal, Department of Defence	18, 25
COLQUHOUN, Mr Lachlan, Assistant Secretary, South-East Asia, International Policy Division, Department of Defence	25
CROSSMAN, Mr Michael, Director, Americas, International Policy Division, Department of Defence	18
CUNLIFFE, Mr Mark, Head, Defence Legal, Department of Defence.....	18
KOOYMANS, Mr Michael John, Manager, International Finance Division, Macroeconomic Group, Department of the Treasury	1
MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade.....	1, 10
NG, Mr Marcus Yue Chung, Policy Analyst, International Finance Division, Macroeconomic Group, Department of the Treasury	1
NIKOLIC, Brigadier Andrew, First Assistant Secretary, Regional Engagement, International Policy Division, Department of Defence.....	25
REDMAN, Ms Lynette, Manager, Tax Treaties Unit, Department of the Treasury	10
THORPE, Mr Jonathan, Policy Analyst, Department of the Treasury	10
TOOP, Ms Emma, Policy Analyst, International Finance Division, Macroeconomic Group, Department of the Treasury.....	1

Committee met at 9.04 am

KOOYMANS, Mr Michael John, Manager, International Finance Division, Macroeconomic Group, Department of the Treasury

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

NG, Mr Marcus Yue Chung, Policy Analyst, International Finance Division, Macroeconomic Group, Department of the Treasury

TOOP, Ms Emma, Policy Analyst, International Finance Division, Macroeconomic Group, Department of the Treasury

Proposed Amendment of the Articles of Agreement of the International Monetary Fund to Enhance Voice and Participation in the International Monetary Fund—adopted by the IMF Board of Governors on 28 April 2008

Proposed Amendment of the Articles of Agreement of the International Monetary Fund to Expand the Investment Authority of the International Monetary Fund—adopted by the IMF Board of Governors on 5 May 2008

Proposed Amendment of the Articles of Agreement of the International Bank for Reconstruction and Development to Enhance Voice and Participation in the International Bank for Reconstruction and Development—adopted by the IBRD Board of Governors on 30 January 2009

CHAIR (Mr Kelvin Thomson)—I now declare open this public hearing for the Joint Standing Committee on Treaties' ongoing review of Australia's international treaty obligations. The committee will take evidence on six treaty actions which were tabled in the parliament on 20 August 2009. I thank witnesses for being available for this hearing.

I call representatives from the Department of Foreign Affairs and Trade, the Treasury and the Attorney-General's Department. 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, would you 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 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 any introductory remarks that you wish to before we proceed to questions.

Mr Kooymans—Thank you, Chair. I was not proposing to make any opening remarks, in view of the comprehensive information before the committee, but of course I am very happy to answer questions.

CHAIR—Okay. What has prompted the IMF and the World Bank to change their voting systems?

Mr Kooymans—Chair, the IMF in particular has suffered a deficit of legitimacy. Its voting system is based on economic weight essentially, based on GDP and other metrics in the world economy. With the rapid growth of the emerging market economies in particular, especially in our region, we have seen quite a wide gap open up between the voting weight of these countries and their global economic weight. This has, I think, exacerbated some issues where they have effectively turned away from the fund to a degree. They tended to self-insure through building up very large reserves, and the fund has recognised this and has sought to address it by closing that gap.

In addition, the secondary objective—or, rather, the equal objective—is to enhance the voice and participation of low-income countries in the IMF. Some very similar considerations apply on the bank side, although I would have to say the concerns around legitimacy and voice of significant emerging market economies is probably more the case in the fund than the bank.

CHAIR—Can I turn to the IMF amendments. I understand that they require acceptance by three-fifths in order to come into effect. Have they come into effect yet? Has there been opposition to them? Have any countries indicated that they will not be accepting the amendments?

Mr Kooymans—No, Chair. No such indication but, no, they have not entered into force. Processes in individual countries vary, of course, but essentially there are around 30 countries of the 186 members who have so far accepted.

CHAIR—What was that? About 30 of 186?

Mr Kooymans—About 30, representing just over 60 per cent of voting power. So there is a little way to go yet, but certainly G20 leaders and G20 finance ministers over the weekend are pushing hard to ensure that those voting majorities are reached as soon as possible.

Ms HALL—How difficult do you think it will be and how long do you think it will take?

Mr Kooymans—That is difficult to judge, but there is no real difficulty that I am aware of, without knowledge of what is happening in each country of course. It is simply a matter of due process. These things require legislation in many cases, treaty processes, and it takes time. Some countries do not have capacity to give these things priority. I guess the expectation is that certainly soon—by the end of the year—this would enter into force.

CHAIR—The three-fifths of the membership, I take it, are just straight countries and not this question of economic weight.

Mr Kooymans—That is correct.

CHAIR—Three-fifths of 186 is a bit over 100.

Mr Kooymans—One hundred and twelve, yes.

CHAIR—From the 30 countries that have accepted it now, to get to 112 would still take some time, wouldn't it?

Mr Kooymans—My guess is that it will come in a rush. These processes have been under way in many countries for some time and they will all culminate pretty quickly.

CHAIR—So, like us, they are making their way through them.

Mr Kooymans—Yes.

Senator CASH—Thank you for your submission. With the national interest analysis at point 7, I note that our voting share will decline but only marginally. I would like you to expand upon the actual implications, if any, of a decline in our voting share as a result of the acceptance of the amendments. It also states:

... Australia has an interest in seeing these amendments accepted as they would likely improve the effectiveness of the IMF and the World Bank in promoting economic and financial stability, international development and poverty reduction.

Can you expand upon how the amendments will improve the effectiveness of those stated objectives.

Mr Kooymans—Perhaps the second first. They really go back to the points I was making earlier about the legitimacy and effectiveness of both institutions. We see a need for countries to have greater ownership of the fund or of the bank to be more engaged with them. If they are, if they turn to the fund for financial assistance at an early stage of their financial difficulties because they trust the fund, because there is no stigma attached to its operations, then hopefully the adjustment process is smoother and the country and the world is better off.

With the voting majorities, they are quite marginal reductions and we do not anticipate that they would have any material effect on Australia's influence within the organisations. We are a member of a constituency of countries in each of the fund and the bank and at the moment our quota and voting share in the fund is broadly equivalent to that of Korea, which is a country with which we now share the executive director position. From 1947 up until 2004 we had the executive director position. It was always an Australian. We are now sharing it, and that is in recognition of Korea's growth relative to the rest of the world. We see that situation continuing for some time.

There is the possibility, depending on relative growth rates, that Korea could at some stage take a greater share of the executive director position, but we would anticipate our influence being primarily through the good people we send to the fund and their ability to carry an argument in the board. Straight up and down voting is a very rare thing in the board and it is really only relevant when you have the full board of governors voting. Something that reaches that level is pretty much a consensus position and it is rare for it to be turned down.

Ms HALL—I note, when talking about the reasons for Australia to take the proposed treaty action, in point 8 you highlight:

The global financial crisis and global recession have highlighted the urgency of accelerating change to the IMF so that it can more effectively fulfil its mandate.

You talk about it increasing its lending resources. Can you expand on that a little bit more and highlight some of the benefits that will come from this, please—also highlighting the ability to increase its lending resources and how that will make it more financially viable, because I think I also read that in the submission.

Mr Kooymans—The G20 has been running a strong reform agenda for the international financial institutions—primarily the IMF and the World Bank—for some while. The first leg of it are the treaty actions that are before the committee—the 2008 quota and voice reform and the bank voice and participation reform. Those adjustments are continuing. There is now a second leg of adjustments that will still further close the gap that I was talking about earlier between economic weight and voting weight.

