

Report 87

Treaties tabled on 13 June 2007

Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Kuala Lumpur, 27 July 2006

Agreement on Health Care Insurance between Australia and the Kingdom of Belgium, Canberra, 10 August 2006

Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes, Saint John's, Antigua 30 January 2007

Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Canberra, 1 March 2007

Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (Europol) (The Hague, 20 February 2007)

Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007

Extension of the Agreement of 4 December 1997 between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty

International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, London, 13 February 2004

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Resolution of appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report upon:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

AFP	Australian Federal Police
APO	Australian Patent Office
ATO	Australian Taxation Office
Cth	Commonwealth
DAFF	Department of Agriculture, Fisheries and Forestry
IMO	International Maritime Organization
IP	Intellectual Property
IPEA	International Preliminary Examining Authorities
ISA	International Searching Authorities
JSCOT	Joint Standing Committee on Treaties
MBS	Medical Benefits Scheme
NIA	National Interest Analysis
OECD	Organisation for Economic Cooperation and Development
SCOT	Commonwealth-State/Territory Standing Committee on Treaties
TIEA	Tax Information Exchange Agreement
WIPO	World Intellectual Property Organization



List of recommendations

2 Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters

Recommendation 1

The Committee supports the *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Kuala Lumpur, 27 July 2006*, and recommends that binding treaty action be taken.

3 The Agreement on Health Care Insurance between Australia and the Kingdom of Belgium

Recommendation 2

The Committee supports the *Agreement on Health Care Insurance between Australia and the Kingdom of Belgium* and recommends that binding treaty action be taken.

4 Agreements for the Exchange of Information with respect to Taxes with Antigua and Barbuda and with the Netherlands in respect of the Netherlands Antilles

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes, Saint John's, Antigua 30 January 2007* and recommends that binding treaty action be taken.

Recommendation 4

The Committee supports the *Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Canberra, 1 March 2007* and recommends that binding treaty action be taken.

5 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (Europol) (The Hague, 20 February 2007)

Recommendation 5

The Committee supports the *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (The Hague, 20 February 2007)* and recommends binding treaty action be taken.

6 Amendment to the Hong Kong Extradition Treaty

Recommendation 6

The Committee supports the *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007* and recommends that binding treaty action be taken.

7 Extension of the Agreement in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty

Recommendation 7

The committee supports the *Extension of the Agreement in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty* and recommends binding treaty action be taken.

8 Report on the International Convention for the Control and Management of Ships' Ballast Water and Sediments (London, 13 February 2004)

Recommendation 8

The Committee supports the *Convention on the International Convention for the Control and Management of Ships' Ballast Water* and recommends that binding treaty action be taken.

Introduction

Purpose of the report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of eight treaty actions tabled in Parliament on 13 June 2007. These treaty actions are:

13 June 2007¹

- *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Kuala Lumpur, 27 July 2006*
- *Agreement on Health Care Insurance between Australia and the Kingdom of Belgium, Canberra, 10 August 2006*
- *Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes, Saint John's, Antigua 30 January 2007*
- *Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Canberra, 1 March 2007*
- *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (Europol) (The Hague, 20 February 2007)*

1 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 177, p. 1945; Australia, Senate 2004-07, *Journal*, No. 146, p. 3853.

- *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007*
- *Extension of the Agreement of 4 December 1997 between the Government of Australia and the International Bureau of the World Intellectual Property Organization in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty*
- *International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, London, 13 February 2004*

Briefing documents

- 1.2 The advice in this Report refers to the National Interest Analysis (NIA) prepared for the proposed treaty actions. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of the NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/13june2007/tor.htm

- 1.3 Copies of treaty actions and NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's review

- 1.4 The review contained in this report was advertised in the national press and on the Committee's website.² Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Members of Parliament and to individuals who have

2 The Committee's review of the proposed treaty action was advertised in *The Australian* on 14 February and 14 March 2007. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee, both in the advertisement and via the Committee's website.

expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A.

- 1.5 The Committee also received evidence at public hearings held on 18 and 22 June 2007 in Canberra. A list of witnesses who appeared before the Committee at the public hearings is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/13june2007/hearings.htm

Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters

Introduction

- 2.1 The *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters*, done at Kuala Lumpur, 27 July 2006 ('the Treaty') provides a formal framework for the provision of mutual assistance between Australia and Thailand. Mutual assistance treaties allow Australia to provide and obtain formal assistance in criminal investigations and prosecutions.¹ Mutual assistance treaties are also used to recover the proceeds of crime.²

Background

- 2.2 Australia has mutual assistance treaties with 26 other countries and is also party to a number of multilateral treaties that impose mutual assistance obligations.³

1 National Interest Analysis (NIA), para. 4.

2 NIA, para. 4.

3 NIA, para. 3.

- 2.3 The Mutual Assistance Treaty with Thailand is based on Australia's model mutual assistance treaty and the provisions of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('the Mutual Assistance Act').

Australia and Thailand already enjoy a close and supportive bilateral relationship with a long history of cooperation in areas of law enforcement and counter-terrorism.⁴

The Mutual Assistance Treaty with Thailand

- 2.4 The key obligation of the Treaty is the commitment to grant the widest measure of mutual assistance in connection with investigations, prosecutions and other proceedings relating to criminal matters, irrespective of whether the assistance is sought to be provided by a court or some other authority.⁵
- 2.5 The Treaty specifies that a criminal matter includes matters connected with offences against a law relating to taxation, customs, and excise duties, foreign exchange control and other revenue matters.⁶ The Treaty does not apply to military offences which are not also offences under the ordinary criminal law.⁷
- 2.6 Under the Treaty, mutual assistance may include:
- Taking of testimony and statement and producing evidence and obtaining statements of persons (Article 9)
 - Providing records of government offices or agencies (Article 10)
 - Serving documents (Article 12)
 - Executing requests for searches, seizures and delivery of articles (Article 13)
 - Arranging for people to give evidence or to assist in criminal investigations in the Requesting State, including the temporary transfer of people in custody for this purpose (Articles 14 and 17);

4 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 29.

5 NIA, para. 9; Article 1 of the Treaty.

6 NIA, para. 10; Article 1(2) of the Treaty.

7 NIA, para. 10; Article 1(7) of the Treaty.

- Locating and identifying persons or objects (Article 15)
- Locating, restraining or forfeiting instruments or proceeds of crime (Article 16); and
- Providing other assistance consistent with the objects of the Treaty and the law of the Requested State (Article 1(3)(h)).