I do not know if you saw the communique of G20 finance ministers over the weekend, but that refers again to this forward agenda on quota and voice and voice and participation reform in both organisations. So that is an important element of further reform. But, more broadly, in London on 2 April G20 leaders effectively committed to a very large increase in the IMF's resource base through its borrowed resources. The IMF is a quota based organisation. People pay in. It is effectively a cooperative. The strong countries pay the hard currencies and they are drawn on by the borrowing countries.

As a backstop to that, the fund had a US\$50 billion arrangement of borrowed resources from creditor countries, to which Australia contributed. It was US\$1.2 billion, totalling US\$50 billion. That was enlarged—and it is almost at the point of being announced as having got to the target—by \$500 billion to \$550 billion. So it is a very substantial increase in borrowed resources. That is just a line of credit. It is only to be drawn on if needed and it, along with quotas, will give confidence to the markets in the current global recession that the fund has the resources to meet any eventuality and also to address any future crisis.

As I mentioned, it is a quota based organisation, so there will be a quota review which will determine an increase in the quota size—the kind of cooperative quantum of resources. That has to be done by January 2011, and there is an expectation that that quota increase will be substantial.

Ms PARKE—We have seen in the World Bank and the IMF that the voting structure has resulted in a concentration of voting power in the hands of larger economies over time. As contained in our information here, the changes that are proposed will result in an increase in the voting power of small economies from 42.6 per cent to 44 per cent. Do you consider that this reflects any significant shift in the balance of power in the IMF and the World Bank as a result of this change, or is it really just an initial incremental step in the wider reform agenda that you have just referred to?

Mr Kooymans—It is a step in the direction of ensuring that under-represented countries become represented on a basis equivalent to their quota, effectively, and that over-represented countries lose quota share equivalently. That is the long-term goal. Of course the goal is based on what is now a simplified but still slightly unhappy quota formula, which effectively seeks to

set out the target. If everyone had the quota suggested by the quota formula, then no-one would be under-represented and no-one would be over-represented.

There are all sorts of arguments about the usefulness of that formula and that may or may not be part of the negotiations going forward, but essentially the sort of 60-40 is probably not going to shift hugely. The IMFC, the International Monetary and Financial Committee, which is a committee of IMF ministers, has called for a further shift, in aggregate, to emerging markets and developing countries. So that will happen. But, essentially, as a quota based organisation based on economic weight, yes, there are some European countries in particular that need to lose quota share and voting share; there are emerging market economies that need to increase their quota and voting share; there are a lot of developing countries that are actually over-represented in the fund based on economic weight.

So it is an organisation with that principle underlining it, plus the principle of basic votes, which is the issue here, which effectively is the principle of equality of states as opposed to the principle of economic weight, but of course that is relatively small. That is one vote per 100,000 SDRs of quota and currently 250 basic votes per country and going up to 750 under these proposals. So, yes, more needs to be done, but it is really more for the emerging market economies that are significantly under-represented at the expense of some advanced economies, and you may not see the overall aggregate total for developing and emerging market economies shift that much.

Ms PARKE—Thank you.

Senator PRATT—I wanted to ask about the key countries that will see a change in their vote weighting. I am told that currently the countries that account for a vast proportion of the votes would be the US, Japan, Germany, UK, France, Italy, and that really we have got a small number of countries with not quite 50 per cent of the votes but a fair proportion of them. To what extent is that particular bloc of countries going to be affected by this change?

Mr Kooymans—I am sorry, the advanced group of economies?

Senator PRATT—I am just trying to get a sense of, I suppose, the bandwidth of those particular countries and how that will be affected by this change.

Mr Kooymans—As I mentioned, there will be an aggregate shift from advanced economies to developing and emerging market economies, but just which of the advanced economies will give up share in that scenario depends, first of all, on their starting point. Some are currently more under-represented or more over-represented than others. In the last round we had France and the UK, in particular, giving up the most voting share to countries like China and Korea.

Senator PRATT—I am interested in knowing the extent to which the votes are now going to be distributed—you have got a bigger proportion of the votes distributed across more countries, as opposed to those votes currently sitting with a smaller bloc of countries. Are the votes going to be more diffusely spread now?

Mr Kooymans—Well, there is no increase in quotas here.

Senator PRATT—No.

Mr Kooymans—So it is a zero-sum game. Sorry, that is not entirely true. There was a small increase in quotas in order to facilitate the redistribution so that no country would lose actual quota, which they have to consent to do and not many would.

Senator PRATT—Okay.

Mr Kooymans—But certainly the increase in basic votes favours smaller and developing countries over larger developed countries and that is part of the shift you are seeing.

Senator PRATT—That is the principle of the change, isn't it?

Mr Kooymans—Indeed, because mathematically, if you are small, whether developing or otherwise, you benefit more, relatively speaking, from a fixed increase in vote.

Senator PRATT—Can I ask the extent to which the change in votes historically has been because, I suppose, contrary to what we might like to have seen happen—and, yes, there are many developing countries that are accelerating their economic development quite considerably—it would be fair to say that growth in economic power and therefore growth in votes has meant that it can be seen from this pattern, in terms of the way votes have been distributed, that there are a great many countries whose economies have not developed as we might have hoped, and that is reflected in the low votes that they have historically carried. Is that true?

Mr Kooymans—Yes. If a country has been languishing in terms of its growth over many years, that will be reflected in its IMF quota. But, as I say, the increase in basic votes is almost certainly going to benefit that country quite significantly, given that the countries you mention are typically developing, poor, small, subSaharan African et cetera.

Senator PRATT—Thank you.

CHAIR—Mr Kooymans, there has been quite a lot of criticism over the years of the World Bank and the IMF in terms of its relationship to poorer or less developed countries. For example, a typical criticism is that it has encouraged those countries to sell off their land, mineral resources, forests and the like to large corporations typically owned overseas and that that is a recipe for corruption and impoverishment and not in the best interests of those countries. Do you think that is a fair criticism?

Mr Kooymans—The IMF has itself acknowledged very significant criticisms that were levelled against it as a result of its actions during the Asian financial crisis. I am not really in a position to comment on the specific issue you mention, which I do not think was really part of the Asian financial crisis. But it has very substantially since then revised its conditionality framework to ensure, in particular, that its conditions on its lending relate purely to the program objectives and you do not sort of bring in some ancillary ones. In fact, most recently, as part of the recent reforms, there have been further significant adjustments to the conditionality framework, as well as to the lending framework, for low-income countries, by setting up a new suite of instruments which are more flexible and more targeted to members' needs. In addition to

that, the fund is directing more of its resources towards low-income countries. This is part of, again, the reforms that are coming out of London and internal to the fund in response to the global financial crisis. Again, the G20 communique over the weekend refers specifically to the concerns held for a lot of low-income countries as a result of the current global recession and the need to do more.

CHAIR—Do you think the World Bank and the IMF have a mindset that these countries should sell off and privatise land, forests, and mineral resources?

Mr Kooymans—I do not really think so, but I do not think I am the right person for you to ask, frankly.

Senator McGAURAN—Following on from your interesting question, Mr Chairman, what was the specific criticism of the IMF, as you said, in regard to their reaction to the global financial crisis? I certainly recall the IMF chief—he is French, isn't he?

Mr Kooymans—At the time he was, yes.

Senator McGAURAN—At the time, yes. He was a most muddled man; I heard several interviews with him. I am interested to know specifically for the record what were the criticisms and therefore, having outlined say three of the top criticisms of the muddled man, what were the reactions or the changes that you specifically spoke of?

Mr Kooymans—The main one relates to the use of program conditionality that is ancillary to the program objectives themselves.

Senator McGAURAN—In plain English?

Mr Kooymans—Instead of saying, 'Okay, the macro needs are this: you need to do this with fiscal policy and this with monetary policy'—

Senator McGAURAN—Too general. What were the specific criticisms of their reaction? That is just general talk.

Mr Kooymans—Instead of targeting those, which were relating to the economic program agreed between the fund and the authorities, there was a suggestion that they would effectively say, 'Okay, let's do something on the structural side,' which was not supporting, necessarily, those objectives. But, effectively, the country was over a barrel, some member countries wanted these reforms and the IMF made them part of the program. There was criticism of this, in particular relating to Indonesia.

Senator McGAURAN—But that was the Asian financial crisis.

Mr Kooymans—The Asian financial crisis.

Senator McGAURAN—Yes. I know that there was criticism that they were trying to rush too many reforms too quickly upon Indonesia at that time, but that is 1997-98.

Mr Kooymans—Yes.

Senator McGAURAN—Now—I am talking 2008—the specific criticisms in regard to the IMF’s reaction to the global financial crisis as distinct from the Asian one.

Mr Kooymans—I am sorry, yes. The IMF itself has done some soul-searching about this and has published some papers, which are certainly worth a read, on its initial response to the global financial crisis and the lessons learned—its response and the response of others, obviously national authorities included. I really do not think the IMF is Robinson Crusoe in this respect. They clearly have a lot of expertise and, essentially, the implications of the subprime crisis were not picked up by too many people. The IMF certainly saw that as a concern early on but more a concern, potentially, for the US economy. I do not think there were too many people who saw how quickly that could feed through the global financial markets and have the implications it had for those markets and for the real economy. So certainly the IMF’s response to that is primarily to strengthen its own financial sector capacities, its ability to analyse the financial markets and the linkages between financial markets and the real economy.

Senator McGAURAN—You are not going to be specific, are you? No. I am after more than that. I will leave it at that though, Mr Chairman.

Mr Kooymans—Sure.

CHAIR—All right. Any other questions?

Senator McGAURAN—Debt stimulus, infrastructure, cash splashes—these were all the conversations the IMF were having at the time. That is what I am trying to get at. Initially the IMF came out and said that the plunge into stimulus, for example, that was about to go on was wrong, and then they said it was right. This is what I am trying to get at.

Ms HALL—Has that got anything to do with this treaty?

Senator McGAURAN—I am following from the chairman’s initial question. Perhaps you could ask him. He asked about the IMF’s changes in approaches to matters and so I am following up from it.

Ms HALL—It has nothing to do with it.

Senator McGAURAN—Mr Chairman, I am sorry if I took a liberty with your question.

Mr Kooymans—On stimulus, Chair, I am not quite sure that the IMF was arguing against stimulus at any stage. That is news to me, but I stand to be corrected. Certainly in the Australian Article IV Consultation that was finalised recently, the IMF saw Australia’s fiscal stimulus as copybook in terms of its advice.

Senator McGAURAN—That was the Frenchman, wasn’t it, who would have said that?

Mr Kooymans—The current—

Senator McGAURAN—Forgive me for not knowing his name.

Mr Kooymans—The IMF staff report published at the conclusion of the board discussion of Australia's article IV set this out, so it is essentially a view of senior staff and management.

CHAIR—Thank you very much for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

[9.37 am]

ATFIELD, Mr Michael John, Senior Adviser, Department of the Treasury

BROWN, Mr Colin, Manager, Costing and Quantitative Analysis Unit, Tax Analysis Division, Department of the Treasury

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

REDMAN, Ms Lynette, Manager, Tax Treaties Unit, Department of the Treasury

THORPE, Mr Jonathan, Policy Analyst, Department of the Treasury

Convention between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion

CHAIR—Welcome. 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 would you 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 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 any introductory remarks before we proceed to questions.

Ms Redman—Thank you, Mr Chairman. Good morning. Yes, we would like to make a statement. We welcome the opportunity to present to this committee the benefits to Australia of the proposed tax treaty with New Zealand. The proposed treaty, signed on 26 June 2009, is a modern, comprehensive tax treaty intended to update and enhance the existing tax treaty arrangements with New Zealand. Australia and New Zealand share an exceptionally strong trade and investment relationship, fostered by the Closer Economic Relations Trade Agreement and the Single Economic Market initiative.

The changes introduced by the proposed treaty will ensure the taxation arrangements between Australia and New Zealand remain up to date and continue to support the highly interconnected economic relationship between both countries. The proposed treaty is generally consistent with other treaties recently concluded by Australia; however, it also includes some new provisions, many of which have been included to support Australia's unique relationship with New Zealand. To facilitate increased investment between the two countries, the proposed treaty reduces withholding tax rate limits on certain dividends, on certain classes of interest and on royalty payments. Notably, the Future Fund and Australia's other nation building funds are exempted from withholding tax on interest and certain dividends received from New Zealand.

The proposed treaty also includes several new provisions intended to reduce compliance costs and improve certainty for taxpayers. In particular, income derived through fiscally transparent entities such as trusts is afforded greater recognition, ensuring it is appropriately dealt with by the treaty. Treaty benefits are specifically extended to Australian managed investment trusts, reducing complexity and compliance costs for Australian investors that use these investment vehicles. A general seven-year time limit will apply for the adjustment of the profits of an enterprise in transfer pricing cases, thereby creating certainty for Australian businesses over their past taxation treatment. Taxpayers may opt to have their case determined by arbitration if there are any disagreements between the two revenue agencies on certain matters which remain unresolved for two years.

In addition, the proposed treaty includes rules to protect nationals and businesses of one country from tax discrimination in the other country. Recognising the ease and frequency with which people move between the two countries, the proposed treaty includes several new features which deal with issues associated with the cross-border movement of personnel. For instance, to remove a potential tax impediment to working and accumulating superannuation benefits in both countries, the proposed treaty provides for the cross-recognition of the tax exempt status of pensioners in both Australia and New Zealand.

The treaty also includes a short-term secondment provision whereby individuals that are seconded between Australia and New Zealand for less than 90 days remain taxable only in their country of residence. This provision reduces the complexity for employees briefly sent from Australia or New Zealand to work in the other country. In addition, the treaty allows services to be taxed in the country in which they are provided where the provision of such services attains a certain degree of permanency.

The proposed treaty also introduces some extra integrity provisions. In this regard new safeguards have been included to ensure that the reduced withholding rates are only available to those genuinely entitled. Also, in recognition of the absence of a comprehensive New Zealand capital gains tax, the treaty allows Australia to tax capital gains derived by Australian residents who relocate to New Zealand for up to six years following their move, thereby preventing the double non-taxation of such capital gains.

The proposed treaty is expected to reduce tax impediments to the cross-border movement of people, capital and technology, facilitate cooperation between taxation authorities to reduce fiscal evasion and provide increased legal and fiscal certainty for commerce between the two countries. We therefore recommend that the members of the committee support the treaty action as proposed.

CHAIR—Thank you. What are the anticipated impacts on the Australian revenue of these various changes, both positive and negative?

Mr Brown—Broadly, the impacts on the Australian revenue could be expected to be neutral, in the sense that the decrease in tax revenue in Australia as a result of reduced withholding taxes would be broadly made up by increased income flows coming to Australia from New Zealand, which would result in additional Australian tax. The cost of the change has been put as broadly unquantifiable, and that reflects the uncertainty of the timing, particularly in respect of income flows coming back from New Zealand and when that will have an impact on Australian revenue.

CHAIR—Presumably you regard it as an improvement on the existing agreement. Are you able to tell us a little bit more about the way in which you think it is an improvement on the existing agreement?