2.7 Information and evidence received under the Treaty must not be disclosed or used for purposes other than those stated in the request without the prior consent of the Requested State.⁸ In addition, both Australia and Thailand can require that a mutual assistance request be kept confidential.⁹

Grounds for refusing a request

2.8 The Treaty contains mandatory and discretionary grounds for refusing a mutual assistance request. The mandatory grounds, included in Article 2(1) oblige a Requested State to refuse to provide assistance if:¹⁰

- The request would prejudice the sovereignty, security, national interest or other essential interest of the Requested State.
- The request relates to a political offence;
- The request is based on a person's race, sex, religion, nationality or political opinions;
- The request relates to an offence for which the person has already been acquitted or pardoned, or has served the sentence imposed.

2.9 The discretionary grounds for refusal, provided in Article 2(2) of the Treaty, allows a request for mutual assistance to be refused if the request relates to:¹¹

- Acts or omissions which are not an offence under the laws of the Requested State;

8 NIA, para. 20; Article 8 of the Treaty.

9 NIA, para. 20; Articles 8(2) and 8(3) of the Treaty.

10 See NIA para. 13.

11 See NIA para. 14.

- An extraterritorial offence which is not an extraterritorial offence under the laws of the Requested State;
- An offence which could no longer be prosecuted in the Requested State because of the lapse of time;
- The provision of assistance that could prejudice an investigation or proceeding in the Requested State;
- The provision of assistance could prejudice the safety of any person in the Requested State;
- The provision of assistance could impose an excessive burden on the resources of the Requested State.

2.10 The Committee received a submission from Dr Ben Saul suggesting that it would be more appropriate for Australia to *mandatorily* rather than *discretionarily* refuse assistance where a request is made with regard to an offence punishable by the death penalty.¹²

2.11 The Committee has considered issues relating to the provision of mutual assistance and the death penalty in prior reports.¹³ It is the Committee's view that appropriate safeguards should be in place to protect against the imposition of the death penalty. However, the discretion provided under the Agreement in these instances is also valuable and marks an appropriate balance between the safeguards and the practical demands and benefits of providing mutual assistance.

2.12 Article 2(2)(e) of the Treaty entitles Thailand to refuse a mutual assistance request on the basis of reciprocity where Australia has refused a mutual assistance request based on the death penalty. The Committee was informed that none of Australia's other bilateral mutual assistance treaties have a similar provision:

No, it is not in any of our bilateral mutual assistance treaties. I suppose it is a novel provision in terms of Australia's treaty approach. One of the reasons it was undertaken was that the Thai government were concerned that, with the range of offences subject to the death penalty within their jurisdiction, it might end up being a situation of imbalance. Part of the approach in negotiations to overcome that was to provide a

12 Dr Ben Saul, *Submission 5*.

13 See JSCOT Report 79 which discusses the Australia – Malaysia Mutual Assistance in Criminal Matters Agreement and JSCOT Report 83, at paras 4.19-4.26, which discusses the value of intelligence cooperation.

basis upon which, if Thailand were concerned about a continual refusal on that basis, they could then, in effect, treat like with like.¹⁴

Benefits of the Treaty

- 2.13 A framework for formal mutual assistance requests between Australia and Thailand is important in combating transnational crime:

Ratifying the Treaty will ensure that Australia can provide, request and receive mutual assistance to and from the Kingdom of Thailand in accordance with clearly defined and mutually agreed terms.¹⁵

- 2.14 The Treaty has specific advantages over the exchange of mutual assistance outside of the bilateral treaty framework:

We have been providing or exchanging mutual assistance with Thailand for a considerable period of time. That has proceeded relatively well. One of the advantages of a treaty is that it codifies and clarifies the respective abilities of each state to provide assistance and it also provides obligations in a treaty level document.¹⁶

- 2.15 The Committee was informed that the types of mutual requests expected under the Treaty would probably relate to transnational crime and drugs:

I think there would be a fair degree of interest in requests which might relate to, obviously, transnational crime – that may include drug related matters. It may also include other matters of a transnational dimension such as people smuggling, trafficking in women and children and the like. We have a fairly strong relationship with Thailand both at a police-to-police level and a government-to-government level in terms of cooperating across the gamut of criminal activities. I think the key ones of interest to Australia would

14 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 30.

15 NIA, para. 8.

16 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 32.

be those which have that transnational component for obvious reasons.¹⁷

Implementation

- 2.16 The Treaty will be implemented through regulations passed under the Mutual Assistance Act.¹⁸ Section 7 of the Mutual Assistance Act states that if a treaty is enacted by way of regulations the Act applies subject to the limitations, conditions, exceptions or qualifications that are necessary to give effect to the Treaty.¹⁹
- 2.17 Mutual assistance requests are to be made through the designated central authority and, under Article 3(3), Australia's central authority is identified as the Commonwealth Attorney-General's Department.²⁰

Costs

- 2.18 Article 7 of the Treaty details the responsibility for costs for fulfilling mutual assistance requests and in general, the costs of fulfilling an ordinary mutual assistance request will be assumed by the Requested State.²¹

Conclusion and recommendation

- 2.19 The Committee supports the Treaty with Thailand as it provides a formal framework through which assistance can be provided, received and requested between Australia and Thailand.

17 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 32.

18 NIA, para. 21.

19 NIA, para. 21.

20 NIA, para. 23.

21 Article 7(1) of the Treaty; NIA, para. 22.

Recommendation 1

The Committee supports the *Treaty between Australia and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Kuala Lumpur, 27 July 2006*, and recommends that binding treaty action be taken.

The Agreement on Health Care Insurance between Australia and the Kingdom of Belgium

Introduction

- 3.1 On the 10 August 2006 Australia signed an *Agreement with the Kingdom of Belgium on Health Care Insurance* (the Agreement).
- 3.2 Australia has a number of such bilateral agreements on health care insurance. They provide residents from each country reciprocal access to the public health care benefits of the other country. Such agreements are of particular benefit for people with pre-existing conditions and older travellers.¹
- 3.3 The Committee was informed in evidence from the Department of Health and Ageing that around 20,000 Australians will potentially benefit each year from this agreement with Belgium.²

Background

- 3.4 Australia has bilateral agreements on health care insurance and medical treatment with a number of countries which have health

1 National Interest Analysis (NIA), para. 4.

2 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, p. 39.

systems of a similar standard to Australia and which are able to provide a comparable level of health care. These countries are New Zealand, the United Kingdom, the Republic of Ireland, Italy, Malta, the Netherlands, Sweden, Finland and Norway.³ In addition, agreements are currently being negotiated with Denmark and Slovenia.⁴

- 3.5 The Australian community in Belgium is estimated at 700. Approximately 5,100 persons in Australia were born in Belgium.⁵ In 2005, it was estimated that over 15,000 Australian's visited Belgium with approximately 12,000 persons from Belgium visiting Australia.⁶

The purpose of the agreement

- 3.6 This Agreement is designed to contribute to a safer travel environment for Australians visiting Belgium by giving them access to necessary health care, which covers medical services, pharmaceuticals and public hospital care. The Agreement should be of particular assistance to persons with pre-existing medical conditions who are fit to travel but unable to obtain travel insurance for their needs and it will also provide cover for those who find it difficult to obtain travel insurance due to their age.