Ms Redman—It is mainly due to those key features that I mentioned in our opening statement. The withholding tax reductions assist in the flow of investment between the two countries. As I said, there are new provisions that will better deal with the fact that our two economies are so closely integrated, that people move around very easily, whether they are an employee or offering services cross-border and that sort of thing.

Mr FORREST—Regarding article 20 and the position of students, I can envisage the situation where an Australian may receive a scholarship from a New Zealand company, given that so many New Zealand companies have interests in Australia. Fonterra is one in the dairy industry. The reference is very brief. It just says:

... education or training shall not be taxed in that State ...

In the circumstance of an Australian in New Zealand, or vice versa, could you amplify what that brief article is really all about?

Ms Redman—It is a standard provision that Australia includes in its tax treaties. It comes from the OECD model tax convention and it basically recognises that you can have students or business apprentices that go to your treaty partner country and that they may be receiving some support payments from their home country. You are usually talking about what we refer to as subsistence payments. So it is not actually payment for working as such, it may just be to assist you with your living expenses and that sort of thing. That is the sort of payment that it is looking at. It makes sure that there is certainty as to how that payment will be treated in the country in which it is visited.

Mr FORREST—In the case of a business apprentice, though, it is payment for work. Presumably the Australian would pay tax in New Zealand but would not be obliged to pay it when they return to Australia. Is that what it has in mind?

Ms Redman—I beg your pardon?

Mr FORREST—It is such a brief clause. There is not enough information in it. For example, what are the obligations with goods and services taxes? Are they exempt?

Ms Redman—Yes, GST would not be covered by this. The treaty generally just deals with income tax matters. It does deal with GST in a couple of the articles in terms of exchange of information, assistance in collection and that sort of thing. But this is really talking about income tax matters.

Mr FORREST—I am no wiser.

Ms Redman—Sorry. We do expand on the provisions in the explanatory memorandum. Because this also comes from the OECD model, there is a commentary that sits with that OECD

model that explains how this would apply. If you give me a moment, I will have a look and see if I can find some words that might assist some more.

Ms HALL—On that particular article 20, does that maybe refer to a person that is employed by an Australian company but working, say, in New Zealand, or vice versa, and that is stopping them being taxed in both countries?

Ms Redman—That is right.

Ms HALL—That is what I would have thought.

Ms Redman—Yes, that is right, but it is only a certain category of payment. If you are actually doing some work while you are there and you are being paid for those services, the country that you are visiting will have the taxing rights over this. This is really about some support payments that you may have from your home country while you are visiting the other country.

Senator WORTLEY—Do the changes mirror the impact on Australian citizens and New Zealand citizens, or are there some differences?

Ms Redman—I am not sure.

Senator WORTLEY—For example, it says here:

... Australians who receive a New Zealand pension will be exempt from Australian tax on that pension if it would have been exempt from New Zealand tax had it been received in New Zealand.

Ms Redman—That is right.

Senator WORTLEY—Then it goes on to say:

New Zealanders who receive an Australian pension will be entitled to a similar exemption from New Zealand tax.

Ms Redman—Yes, it is intended to be reciprocal.

Senator WORTLEY—So ‘similar’ is perhaps not the right word?

Ms Redman—It probably should have appeared earlier in the sentence, so ‘similarly will receive an exemption’.

Senator WORTLEY—Thank you.

Ms Redman—Essentially, what is intended with that provision is that it recognises that people that move between Australia and New Zealand during their working life can accumulate superannuation benefits in both countries but they have to retire to one. Often you will have the situation where somebody has accumulated an Australian superannuation benefit and, had they retired to Australia, the payment would have been exempt. Because they are aged over 60, it is

coming from a tax-complying superannuation fund. But if they moved to New Zealand, it would not be exempt under their domestic law. So it ensures that that Australian exemption will also be granted in New Zealand and vice versa.

Senator WORTLEY—What sorts of numbers are we looking at?

Ms Redman—In terms of pensioners? I do not think I have that with me.

Senator WORTLEY—Would you be able to provide those?

Ms Redman—I am not sure that we have exact numbers on pensioners, but we did look at what sort of revenue might be involved in this aspect and it was not great.

Senator WORTLEY—Thank you.

Mr MURPHY—Following on from Senator Wortley's question, if a New Zealand citizen who had been working here in Australia received a Commonwealth pension and returned to New Zealand, how would that benefit that person now?

Ms Redman—In that situation there are some benefits for Commonwealth pensions. Most Commonwealth pensions come from what is called an untaxed source, but if you receive it over age 60 I think there is some special rebate so you get a reduced level of tax on it. New Zealand will recognise that and also grant that reduced level of tax.

Mr MURPHY—That is the 10 per cent rebate on pensions payable to recipients over 60 years of age?

Ms Redman—Yes.

Mr MURPHY—So that is the only benefit?

Ms Redman—For a Commonwealth pension, probably—no, it would not be the only benefit. To the extent that there is an untaxed component of it, return of your own contributions, New Zealand would similarly not tax that proportion of the pension. We did discuss that with New Zealand. It is what we call the undeducted purchase price in pension situations. They were happy to grant equivalent exemptions to those that Australia would. How they will actually do that I suspect will be a bit tricky, because they will have to do manual calculations, but they are prepared to do it.

Mr MURPHY—So say someone was receiving a pension under the CSS or PSS, for example, and returned to their homeland in New Zealand to retire, under this agreement the pension would be taxed here in Australia?

Ms Redman—No—but I do need to just check. We deal with government service pensions separately often. Sorry, I just needed to check the actual text. All pensions are taxable only in the person's country of residence, so if this person that you are referring to has taken up tax residence in New Zealand, they are only taxable on that CSS or PSS pension now in New Zealand—

Mr MURPHY—In New Zealand.

Ms Redman—and New Zealand would do whatever calculation is necessary to grant equivalent exemptions to what the person would have received in Australia under our domestic law.

Mr MURPHY—I have just got a background paper here that says:

Superannuation payments, lump sums or pension will also be taxable solely in the country from which it is paid.

Ms Redman—Sorry, with lump sums, that is right.

Mr MURPHY—It says:

Superannuation, lump sums or pension will also be taxable solely in the country from which it is paid.

Is that not correct?

Ms Redman—No, that is not correct. There is different treatment depending on whether it is a periodic payment, which is what we view a pension as, or whether it is a lump sum. So if it is a pension, under this treaty—and if you look in article 18 of the treaty text, paragraph 1 there says:

Pensions (including government pensions) ... paid to a resident of a Contracting State shall be taxable only in that State.

So it is exclusive taxing rights in the country of residence.

Mr MURPHY—So the sole taxing rights for pensions will be in the country of residence. Correct?

Ms Redman—That is right.

Ms HALL—So if it is a lump sum, it is taxed at the point that the lump sum is given?

Mr MURPHY—Yes.

Ms Redman—Yes, that is right.

Ms HALL—Yes, so that is different.

Ms Redman—It is taxed only in the paying countries.

Ms HALL—Yes.

Ms Redman—Yes.

Mr FORREST—That is obviously in the memorandum of understanding. I wonder if you might provide that memorandum to the committee, because article 18 is only three paragraphs. It does not explain any of what you have just said.

Ms Redman—If you look at paragraph 1 of article 18, it says:

Pensions (including government pensions) and other similar periodic remuneration paid to a resident of a Contracting State ...

So in the example that we were just discussing, paid to a resident of New Zealand shall be taxable only in New Zealand, and then it goes on.

Mr FORREST—Okay.

Ms Redman—So that deals with which country gets to tax. The next sentence says:

However, such income arising in the other Contracting State ...