- 3.7 Under the agreement an Australian who needs to go to a doctor or visit a hospital for treatment in Belgium will:

[s]imply register by showing their passport before or after having the medical service. The arrangements operate very similarly in Belgium as they do in Australia. As is the case in Australia, the doctor can choose to bill an insurer directly with no charge to the patient or the doctor may bill the patient directly, leaving the travelling patient to claim a rebate from the insurer. It is a system that Australians are familiar with under Medicare.⁷

- 3.8 In addition, the Committee was told in evidence that:

3 NIA, para. 4.

4 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, p. 39.

5 NIA, Political Brief on Belgium, Annex, para. 1.

6 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, p. 41.

7 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, pp. 30-40.

Belgium is an important building block for us in the network of reciprocal healthcare agreements that we have in Europe. It is part of making it easier to travel and do business knowing that healthcare needs have been addressed.⁸

Obligations

3.9 The National Interest Analysis (NIA) outlines Australia's key obligations under the agreement. These being:

- Article 4 of the Agreement stipulates that Party nationals will be subject to the same obligations and entitled to the same benefits under legislation as nationals of the other Party whilst lawfully in the territory of the other Party. In effect Australia and Belgium will treat each other's nationals as their own in relation to access to public health care benefits.
- Article 5(1) of the Agreement provides that a person from the territory of one Party who receives treatment for an episode of ill-health that requires prompt medical attention while in the territory of the other Party, is entitled to the public health care benefits of the other Party. Article 5(3) excludes those entering either country for the specific purpose of receiving medical treatment.
- Article 6 allows students and their accompanying family members present in the territory of the other Party to have equal access to public health care benefits as the other Party's nationals receive in like circumstances.
- Article 7 provides that persons subject to Articles 9 to 11 of the Agreement are entitled to benefits in kind while lawfully present in the territory of the other Party.
- Article 8 requires each Party to pay the expenses of providing like benefits to the nationals of the other Party. The Parties may agree on a refund.
- Article 9 requires each Party to take the necessary steps to implement this Agreement, communicate on matters concerning its implementation and on legislative amendments that affect the operation of the Agreement.

8 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, p. 40.

- Article 10 provides the Parties give free assistance to one another in the application of this Agreement, unless otherwise agreed between the Parties.⁹

Entry into force, implementation and withdrawal

- 3.10 The NIA states that Article 16 of the Agreement provides for entry into force on the first day of the third month after the date of the last notification in writing by both Australia and Belgium that their respective domestic processes for the entry into force of the Agreement have been fulfilled. This will occur as soon as practicable for both Parties.¹⁰
- 3.11 Section 7(1) of the *Health Insurance Act 1973* (Cth) provides that the Government of Australia may enter into agreements with the Governments of other countries for the purpose of the provision of health care to visitors to the host country as if they were residents of that country.¹¹
- 3.12 Section 7(2) of the *Health Insurance Act 1973* (Cth) provides that a visitor to Australia to whom an agreement under section 7 relates shall, subject to the agreement, be treated as an “eligible person” for the purposes of the Act during their stay in Australia. This means that once the Agreement has come into force, the Act applies automatically to visitors covered by the Agreement.¹²
- 3.13 The NIA advises that no further legislative action by the Commonwealth or the States and Territories is required to implement the Agreement.¹³
- 3.14 Article 15 of the Agreement contains a procedure for the Agreement’s termination. It allows for termination twelve months after either party gives written notice, to the other party, of its intention to terminate the Agreement. Any such termination is subject to Australia’s domestic treaty process.¹⁴

9 NIA, paras 6-12.

10 NIA, para. 2.

11 NIA, para. 13.

12 NIA, para. 14.

13 NIA, para. 15.

14 NIA, paras 13-15 and para. 21.

Consultation

- 3.15 The Attorney-General's Department and the Department of Foreign Affairs and Trade provided advice to the Department of Health and Ageing on the Agreement text as it was being developed. The Prime Minister, Attorney-General and Minister for Foreign Affairs and Trade gave the necessary approval prior to signing the Agreement. The Medicare Eligibility Section of Medicare Australia was made aware of the proposed Agreement with Belgium.¹⁵
- 3.16 Information on the proposed Agreement was provided to the States and Territories through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). All State and Territory health authorities were advised in writing of the proposed Agreement. The Department of Health and Ageing has not received comment from State or Territory governments on the treaty.¹⁶

Cost

- 3.17 The Agreement has been estimated to cost the Australian Government \$25,000 per annum in health benefits.¹⁷ For simplicity of administration, each country will absorb the cost of providing medical care to visitors, which results in negligible additional administrative operating costs.¹⁸
- 3.18 The Committee was told in evidence that this calculation was:
- based on an extrapolation using the figures gained from the reciprocal agreement with Holland. It has been calculated that the average cost for the total number of Dutch tourists is \$1.68 per person, so it is \$1.68 times the number of Belgian tourists, which was based on the figure of 12,000.¹⁹

15 NIA, Consultation, paras 1-6.

16 NIA, para. 6.

17 This cost has been agreed to by the Department of Finance and Administration.

18 NIA, paras 16-19.

19 Ms Jennifer Campain, *Transcript of Evidence*, 22 June 2007, p. 41.

- 3.19 In terms of the Medical Benefits Scheme (MBS), Australia's bilateral healthcare agreements cost just over \$2 million for the first six months of this financial year, for around 46,000 services.²⁰

Other matters

- 3.20 The Committee also inquired about any progress towards a similar agreement with Germany but was told in evidence that Germany was not as yet ready to negotiate such an agreement.²¹

Conclusion and recommendation

- 3.21 It is the view of the Committee that a health care insurance agreement between Australia and Belgium that provides residents from either country with reciprocal access to the other countries health care would be of benefit to a number of Australians particularly those who have pre-existing medical conditions and cannot obtain travel insurance and to older Australians. The Committee also accepts that this agreement will promote goodwill and a safer environment for tourists, people on working holidays and business people.

Recommendation 2

The Committee supports the *Agreement on Health Care Insurance between Australia and the Kingdom of Belgium* and recommends that binding treaty action be taken.

20 Ms Samantha Roberson, *Transcript of Evidence*, 22 June 2007, p. 42.

21 Ms Samantha Robertson, *Transcript of Evidence*, 22 June 2007, p. 42.

Agreements for the Exchange of Information with respect to Taxes with Antigua and Barbuda and with the Netherlands in respect of the Netherlands Antilles

Introduction

- 4.1 This chapter contains the Committee's findings in relation to two agreements:
- *Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes, Saint John's, Antigua 30 January 2007; and*
 - *Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Canberra, 1 March 2007*
- 4.2 The Agreements enable information to be exchanged on criminal and civil tax matters between Australia and the Netherlands Antilles and Australia and Antigua and Barbuda.¹ The Agreements also incorporate safeguards to protect the legitimate interests of taxpayers.

¹ National Interest Analysis (NIA), Antigua and Barbuda Agreement NIA, para. 6, Antilles Agreement NIA, para. 6.

As the obligations contained in both treaties are largely the same, this chapter will discuss both.²

Background

4.3 The Organisation for Economic Cooperation and Development (OECD) has developed a model Tax Information Exchange Agreement (TIEA) to facilitate effective exchange of information between countries. The model TIEA is designed to facilitate negotiations between OECD member countries and the 33 low tax jurisdictions which are collectively known as 'participating partners'. Australia's agreements with the Netherlands Antilles and with Antigua and Barbuda are based on the model TIEA.³

4.4 The Committee was informed by representatives from the Department of the Treasury that:

We have contacted 31 countries in this program. Of those 31 countries, we have signed agreements with three to date. Of the remaining countries, you could say that we are in substantive negotiations with them and are very close to finalisation; there might be a few issues outstanding. We have had preliminary discussions with another five countries about tax information exchange agreements. For the others, a handful have said they are not interested and others have said they want double tax agreements. It is not current government policy to offer those agreements and that is certainly not compatible with the position that the OECD and our colleagues in the OECD have been taking.⁴

4.5 The Committee was informed that an estimated \$5 billion is moved out of Australia each year to tax havens around the world.⁵ Most of this amount is legitimate but a tax haven's legal framework and communication systems can also be used in arrangements designed to avoid paying tax elsewhere.⁶ TIEAs assist in the investigation of tax evasion and money laundering by establishing mechanisms to

2 Antigua and Barbuda Agreement NIA, para. 6, Antilles Agreement NIA, para. 6.

3 Antigua and Barbuda Agreement NIA, paras 10-11, Antilles Agreement NIA, paras 10-11.

4 Mr Michael Rawstron, *Transcript of Evidence*, 22 June 2007, p. 30.

5 Antigua and Barbuda Agreement NIA, para. 13, Antilles Agreement NIA, para. 13.

6 Antigua and Barbuda Agreement NIA, para. 13, Antilles Agreement NIA, para. 13.

exchange information to establish the extent and nature of the tax evaded.⁷

- 4.6 The two agreements currently before the Committee are the second and third agreements of this kind. The first was signed with Bermuda in 2005 but has not yet entered into force.⁸

Obligations

- 4.7 The primary obligation between Australia and the Netherlands Antilles and between Australia and Antigua and Barbuda is to exchange information, upon request, where the information is relevant to the:
- Determination, assessment and collection of taxes;
 - Recovery and enforcement of tax claims; or
 - Investigation or prosecution of tax matters.⁹
- 4.8 Each party must do so irrespective of whether the conduct being investigated is a crime under its domestic law.¹⁰
- 4.9 There is no provision in either Agreement for the routine or voluntary exchange of information between the two parties.¹¹
- 4.10 If requested by the other party in either Agreement, Australia is obliged to supply information on any federal taxes administered by the Commissioner of Taxation.¹² To enable this obligation to be fulfilled, Australia must ensure the Commission of Taxation has the necessary authority to obtain and provide information held by banks, other financial institutions and a range of other bodies.¹³ The

7 Antigua and Barbuda Agreement NIA, para. 13, Antilles Agreement NIA, para. 13.

8 See JSCOT Report 73; see Mr Graham Whyte, *Transcript of Evidence*, 22 June 2007, p. 31.

9 Antigua and Barbuda Agreement NIA, para. 18, Article 1 of the Treaty; Antilles Agreement NIA, para. 18, Article 1 of the Treaty.

10 Antigua and Barbuda Agreement NIA, para. 18, Article 5(2) of the Treaty; Antilles Agreement NIA, para. 18, Article 5(1) of the Treaty.

11 Antigua and Barbuda Agreement NIA, para. 18; Antilles Agreement NIA, para. 18.

12 Antigua and Barbuda Agreement NIA, para. 19, Article 5(4) of the Treaty; Antilles Agreement NIA, para. 19, Article 5(3) of the Treaty.

13 Antigua and Barbuda Agreement NIA, para. 19; Antilles Agreement NIA, para. 19.

Netherlands Antilles and Antigua and Barbuda have a corresponding obligation for requests by Australia.

- 4.11 Where the information available to the Commissioner of Taxation is insufficient to enable compliance with the request, Australia must use all relevant information gathering methods to furnish details to the other party, even where it is not needed for domestic tax purposes. This is consistent with the model TIEA.¹⁴
- 4.12 Information provided under the Agreements must be treated confidentially by all parties, can only be revealed to specified persons or authorities concerned with the taxation matters covered by the Agreement and can only be used for such purposes. All parties remain bound by confidentiality provisions of the Agreement even after the termination of the Agreements.¹⁵
- 4.13 The Committee was informed by representatives from the Department of the Treasury that the Agreements contain appropriate safeguards:

In particular, countries cannot engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of the specific taxpayer, and any information exchanged must be treated as confidential. The safeguards also confirm when a request for information can be reasonably denied. Implementation of these proposed agreements will have a negligible cost. Broader revenue impacts are unquantifiable because the level of revenue that may be reclaimed from taxpayers avoiding their tax liabilities or the level of lost revenue that may be prevented in the future are currently unknown.¹⁶

Costs

- 4.14 It is likely that Australia will be making requests rather than receiving them under the Agreement. As a result, the financial costs of the Agreements are likely to be associated with the administration of

14 Antigua and Barbuda Agreement NIA, para. 21, Article 5(2) of the Treaty; Antilles Agreement NIA, para. 21, Article 5(2) of the Treaty. This is consistent with Article 26 of the *OECD Model Convention on Income and on Capital*, which was updated in 2005.

15 Antigua and Barbuda Agreement NIA, para. 23, Article 8 of the Treaty; Antilles Agreement NIA, para. 23, Article 8 of the Treaty.

16 Mr Michael Rawstron, *Transcript of Evidence*, 22 June 2007, p. 28.

requests to the Netherlands Antilles and Antigua and Barbuda and the analysis of information by the ATO.¹⁷

4.15 The ATO has entered into a Memorandum of Understanding with both the Netherlands Antilles Ministry of Finance and the Antiguan and Barbudan Ministry of Finance under which the ATO will pay for certain extraordinary costs borne by the other party.¹⁸ Some examples are:

- Reasonable costs of engaging experts, interpreters or translators;
- Reasonable litigation costs in relation to a specific request for information; and
- Reasonable costs for obtaining depositions or testimony.