... shall not be taxed in the first-mentioned State to the extent that such income would not be subject to tax in the other State if the recipient were a resident of that other State.

So that is the provision that allows the reciprocal recognition of exemptions. In terms of lump sums, that is dealt with in paragraph 2, and it basically says that it shall be taxable only in the paying country.

Ms HALL—In your presentation you said that this agreement recognises the unique relationship that Australia and New Zealand have, and I was wondering if you could highlight some of the key differences in this treaty and treaties we have with other countries that show this recognition of the unique relationship?

Ms Redman—I think that the key differences are the ones that are dealing with the movement of personnel. So this provision that we have just been discussing, the pensions and the cross-border recognition of exemption, because we have such similar pensions systems and there is so much movement of people between the two jurisdictions, it seemed to make sense to include provisions that provide for this outcome. The other one is the short-term secondment provision. That is something you would not usually include in a treaty, but because it is so very easy for people to move between the two countries that has been included.

I think they are probably the main ones. Others are sort of targeted at trying to mesh the two tax systems and making sure that the treaty rules are appropriate and lead to appropriate outcomes—for instance, the capital gains tax issue that I mentioned before. New Zealand does not generally tax capital gains, so we were concerned about former Australian residents moving to New Zealand and then alienating their assets and escaping tax altogether. So we have got a provision in there that allows us, for up to six years, to continue to tax those capital gains. Under the OECD model, which we now adopt pretty well in respect of capital gains in our tax treaties, you would not have that taxing right.

Ms HALL—I am sure I have read this somewhere here but I have turned the pages so many times now: there was some concern from business. I was wondering, if there was some concern from business, what that concern was and how it has been dealt with.

Ms Redman—Sure. We consult directly with business representatives and key industry groups, key professional groups, through the Tax Treaties Advisory Panel. It is a panel that Treasury chairs and we meet with them a couple of times a year. We have actually had the opportunity to sit down with them, now that the New Zealand treaty text is public, and I must say that they are very supportive of most of what is included in the treaty.

The one thing that they are not keen on, and which we expected, was the provision allowing for the taxation of services because, as you can understand, there are a lot of taxpayers that do not want to get caught up in the tax system of another country. But that was a very important issue to New Zealand. It has made it very clear internationally that it places great importance on the inclusion of a services provision. So one has been included, but we took great pains to try and make it as practical as possible and it has got a carve-out for short-term visits of five days. So we have tried to make it as reasonable as possible. But that is probably the only real criticism we have had.

They really like what we have done in terms of the provisions dealing with fiscally transparent entities and managed investment trusts. They would like us to go further and we take on board their comments and consider whether more can be done. But in terms of this treaty with New Zealand, we have gone as far as we could on that.

Ms HALL—What about professional groups? I was not going to ask about that, but you mentioned them just then. Are there any concerns amongst professional groups?

Ms Redman—No. The provision which they—

Ms HALL—Cover.

Ms Redman—particularly liked, in terms of the TTAP, from all the members, was the pensions provision. They loved that. And there would be a lot of taxpayers that would particularly like it, because you have to choose to retire to one jurisdiction. You cannot be a dual resident on retirement. They would like it that their home country exemptions are preserved and that is what we have managed to agree.

Ms HALL—Thank you very much.

CHAIR—Any other questions?

Senator McGAURAN—Mr Chairman, I am a bit nervous about following up any questions.

CHAIR—In that case, we thank you very much for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

Proceedings suspended from 10.01 am to 10.31 am

BURDON, Mr Ben, Assistant Secretary, Americas, North and South Asia, and Europe, International Policy Division, Department of Defence

CAREY, Mr Michael Andrew, Senior Legal Officer, Directorate of International Government Agreements and Arrangements, Defence Legal, Department of Defence

CROSSMAN, Mr Michael, Director, Americas, International Policy Division, Department of Defence

CUNLIFFE, Mr Mark, Head, Defence Legal, Department of Defence

Amendments to the Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the United States of America concerning Certain Mutual Defence Commitments (Chapeau Defense Agreement)

CHAIR—I call representatives from the Department of Defence and the Attorney-General's Department. 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, would you 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 response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. Do you wish to make any introductory remarks before we proceed to questions?

Mr Cunliffe—Thank you, Chair. I do have some introductory comments. Thank you and the committee for the opportunity to appear before you today with regard to the amendment to the exchange of notes constituting an agreement between the government of Australia and the government of the United States of America concerning certain mutual defence commitments. Defence led the negotiation of this treaty amendment, in close cooperation with our colleagues in the Department of Foreign Affairs and Trade and the Attorney-General's Department. Those departments are represented here today to address any issues that fall within their responsibilities.

One of the foundations of Australia's security policy is Australia's security alliance with the United States. At the core of the Australian and United States security alliance is the frequent and fruitful cooperation of our respective defence personnel, not only in operations but also through exchanges, secondments and liaison positions with each other's services. This treaty action will ensure that this highly valued cooperation between Australian and United States defence personnel will continue and prosper, ensuring that Australia continues to receive the considerable benefits that flow from our close relationship with the United States, including access to their defence technology, facilities and training opportunities.

An essential element of our close and highly valued relationship is the exchange of notes constituting an agreement between the government of Australia and the government of the United States of America concerning certain mutual defence commitments, which is colloquially referred to as the Chapeau Defense Agreement. The Chapeau Defense Agreement was concluded in 1995 to clarify the legal status of liability and claims settlement provisions within cooperative arrangements that were directed at the settlement of any claims arising between the Australian Department of Defence and the United States Department of Defense as a result of death, injury or damage to property that occurred as a consequence of the provision and receipt of reciprocal military assistance defined within the Chapeau Defense Agreement as cooperative research, development, test evaluation or production programs and the provision of logistic support.

The Chapeau Defense Agreement fulfils a United States legal requirement enacted in the US Mutual Defence Assistance Act of 1949 that reimbursible military assistance provided by its government to another nation must be authorised by United States law and must be governed by an agreement between the United States and the recipient nation that is binding in international law. Without an amendment to the exchange of notes constituting an agreement between the government of Australia and the government of the United States of America concerning certain mutual defence commitments, Australia faces the very real possibility that our personnel interaction with the United States military could be reduced and that significant limits will be placed upon Australian defence personnel's access to the United States' classified and controlled unclassified information.

The amendment to the Chapeau Defense Agreement will extend the application of the Chapeau Defense Agreement's terms and conditions from cooperative research, development, test evaluation or production programs, logistics and materiel based military assistance to include personnel matters such as claims and liabilities issues arising out of personnel loans, secondments, exchanges and liaison officer activities, security assurances for personnel undertaking the abovementioned personnel activities, personnel access to controlled and classified information, criminal jurisdiction and limits upon the exercise of service disciplinary action for personnel undertaking the previously mentioned personnel activities, and caveats placed upon the duties that personnel may undertake while undertaking their previously mentioned personnel activities.

The amended Chapeau Defense Agreement will therefore provide the basis for all Australia-United States cooperative defence activity and may be supplemented with further subsidiary non-legally binding arrangements as required. The genesis of the amendment to the Chapeau Defense Agreement dates back to 1998 when the United States Department of Defense advised the Australian Department of Defence that under United States law the United States Department of Defense was required to have agreements binding in international law covering all personnel programs. This contradicted previous United States Department of Defense advice that personnel activities were not considered to be reimbursible military assistance.

For Australia this changed position meant that a treaty would be required for each personnel program involving an Australian citizen placed with a United States military organisation or a United States citizen placed with an Australian defence organisation. At the time that this issue was brought to the attention of the Australian Department of Defence there were numerous arrangements between the United States Department of Defense and the Australian Department of Defence which related to personnel programs.