4.16 The Committee was informed that overall, the cost of the TIEA program will be approximately equivalent to one additional full time employee.¹⁹ This will be absorbed into the ATO's existing exchange of information program.²⁰

Implementation and consultation

4.17 The obligations found in both Agreements are met through existing legislation, the *International Tax Agreements Act 1953 (Cth)*.²¹

4.18 No public consultation was undertaken prior to the conclusion of either agreement.²²

17 Antigua and Barbuda Agreement NIA, paras 25-28; Antilles Agreement NIA, paras 25-28.

18 Antigua and Barbuda Agreement NIA, paras 25-28; Antilles Agreement NIA, paras 25-28.

19 Antigua and Barbuda Agreement NIA, para. 28; Antilles Agreement NIA, para. 28.

20 Antigua and Barbuda Agreement NIA, para. 28; Antilles Agreement NIA, para. 28.

21 Antigua and Barbuda Agreement NIA, para. 24; Antilles Agreement NIA, para. 24.

22 Antigua and Barbuda Agreement NIA Consultation annex; Antilles Agreement, NIA Consultation annex.

Conclusion and recommendations

4.19 The Committee supports the Agreements as

These agreements are an important tool in Australia's efforts to combat offshore tax evasion. The proposed agreements will provide for effective exchange of information between Australia and these countries, promoting fairness and enhancing Australia's ability to administer and enforce its domestic tax laws.²³

4.20 As such, the Committee considers that the Agreements are in the national interest.

Recommendation 3

The Committee supports the Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes, Saint John's, Antigua 30 January 2007 and recommends that binding treaty action be taken.

Recommendation 4

The Committee supports the Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes, Canberra, 1 March 2007 and recommends that binding treaty action be taken.

²³ Mr Michael Rawstron, *Transcript of Evidence*, 22 June 2007, p. 30.

Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (Europol) (The Hague, 20 February 2007)

Introduction

- 5.1 The *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (Europol)* (the Hague, 20 February 2007) ('the Agreement') will provide a formal framework for the sharing of intelligence and strategic cooperation between Australia and Europol. Europol is the European Union law enforcement organisation that handles criminal intelligence.

The Agreement

- 5.2 The Agreement will facilitate the exchange of criminal intelligence between Europol and Australian law enforcement agencies, providing significant operational benefits to Australian agencies in combating international crime.¹ The AFP has been designated as the national

¹ National Interest Analysis (NIA), para. 9.

contact point between Europol and other competent authorities in Australia.²

5.3 Information sharing under the Agreement may include:³

- Exchange of specialist knowledge;
- General situation reports;
- Results of strategic analysis;
- Information on criminal investigation procedures;
- Information on crime prevention methods;
- Participation in training activities; and
- Providing advice and support in individual criminal investigations.

5.4 The Agreement will apply to all areas of crime within Europol's mandate.⁴ Annex 1 of the Agreement defines certain specific forms of criminality. The Committee was informed that:

Annexure 1 is not a list of every crime type covered by the Europol Agreement. Instead, it is probably best explained as a list of definitions of some of the crime types covered by the Europol Agreement.⁵

5.5 The exchange of information between Australia and Europol will only take place for the purpose of and in accordance with the provisions of this Agreement.⁶

5.6 Article 8 of the Agreement provides for the supply of information by Australia to Europol and Article 9 of the Agreement provides for the supply of personal data by Europol to Australia. The Committee received a submission from Dr Ben Saul who noted that 'where personal data is supplied by Europol to Australia, a more comprehensive range of safeguards applies (Article 9) than when Australia supplies information to Europol (Article 8)'.⁷

2 Article 5 of the Agreement. See Article 6 'Competent Authorities'.

3 Article 4 of the Agreement.

4 Article 3(1) of the Agreement.

5 Australian Federal Police, *Submission 3*.

6 Article 7(1) of the Agreement.

7 Dr Ben Saul, *Submission 5.1*.

- 5.7 The AFP explained that the different safeguards were a result of Australia's and Europol's domestic regimes:

Europol specifically required that comprehensive data protection obligations be included in Article 9 of the Europol Agreement because Australia is not a Member State of the European Union and is not subject to the privacy regime that applies to European Union Member States under the European legal framework. The relevant Council of the European Union Acts require that data protection safeguards be included in cooperation agreements that Europol concludes with non-European member states. Article 9 reflects that requirement.

Australia did not require a similar undertaking from Europol because the European Police Office (Europol) and the Member States of the European Union are subject to the European data protection regime. Australia was satisfied that Europol is operating under strict obligations in relation to data protection and did not consider it necessary to include any further safeguards in the Europol Agreement.⁸

- 5.8 Article 14 of the Agreement provides for AFP officers to be assigned as liaison officers to Europol. The Committee was informed by representatives from the AFP that an officer started at Europol in April to facilitate the exchange of information between Australia and Europol.⁹

- 5.9 Under Article 7(3) of the Agreement, a written request is required.¹⁰ The Committee was informed that:

One of the reasons that we have placed an officer at Europol headquarters is that he will have access to the online AFP case management system. Therefore, once the requests are received in Canberra from any jurisdiction in Australia they can be transmitted electronically to that officer who can then print them off and make a formal request in writing to Europol. Similarly, we expect that Europol will receive written requests from their member states and then come to

8 Australian Federal Police, *Supplementary Submission 3.1*.

9 Federal Agent Tim Morris, *Transcript of Evidence*, 22 June 2007, p. 35.

10 A request can be made orally with written confirmation to follow if required by the requested party: Article 7(3) of the Agreement.

our officer in Europol in the Hague who, to save time, will transmit them electronically back to Australia where they can be actioned.¹¹

Implementation

- 5.10 The Committee was informed that the AFP is currently implementing structures which will assist in the facilitation of intelligence received under the Agreement through the AFP:

We are currently building those structures. We have an implementation team in Canberra. We are finalising arrangements with the states and the Crime Commission about what databases will be used to store the information so that we are consistent with the privacy principles required by Europol and the European Union. We are trying to work out the best way to leverage the substantial amount of information and expertise that they have into the Australian law enforcement community. Similarly, we have to make available to Europol the extensive holdings of Australian law enforcement in a coordinated way so that they can get the most use from them. We are still working through the issues to find the optimum way.¹²

Costs

- 5.11 The costs associated with the assignment of a liaison officer to Europol are estimated to be approximately \$500,000 per annum and are being met from within the current AFP budget allocations.

That cost includes the salary and allowances for the officer and the cost of accommodation and air fares and the normal entitlements that overseas government officials are entitled to such as reunion airfares and the like. It also includes the cost of setting up the office and maintaining the computer systems

11 Federal Agent Tim Morris, *Transcript of Evidence*, 22 June 2007, p. 38.

12 Federal Agent Tim Morris, *Transcript of Evidence*, 22 June 2007, p. 36.

at the office, and so on. That is the approximate cost that we have per officer in Europe.¹³

Consultation

- 5.12 The Minister for Justice and Customs and the AFP Commissioner consulted with State and Territory Police Ministers and police services about the proposed Agreement, and in particular, whether State and Territory police forces wanted to be listed as ‘competent authorities’ for the purposes of the Agreement.¹⁴ Each jurisdiction advised it wished to be designated as a competent authority and that it was in a position to meet the obligations under the Agreement.¹⁵
- 5.13 The Agreement was listed on the schedule to the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) since February 2005.¹⁶

Recommendation

Recommendation 5

The Committee supports the *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (The Hague, 20 February 2007)* and recommends binding treaty action be taken.

13 Federal Agent Tim Morris, *Transcript of Evidence*, 22 June 2007, p. 38.

14 NIA, Consultation Annex, para. 1.

15 NIA, Consultation Annex, para. 1.

16 NIA, Consultation Annex, para. 2.

Amendment to the Hong Kong Extradition Treaty

Introduction

- 6.1 The Amendment to the Hong Kong Extradition Treaty¹ makes two key amendments to the extradition framework established by the Australia Hong Kong Extradition Treaty.² The original treaty ‘outlines the process under which persons can be sent from the jurisdiction of one country to the jurisdiction of another in order to face criminal charges or serve a sentence.’³ The two amendments relate to the standard of evidence required for extradition requests by Australia to Hong Kong and the provision of reasons where a request is refused.

1 The full title for this treaty is the *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007*

2 The full title for this treaty is the *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong, done at Hong Kong on 15 November 1992 [1997] ATS 11. This treaty entered into force on 29 June 1997.*

3 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 35.

‘No evidence’ standard for extradition requests by Australia

6.2 Under the existing extradition treaty with Hong Kong, both Australia and Hong Kong are required to provide evidence that would justify a person’s committal for trial if the offence had been committed in the jurisdiction of the requested party. This is the ‘prima facie’ standard for extradition requests.

6.3 The Protocol amends the existing treaty so that the ‘no evidence’ standard will apply to extradition requests from Hong Kong to Australia.⁴ The ‘no evidence’ standard means that the documents required for extradition do not need to include a brief of evidence of the alleged offence. The Committee was informed that previously the prima facie standard for extradition requests would require ‘witness statements, documents and all the paraphernalia that is associated with a committal proceeding.’⁵

6.4 Extradition requests from Australia to Hong Kong will remain at a level where the information contained in the request would, in accordance with Hong Kong’s domestic law, justify the extradited person’s committal for trial.⁶

6.5 The Committee was informed by representatives from the Attorney-General’s Department that:

Hong Kong’s domestic law prevents Hong Kong from reciprocally lowering the evidentiary standards for receiving extradition requests. This means that requests from Australia to Hong Kong will still need to meet the prima facie evidentiary standard.⁷

6.6 The adoption of the no evidence standard is already included in many of Australia’s bilateral extradition treaties and is also consistent with the United Nations Model Treaty on Extradition.⁸ Australia currently has 31 bilateral extradition treaties which adopt the ‘no evidence’ standard, two bilateral extradition treaties, with Hong Kong and Israel, which require evidence to a *prima facie* standard and a further two, with the United States and the Republic of Korea, require the

4 NIA, para. 11; Article 3 of the Protocol amends Article 9(3) of the Treaty.

5 NIA, para. 7. Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 38.

6 NIA, para. 11.

7 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 35.

8 NIA, para. 7.

establishment of 'reasonable grounds' to believe the person sought committed the offence for which extradition is sought.⁹

- 6.7 Representatives from the Attorney-General's Department informed the Committee that there were two key benefits of this change:

One is from the perspective of trying to align our extradition relationships with the domestic processes under our respective laws, and to some extent we had to learn to live with differences between different legal systems. Another one is that in circumstances where an extradition request has been received from another country involving an application of the prima facie requirement, that does consume a considerable amount of resources for Australia, and in terms of having the case presented before the magistrate litigation can arise in relation to dealing with the request. So the view was taken that in circumstances where we are able to provide extradition on a no evidence basis, notwithstanding that the legal system within the foreign country does not provide it, then it would be appropriate for us to give Hong Kong the benefit of the no evidence approach.¹⁰

Reasons for refusing an extradition request

- 6.8 The Protocol amends the existing treaty so that both Hong Kong and Australia must provide reasons to the other country where an extradition request is either partially or completely refused.¹¹

Parties are able to better understand how requests have been dealt with where reasons are provided. The requirement to give reasons for complete or partial refusal of an extradition request is included in close to half of our modern bilateral treaties, including most recently our treaties with Malaysia and Turkey.¹²

9 Attorney-General's Department, *Submission 2*, p. 2;

10 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, p. 39.

11 NIA, para. 12; Article 4 of the Protocol amends Article 16(1) of the Treaty.

12 Mr Steven Marshall, *Transcript of Evidence*, 18 June 2007, pp 35-36.

Conclusion and recommendation

- 6.9 The Committee supports the amendments to the Australia Hong Kong Extradition Treaty as the changes will implement a consistent approach to extradition requests in Australia's bilateral extradition agreements.

Recommendation 6

The Committee supports the *Protocol between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Amending the Agreement for the Surrender of Accused and Convicted Persons of 15 November 1993, Hong Kong, 19 March 2007* and recommends that binding treaty action be taken.

Extension of the Agreement in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty

Introduction

- 7.1 The *Patent Cooperation Treaty*¹, which facilitates the filing and assessment of a patent application in multiple jurisdictions, provides for the appointment of International Searching Authorities (ISA) and International Preliminary Examining Authorities (IPEA). The Original Agreement appoints and provides for the functioning of the Australian Patent Office (APO) as an ISA and IPEA, and is therefore necessary to allow for the filing of 'international applications' for patents in Australia.² The APO has been an ISA and IPEA since 31 March 1980.³
- 7.2 The Original Agreement is due to expire on 31 December 2007. Although an agreement to replace the Original Agreement is currently being prepared, it will not be ready to enter into force when
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1 [1980] ATS 6.