The Australian Department of Defence currently has 28 bilateral arrangements with the United States Department of Defense, relating to some 400 Australian personnel placed with the United States defence organisation and 102 United States defence personnel placed with the Australian defence organisation. These 28 documents are not legally binding at international law but are in the form of non-legally binding arrangements. It is important to note that, while there are currently 28 arrangements, with 502 personnel involved, this continues to increase as the nature of our defence relationship evolves and expands.

The Australian Department of Defence determined that the most efficient way to accommodate the United States' requirement was to amend the existing Chapeau Defense Agreement to incorporate terms and conditions covering the exchange, secondment and liaison of personnel between the two nations' defence organisations. In November 2003 the US Department of Defense advised the Australian Department of Defence that such a proposal was acceptable to them.

The Australian Department of Defence was granted a mandate in July 2004 to commence formal negotiations with the US Department of Defense to amend the Chapeau Defense Agreement and an agreed text was obtained in April 2005. It was then agreed by Australia and the United States that the United States Department of Defense would obtain its relevant national clearances and then notify the Australian Department of Defence that this had been done so that Australia could proceed to obtain its national clearances.

Unfortunately, the US experienced a considerable delay in obtaining their clearances, with the United States department considering the text for more than two years. Australia received formal notification of US clearance of the amendment to the Chapeau Defense Agreement in June 2007. This amendment to the Chapeau Defense Agreement was signed on 4 December last year in Canberra but it will not enter into force until a third party note is sent by Australia to the United States informing them that all of our domestic procedures have been complied with.

This treaty action is the first step in the lengthy process. This treaty action will benefit the Australian Defence Force by ensuring that the exchange of defence information and ideas with the United States will continue now and into the future, will contribute to the continued development of ADF military capability and training and will support Australia's defence partnership with the United States. As noted earlier in this statement, this partnership is central to Australia's broader strategic and security objectives. That concludes my opening statement, Chair and committee members. I welcome any questions you might have.

CHAIR—Thank you.

Mr Burdon—Chairman and members, my sincere apologies for running late.

Mr Crossman—My apologies for my lateness today.

CHAIR—No trouble. I have two questions. First, personnel undertaking a placement with a host country are granted privileges and immunities as provided for by the written arrangement covering their placement. If administrative or disciplinary action must be taken against a person, that action can only be taken by the person's home country and the host country is prohibited

from taking any disciplinary action. Does that mean that personnel will not be subject to the jurisdiction of the country's criminal justice system if they are suspected of committing a crime?

Mr Cunliffe—No, it does not have that meaning. What it would mean, for instance, in the case of Australian Defence Force personnel would be that they would be subject to the Defence Force Discipline Act in relation to matters arising out of their service. For example, in a criminal assault that was not related, potentially they would be dealt with by the other government.

CHAIR—So if you are on leave and speeding, it would just be the standard jurisdiction of the home country that applied?

Mr Cunliffe—Yes.

CHAIR—Second, a number of crimes in a number of states of the United States carry the death penalty. Is it possible that a member of the Australian Defence Force serving in the United States under the written arrangement for cooperation could be subject to the death penalty?

Mr Cunliffe—I understand the answer to be yes. It would be useful to confirm that with the Attorney-General's Department, who of course are responsible in other areas for activity, including international activity on criminal matters.

CHAIR—If you want to provide any follow-up information, obviously that would be welcomed, but your answer is clear enough.

Mr Cunliffe—I will confirm it.

Senator CASH—Thank you for your submission, gentlemen. I note in our briefing papers that disputes arising from matters covered by the original Chapeau agreement are to be resolved by consultation and are specifically prohibited from being referred to a national or international tribunal. Can I ask you why that is so and what the implications of that actually are? If you need to take it on notice, that is fine.

Mr Cunliffe—I might take that one on notice. I think they go to broader principles than just specific to this matter. So I think it would be useful to ensure that we have a whole-of-government response for you, not just a response at the moment.

Senator CASH—That is fine. Thank you very much.

Ms HALL—The original and the amended Chapeau agreements deal with the administration of written cooperation arrangements. How many such agreements exist between the US and Australia? Can you give us some examples of these arrangements? How many personnel are involved in these arrangements?

Mr Cunliffe—I think that your question is about the personnel arrangements?

Ms HALL—Yes.

Mr Cunliffe—In that case we are talking some 28 agreements and arrangements.

Ms HALL—I wrote that down, and 502 personnel. Sorry, yes.

Mr Cunliffe—The 502 personnel is a total of both nations and I would urge some caution in asserting that it is absolutely definite. The personnel system that we have in defence is not capable of precise formulation, but that is the best advice that we have been able to obtain. But in broad terms it is of that number.

Ms HALL—And examples? I am really interested in some examples of these arrangements.

Mr Cunliffe—I can give you an example which arises in relation to an Air Force legal officer exchange, for instance, which we actually conduct with the United States. Under that arrangement we have a legal officer in place who works in the US for a term and in return the US has a person who works with us in our division.

That is one example. There will be a myriad, obviously, across the agency, but that is an example within my own division, which is a great assistance. Over time, in fact, those people have gone on to more senior roles and obviously bring with them an abundance of knowledge and an abundance of ability to contact people who are significant people.

Ms HALL—The Chapeau agreement only relates to written arrangements for cooperation. The arrangement is carried over to the amended agreement. How are the issues in the original agreement and the amended agreement dealt with when cooperation between armed forces occurs and there is no written agreement? What happens in those circumstances?

Mr Cunliffe—The practice is to move to such an arrangement as quickly as we can. The urgent matters are in fact matters which this Chapeau will assist, because the detail of the exchange or secondment, or whichever way it will work, will be far more easy to identify once this Chapeau agreement is in place, because it will sit above it and all of those assignments will derive from it. So there will be a written exchange.

Ms HALL—This agreement took a very long time to reach. What were the causes of that delay? I know you pointed out that it took some two years in the US.

Mr Cunliffe—Yes.

Ms HALL—What were the underlying problems associated with coming to the point we are at at the moment and what does that mean for the future?

Mr Cunliffe—The first issue, once it came back to Australia in the middle of 2007, was the electoral cycle, in fact, because we were heading towards an electoral event in late 2007. Then during the course of calendar 2008 the further steps were progressed, with the Executive Council approval entered on 28 August. The signatory with the former US ambassador and the former Minister for Defence took place in fact in this parliament last December.

I do not think there is any single cause. I suppose it is partly a reflection of other conflicting priorities. I think that is probably also true within the US about its own difficulties. I suspect it is also possibly affected a little by the fact that the activities were actually working. We were being directed by a United States change of policy but not a United States change of policy which was

bringing the current agreements for individual personnel activities or exchanges into any question. So, as distinct from those which are desperately urgent, it did not have that same level of urgency. We were working towards what was a US goal. It did not, from our point of view, make fundamental changes. I think, therefore, to a large degree it was a question of competing priorities.

Ms HALL—What does it mean for the future?

Mr Cunliffe—It will enable those urgent arrangements to be entered more quickly, because we will have something in place that will give much of the information and structure. What it will also mean, in fact, is some body of work, because under this treaty there will be a need for those 28 arrangements over time to be explicitly identified as deriving from this overarching treaty. So there will be some steps which will over time happen progressively as we engage in any activity on any one of those 28, but again none of those is of the highest urgency. The alternative course, which at one stage was mooted and identified as a possible approach, would actually have been to try to insert terms and conditions into each one of those 28 documents, which obviously would have been a much larger and inefficient activity because it would have required the thing to happen 28 times instead of once, with very minor changes in the other 28.

Ms HALL—Finally, I want to put on the record that I am very concerned that Australian citizens may have to face the death penalty. Is there any way—given that you have indicated that you think they will be required to under this agreement—that we can quarantine them from having to face the death penalty? That is a big concern to me.

Mr Cunliffe—Thank you, Ms Hall.

CHAIR—They are providing advice on the—

Ms HALL—Yes, they are providing advice to Kelvin. Given that you believe it is in the agreement, I would like to see if there is any way that we would be able to quarantine Australian citizens from actually having to face the death penalty.

Mr Cunliffe—I should clarify: it is not what is in the agreement. It is the fact that there is no exclusion deriving from the agreement. Therefore, if I travel individually to the United States for a holiday, I will be subject to the local law. That is, of course, a risk that all Australian travellers take. And, without wanting to delve into DFAT business, when you get your passport they give you a little book warning you about local laws and warning you about particular activities that may expose you to what we would certainly regard as harsh and difficult punishments.

Mr FORREST—I note the amended agreement has got a new clause in it, and it refers to the obligations of both parties: even though the agreement might be terminated, they have to comply with its requirements. I think I understand why that is—for issues of classified material or national security—but it is a bit curious. I wonder if you could just clarify what that means.

Mr Cunliffe—Mr Forrest, I might refer to Michael Carey, who is closer to the detail on this. But, in broad terms, in the same way as the provisions of the Crimes Act and the Public Service Act and various other legislation under which I work now will apply just as actively in 20 years time—when I will hopefully be enjoying a long and happy retirement—I will still have

obligations; there will still be limits on what I can do and what I can disclose, and if I breach those I will be, presumably, prosecuted through the criminal processes. So in many instances there are matters such as this.

There is also of course the issue that, notoriously, matters which arise, for instance in the nature of legal disputes, tend to take some time to be dealt with. So there is, if I can put it like that, always something of a tail deriving from any incident. Those who have been involved in a motor accident, or whatever it might be, will know that long after the vehicle is repaired there are still issues that need to be dealt with, even at that relatively everyday level. But I will just allow Mr Carey to add any precise detail beyond those general comments.

Mr Carey—The main principle is to ensure, as was earlier stated, the protection of information, issues like that, and to ensure that, if any outstanding claims have yet to be resolved at the time at which the agreement may be terminated or come to a conclusion, those matters can be effectively dealt with under the existing provisions within that agreement.

Mr FORREST—There is another related question. The original agreement stays in place for six months. I assume that is to provide a transitional period between the ratification of the new agreement—in other words:

The original agreement will remain in force until six months after the date of receipt of notification of termination by either government.

I did not read that right either, did I?

Mr Cunliffe—I think we might need to come back on that. I am not sure we can explain what was in the original document now, other than to say that I think it is probably intended as a transitional mechanism; if there are matters that are about to mature, that action can be taken. Presumably, if we envisaged, for instance, not a replacement nor an amended arrangement but actually an extinguished arrangement of this nature—after all, people are posted for two or three years to either place—there would be a number of steps to be taken. There would be materials and other such things which I expect would be retrieved by the parties, where they had come from one nation to the other, and I think it is most likely mechanical processes of that sort that it is intended for. But if we can provide any more material, I will have to come back with that, Mr Forrest.

Mr FORREST—I read it as a transition to the formalisation of the new agreement. But no?

Mr Carey—No. Upon entry into force of this amendment, it will automatically amend the existing agreement. The six-month termination provision is a notice, so that when the overarching document—as amended going forward—is terminated, if notice is given by one party to another, a six-month time kicks in and allows a winding up or a period of time for the parties to negotiate leading up to the termination of that agreement.

CHAIR—Any other questions? Thank you for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

[10.56 am]

CAREY, Mr Michael, Senior Legal Officer, Directorate of International Government Agreements and Arrangements, Defence Legal, Department of Defence

COLQUHOUN, Mr Lachlan, Assistant Secretary, South-East Asia, International Policy Division, Department of Defence

NIKOLIC, Brigadier Andrew, First Assistant Secretary, Regional Engagement, International Policy Division, Department of Defence

Agreement between the Government of Australia and the Government of the Republic of Singapore Concerning the Use of Shoalwater Bay Training Area and the Use of Associated Facilities in Australia

CHAIR—I call representatives from the Department of Defence. 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, would you 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 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 any introductory remarks that you wish to make before we proceed to questions.

Brig. Nikolic—Thank you, Chair, members of the committee. The recently released Defence white paper reaffirms Singapore as one of Australia's key strategic partners in South-East Asia. Our two countries share a common strategic perspective on a range of issues, and our robust and longstanding bilateral defence relationship continues to develop and deepen. The Shoalwater Bay Training Area Agreement with Singapore was first signed in 1995. The document being considered by the committee today is the product of a regular review of this agreement, the last being by JSCOT in June 2005.

The nature of the agreement is to provide the Singapore armed forces with continued access to the Shoalwater Bay training area, to conduct unilateral training activities, in particular Singapore's major annual exercise, Exercise Wallaby. The benefits of this activity are important. With inadequate training areas in Singapore, use of the Shoalwater Bay training area allows Singapore to develop its capability as a modern military force. This benefits Australia by making Singapore a more effective coalition partner and contributor to regional security.

It is also worth noting that the local community gains economic benefits from Singapore's defence activities in Australia. This agreement continues to require the Singaporean armed forces to engage Australian contractors to provide equipment and services where available, and this creates business for Australian industry and jobs for Australian workers. In 2004, the Central Queensland University conducted a study that found that Exercise Wallaby injected

approximately \$6 million into the local economy. I emphasise the study is five years old now, so the anticipated financial benefits of this activity, Exercise Wallaby and Singapore's use of Shoalwater Bay training area, is likely to be more significant.

The new agreement is substantially similar to the existing agreement. The biggest change is perhaps to its duration, which we propose be extended from five to 10 years to cut down on the administrative burden of renewal. The change to the duration also brings the agreement more into line with other arrangements Australia has with Singapore, such as the treaty governing Singapore's helicopter training detachment at the Army Aviation Centre in Oakey and the memorandum of understanding governing Singapore's flight training at RAAF Base Pearce, which are both 15 years in duration.

Noting comments raised in the previous JSCOT hearing in 2005 regarding Australia's ability to cease Singapore's access to the Shoalwater Bay training area, should that be necessary in the national interest, additional wording has now been included in the new agreement to supplement existing cessation processes and to remove any perceived ambiguity regarding Australia's ability to shut off access to Shoalwater Bay training area in extreme circumstances. Clause 3, paragraph 7 now states:

In the extreme situation where events, environmental considerations or strategic circumstances cause SWBTA to become unavailable or unsuitable for use by the SAF, the provisions of this Agreement shall be reviewed immediately by the Parties and all activity pursuant to this Agreement shall be suspended pending resolution of such event.

The ability of the ADF liaison officers to prohibit, suspend or cause to stop immediately the SAF training activity for reasons of safety or security remains, as does the termination clause, article 21, which sets out the process where either party can give 12 months notice to terminate the agreement. These two clauses were deemed appropriate for the purpose of terminating Singapore's activities at Shoalwater Bay training area should it be in the national interest, although we felt it was warranted during renegotiations to ensure that any concerns that this committee might still hold regarding this issue were addressed.

Defence takes its custodianship of the Shoalwater Bay training area very seriously and the new agreement contains additional reference to Australia's environmental laws and the requirement for Singapore to adhere to those laws. The new agreement also extends Singapore's remediation responsibilities to include external public access roads to Shoalwater Bay training area if deemed necessary by the environmental monitoring group and the post-exercise damage inspection. These are the main changes to the agreement.