2 This agreement was reviewed by JSCOT in its Eleventh Report in November 1997.

3 Mrs Fatima Beattie, *Transcript of Evidence*, 22 June 2007, p. 43.

the Original Agreement expires. Australia and the International Bureau of WIPO have agreed to extend the operation of the Original Agreement to either 31 December 2008 or when the new agreement enters into force. This will allow for the APO to continue to operate as an ISA and IPEA without interruption.⁴

A new agreement is being negotiated between WIPO and current international authorities; however, it will not be finalised in time for Australia's domestic treaty-making processes to be complete so that it can come into force on 1 January 2008. After negotiations with the International Bureau of WIPO, an extension agreement has been developed to allow Australia time to complete all necessary domestic processes in relation to the new 2008-2017 agreement.⁵

Reasons for the agreement

- 7.3 WIPO has proposed a new draft model agreement, on which future agreements for appointing ISAs and IPEAs will be based. The text of the new individual country agreements for the next ten years will not be settled and approved by the Assembly of the International Patent Cooperation Union until October 2007 – this includes the proposed new agreement with Australia (the 2008–2017 Agreement) – and the Australian treaties process for the 2008–2017 Agreement will not be able to be completed by 31 December 2007. It is therefore necessary for the International Bureau of WIPO and Australia to extend the operation of the Original Agreement until the 2008–2017 Agreement enters into force. The 2008–2017 Agreement will be subject to the Australian treaty process when it is finalised.⁶
- 7.4 The Patent Cooperation Treaty simplifies and streamlines the process of filing for patent protection in a number of countries by filing a single international patent application, saving time, work and money for any person seeking a patent in a number of countries. An essential element in this simplified process is the appointment of ISAs and IPEAs (such as the APO) to conduct the required international search and examination providing significant cost savings to patent

4 NIA, p. 1.

5 Mrs Fatima Beattie, *Transcript of Evidence*, 22 June 2007, p. 43.

6 NIA, p. 2.

applicants. There is considerable international prestige associated with appointment as an ISA and IPEA.⁷

It is crucial that the Australian Patent Office continues as an international authority in order to enable Australian patent applications filed under the Patent Cooperation Treaty to be searched and examined. IP Australia is currently the only international authority that Australian patent applicants can use for carrying out their international searches and international preliminary examination. All Australians filing Patent Cooperation Treaty applications stand to be adversely affected if this extension agreement does not go ahead.⁸

- 7.5 The APO issues reports on approximately 3000 international searches each year. This workload has doubled since 1997 and continues to increase.⁹

In addition to providing international authority services to its own nationals, the accreditation agreements with WIPO can include extension of those services to other nationals. For example, Australia's agreement includes an obligation to provide international authority services to developing countries and New Zealand. The Australian Patent Office has entered into bilateral arrangements with countries in the Asia-Pacific to conduct patent searches. Currently the Australian Patent Office also does patent searches for many countries including New Zealand, Thailand and Singapore, and has been approached to do work for other countries.¹⁰

- 7.6 Further benefits to Australia from the APO's standing as an International Authority include a strong and respected voice in international fora, particularly in Patent Cooperation Treaty-related matters in WIPO. This reflects in turn on Australia's standing in the international intellectual property community and its ability to influence that community to the benefit of Australian intellectual property rights holders.¹¹

7 NIA, p. 2.

8 Mrs Fatima Beattie, *Transcript of Evidence*, 22 June 2007, p. 44.

9 NIA, p. 3.

10 Mrs Fatima Beattie, *Transcript of Evidence*, 22 June 2007, p. 44.

11 NIA, p. 3.

Obligations

- 7.7 The Extension Agreement extends the application of obligations under the Original Agreement until 31 December or until the 2008–2017 Agreement comes into force, whichever is the sooner. It creates no new obligations.¹²

Costs

- 7.8 There are no additional costs to government or industry as a result of the Extension Agreement.¹³

IP Australia operates on a full cost recovery basis and our activities are revenue neutral to government.¹⁴

Future treaty action

- 7.9 The 2008-2017 Agreement is expected to be finalised in late 2007. Once finalised, it will be subject to the Australian treaty process.¹⁵

Withdrawal or Denunciation

- 7.10 Article 12 of the Original Agreement provides for the unilateral termination, upon one year's notice, by either party. The Extension Agreement will not alter this termination provision. Any termination on the part of Australia will be subject to the Australian treaty process.¹⁶

12 NIA, p. 3.

13 NIA, p. 4.

14 Mrs Fatima Beattie, *Transcript of Evidence*, 22 June 2007, p. 44.

15 NIA, p. 4.

16 NIA, p. 5.

Conclusion and Recommendation

- 7.11 The Committee agrees that continuation of the APO as an international authority is important for Australia and crucial for Australians filing patents under the Patent Cooperation Treaty. Accordingly, the Committee supports the extension agreement.

Recommendation 7

The committee supports the *Extension of the Agreement in relation to the functioning of the Australian Patent Office as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty* and recommends binding treaty action be taken.

Report on the International Convention for the Control and Management of Ships' Ballast Water and Sediments (London, 13 February 2004)

Introduction

- 8.1 The *International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004* (the Convention) was adopted by the International Maritime Organization (IMO) on 13 February 2004.
- 8.2 Australia signed the Convention, subject to ratification, on 27 May 2005.¹

Background

- 8.3 Ballast water consists of water that is taken on board a ship for the enhancement of the ship's stability at sea. Ballast water may contain sediment if it is taken on whilst the ship is in shallow or turbid water. These sediments and the water can contain a wide range of live marine flora and fauna. These are then transported away from their

1 National Interest Analysis (NIA), para. 1.

original source and discharged with ballast water into the destination port as the ship is loaded with cargo. The larvae and spores of some marine animals and plants can survive this journey.

- 8.4 Ballast water is now recognised as a major source of spreading exotic marine pests around the world. In response the IMO has developed the *International Convention for the Control and Management of ships' Ballast Water and Sediments*. The development of the Convention fulfills an objective of the 1982 *United Nations Convention on the Law of the Sea* which inter alia called for countries to take all measures to reduce and control the accidental or intentional introduction of marine species into new environments. Similarly the 2002 World Summit on Sustainable Development called for action at all levels to accelerate the development of measures to address the problem of the transport via ballast water of invasive alien marine species.²
- 8.5 Australia is particularly vulnerable as many cargo ships arrive here without cargo and therefore with a large quantity of ballast water. If the organisms survive the transport and discharge process they may become established in the new community and populations may flourish.³
- 8.6 Each year, around 200 million tonnes of ships' ballast water is discharged into Australian ports by 13,000 ship visits from some 600 overseas ports.⁴
- 8.7 There are now estimated to be more than 250 exotic species known to be present in the Australian marine environment. The introduced organisms can affect local marine life in a number of ways, by competing with native species for food or space, preying on native species, crossbreeding with native species or by changing the habitat. Generally if the effects of introduced organisms are sufficiently severe they are referred to as "pests". Approximately one in six introduced marine species become pests.⁵

2 Mr Charles Willcocks, *Transcript of evidence*, 22 June 2007, p. 46.

3 Department of Environment and Water Resources, "The Introduction of Marine Pests to the Australian Environment via Shipping", <www.environment.gov.au/biodiversity/threatened/ktp/pests-via-shipping.html>.