There are a number of small administrative changes. However, vehicle and personnel numbers remain unchanged, as does the need for local community consultation, strict environmental monitoring and the requirement for Singapore to conduct its activities on a full cost recovery basis. Singapore's access to Shoalwater Bay training area is one of the cornerstones of the bilateral defence relationship and benefits both Singapore and Australia. Through the renewal of the agreement, we hope to continue those benefits.

CHAIR—Thank you. We are told that one of the reasons for renegotiating this agreement after a short time is to insert a claims handling process. Can you please explain that process and why it is necessary.

Brig. Nikolic—The National Interest Analysis states that the agreement has provisions on how claims will be handled by both parties to bring the agreement into line with current practice. Your question is, ‘What has changed?’ Simply, it is unchanged from the old agreement. I would have to concede there was perhaps some poor wording on our behalf. The intent of that provision was to highlight that provisions in the 2005 agreement brought into line with standard practice were replicated in the 2009 agreement. But for all intents and purposes the intent of that remains unchanged.

CHAIR—How many other agreements for the use of Shoalwater Bay does Australia have and with which countries have those agreements been negotiated?

Brig. Nikolic—For unilateral training, nil, but we of course exercise with a whole range of other countries at Shoalwater Bay.

CHAIR—Examples of those countries?

Brig. Nikolic—United States, for example. Major activities with the United States. New Zealand is the other notable partner that gets engaged in activities.

CHAIR—The agreement indicates that Singapore and its contractors must demonstrate a practical commitment to supporting Australian commercial enterprises and that the Department of Defence determines what companies constitute Australian commercial enterprises for the purposes of the agreement. Can you tell the committee how the Department of Defence goes about establishing what an Australian commercial enterprise is?

Brig. Nikolic—In the broad, what we have asked Singapore to do in the agreement is to ensure that its contractors demonstrate a practical commitment to the use of Australian commercial enterprises. I guess there would be some sort of process whereby Singapore would consider the ability of commercial contractors to deliver the services they are after and I imagine that the Defence Materiel Organisation would have a role in overseeing and determining the defence and Australian enterprises that could provide the services they require, but I would be willing to take that on notice and perhaps consult with DMO and others.

CHAIR—It would be helpful if we understood a little better just how that process works and how we satisfy ourselves that Singapore has discharged that obligation. That would be interesting for us to know.

Brig. Nikolic—Sure.

Mr FORREST—Do any of the exercises that Singapore undertake involve ordnance?

Brig. Nikolic—Yes, they do.

Mr FORREST—What are the obligations that they are under about any unexploded ordnance and all the other environmental challenges?

Brig. Nikolic—With ordnance use, they are required, in putting forward a concept, to ensure that the ordnance they propose to use is fit for purpose for Shoalwater Bay training area, that it would comply with the sorts of safety considerations that we would apply to the use of that ordnance and of course they would have responsibility for dealing with unexploded ordnance in the normal way. EOD technicians would be required to make safe any unexploded ordnance or to have it removed from the range area. Where there is a requirement for us to use Australian EOD range disposal techniques in support of Singaporean EOD issues, that would also be on a full cost recovery basis. So they would pay for that.

Ms NEAL—Are there any other arrangements with other countries in regard to the use of this facility at Shoalwater Bay?

Brig. Nikolic—Not in terms of unilateral training. Singapore, as you know, is a very small country, some 40 kilometres across. So we have this unilateral agreement with them to enable them to undertake collective activities over a broad area, employing a range of military capabilities in an integrated way, and Shoalwater Bay gives them the specific space they need to do that. They do not just undertake unilateral training in Australia. They do it in the United States, France, Malaysia and in other countries as well.

Ms NEAL—But there are lots of agreements with other countries for joint operations with the Australian Defence Forces all around Australia at different facilities?

Brig. Nikolic—There certainly are. There are a range of other countries with whom we exercise on a regular basis, both regional and international. Under the Defence Cooperation Program, which falls within my area, we do a whole range of joint exercises with countries in the region, and of course major exercises like Tandem Thrust with the United States and others.

Ms NEAL—What do you see as the most important benefit derived from having arrangements like this one where Singapore has unilateral training in this facility?

Brig. Nikolic—From Singapore's perspective, they are one of our key partners in South-East Asia. So by enhancing their ability to be self-reliant in a defence perspective by building their capacity in a defence sense, they are better able to respond to regional contingencies that we might find ourselves engaged in. By working on a unilateral basis on their own capabilities, they are then able to more effectively engage in joint exercises, which I mentioned earlier. So assisting Singapore's development of a modern, self-reliant military helps to contribute to regional security and therefore benefits us as well.

Mr FORREST—I have a question about community acceptance around the Shoalwater Bay region. No doubt these defence people would get some rec leave and come into town. What is the community reaction to that?

Brig. Nikolic—From a Singaporean perspective, I know, having exercised frequently with the Singaporeans over the last 31 years, that they place a very high premium on how they are seen within the community and they certainly, from a command and control perspective, take all steps

to try and ensure that their people reflect the values and professional ethos for which Singaporeans are known. I know that their people are well briefed prior to going into the community to engage with members of the community, to visit the shops and to socialise at the end of the exercise activity period. I would have to say that the people in the surrounding region—Rockhampton and elsewhere—not only value the economic benefits of Singaporean activities but they also consider that Singaporean armed forces personnel conduct themselves quite well. The Rockhampton mayor and town council are fully consulted on any plan for engagement with the community and they are very supportive of that engagement.

Mr FORREST—Do the personnel interact in uniform or are they casually attired?

Brig. Nikolic—They bring civilian clothing and so they would move into the community out of uniform and in civilians.

CHAIR—You mentioned the application of Australia’s environmental laws there. Are there particular environmental sensitivities at Shoalwater Bay?

Brig. Nikolic—I think there are, and I would also have to put on the record that we have managed Shoalwater Bay training area responsibly for some 31 years. That is about the same time as I have been in the Defence Force. I have parachuted onto, driven over, walked over, fired on, and been engaged in a whole range of activities at Shoalwater Bay training area, and I think it is fair to say that the continuing high conservation and heritage value placed on the area bears testimony to Defence’s ability to manage both the environmental concerns in Shoalwater Bay and our military training imperatives quite well. So, yes, there are sensitivities and I would have to say that they are very sensitively handled.

CHAIR—Belinda Neal mentioned other training agreements and other facilities. What are examples of other facilities around the country where there are training agreements in place with other countries?

Brig. Nikolic—With Singapore, for example, they have flying training at Pearce in Western Australia, they have helicopters at the Army Aviation Centre at Oakey, and both of those are arrangements that are 15 years in duration. Can I also mention for the record that Singapore is able to keep up to seven personnel permanently based in Australia to take care of the maintenance and the starting up of vehicles and the other things that they have to do, but the RAAF Base Pearce and Army Aviation Centre Oakey arrangements are the other two main ones involving Singapore.

CHAIR—Any other questions? In that case, thank you for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

Brig. Nikolic—Chair, further to my response on your question to ‘Australian commercial enterprises’, it is defined for the purposes of the agreement as:

... any body corporate registered under Australian Corporations Law, or incorporated under any other law of the Commonwealth, or a State or Territory of Australia, which conducts business in Australia for the commercial purposes of that enterprise, uses a primarily Australian labour force and which is certified pursuant to clause 2 of Article 15.

So that is the formal definition of a commercial enterprise.

CHAIR—Yes, thank you.

Resolved (on motion by **Senator Cash**, seconded by **Ms Neal**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

I now declare the public hearing closed.

Committee adjourned at 11.14 am