4 NIA, para. 7.

5 Department of Environment and Water Resources, "The Introduction of Marine Pests to the Australian Environment via Shipping", <www.environment.gov.au/biodiversity/threatened/ktp/pests-via-shipping.html>. Marine pests can also be introduced via hull fouling.

- 8.8 It is estimated that between 10 and 40 per cent Australia's fishing industry is potentially vulnerable to marine pest incursion.⁶ The North Pacific Seastar, for example, is a major pest introduced into Australia via ballast water.⁷ According to evidence given to the Committee by the Department of Agriculture, Fisheries and Forestry (DAFF), the North Pacific Sea Star has been linked to a significant impact on the spotted handfish stocks in Tasmanian waters and to a decline in scallops and other fisheries in Port Phillip Bay in Victoria.⁸ Some introduced marine species may pose threats to the Great Barrier Reef.⁹
- 8.9 With expanding international maritime trade, it is considered to be in Australia's interest to implement more uniform and stringent requirements to manage the risk of introducing marine pests into Australian waters. Consequently, as DAFF noted: "Australia was one of the first countries to raise this issue at the international level and has been particularly active in developing this convention over a number of years."¹⁰
- 8.10 In evidence to the Committee, DAFF emphasised the importance of ratification of the Convention for Australia as it provides internationally consistent rules for ballast water management in an expanding trading market:

Initially, management will be by exchange of ballast water. But, under the convention, ships built after 2009 will be required to have treatment systems, significantly reducing the risk of marine pest translocation. Further, any increased shipping costs will be equivalent across countries and will not have an effect on Australia's ability to compete in export markets. In most circumstances, the convention will require that ballast water exchange be undertaken at least 200 nautical miles from the nearest land and in waters at least 200 metres in depth.

The convention includes specific and unique protection measures for the Great Barrier Reef. The outer edge of the

6 Regulation Impact Statement (RIS), p. 7-8.

7 Media Release by the Minister for Agriculture, Fisheries and Forestry, 1 June 2005.

8 Mr Andrew Johnson, *Transcript of Evidence*, 22 June 2007, p. 47.

9 Mr Andrew Johnson, *Transcript of Evidence*, 22 June 2007, p. 48.

10 Mr Charles Willcocks, *Transcript of Evidence*, 22 June 2007, p. 46-47.

Great Barrier Reef is considered to be nearest land for the purposes of the Conventions's operation requirements.

- 8.11 DAFF also highlighted the international significance of Australian ratification in the NIA: "Ratification of the Convention by Australia would be regarded positively by other IMO-member States, and would heighten Australia's reputation as a world leader on environmental issues."¹¹

The purpose of the convention

- 8.12 The Convention is designed to prevent, minimise and ultimately eliminate risks to the marine environment arising from the transfer of harmful aquatic organisms and pathogens via ships' ballast water and sediments.

Obligations

- 8.13 The Convention is divided into general obligations set out in the Articles of the Convention and specific requirements in Regulations contained in the Annex. Some key general obligations include:
- Parties must give effect to the provisions of the Convention and develop ballast water management plans in order to prevent, minimize and ultimately eliminate the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments (Article 2(1) and (5)). Parties may take more stringent measures in a manner consistent with international law (Article 2(3)). Parties must also ensure that ballast water management practices do not cause greater harm than they prevent to the environment (Article 2(6)).
 - The Convention also requires Parties to
 - ⇒ take effective measures to ensure that ships flying their flag comply with the requirements of the Convention, including the Regulations, and develop national policies, strategies or programmes for ballast water management in their waters (Article 4)

11 NIA, para. 10.

- ⇒ ensure that ports and terminals where cleaning or repair of ballast tanks occurs provide adequate facilities for the reception of ballast water sediments (Article 5)
- ⇒ promote, facilitate and share with other Parties the results of scientific and technical research on ballast water management, and monitor the effects of ballast water management on waters in their jurisdiction (Article 6), and
- ⇒ survey and certify ships flying their flag in accordance with the Regulations (Article 7).
- Parties are required to co-operate to enforce the provisions of the Convention (Article 10). This includes a requirement to prohibit and establish sanctions under domestic law for violations of the Convention, and to take action, or provide relevant information and evidence to other Parties, in relation to alleged violations. A Party's laws must prohibit both violations committed by ships entitled to fly their flag, or operating under their authority, wherever the violation occurs (Article 8(1)), and violations committed within their jurisdiction by any ship covered by the Convention (Article 8(2)).
- The Regulations establish Ballast Water Management and Control Requirements, and Standards for Ballast Water Management that must be met. Subject to entry into force and commencing from a date determined according to the ballast water capacity and date of vessel construction, ships covered by the Convention will be required to discharge ballast water in accordance with the Annex (Regulation A-2). The regulations further require ships to have an approved Ballast Water Management Plan (Regulation B-1) and to maintain a Ballast Water Record Book (Regulation B-2) to record when ballast water is taken on board, circulated or treated, and discharged into the sea. Ships may only conduct ballast water exchange in specified areas (Regulation B-4) and are required to be surveyed (Regulation E-1) and certified (Regulation E-2). Port authorities will be empowered to inspect ships and take samples of ballast water.
- The obligations will apply to all ships entitled to fly the flag of a party to the Convention, as well as to ships not entitled to fly the flag of a Party but which operate under the authority of a Party.
- The obligations do not apply to ships not designed or constructed to carry ballast water, ships with permanent ballast water in sealed

tanks that are not subject to discharge, and any military or other ship used for governmental non-commercial service.

- 8.14 Article 2(e) provides that the Convention will not apply to any warship, naval auxiliary or other ship owned or operated by a State and used only on government non-commercial service. However, each Party shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the Convention.¹²

Consultation

- 8.15 The Australian Government has been represented throughout the IMO's development of the Convention and has consulted with relevant groups/bodies including the Australian Shipowners Association, Shipping Australia, the Minerals Council of Australia, the National Bulk Commodities Group and the Association of Australian Ports and Marine Authorities. The NIA indicates that these groups support ratification of the Convention. Consultations were also undertaken with other federal, state and Northern Territory government departments, other IMO Member States and relevant Non-Government Organisations.¹³

Implementation and costs

- 8.16 Under the *Quarantine Act 1908* all ships arriving in Australian ports from overseas are required to comply with mandatory ballast water management arrangements. These arrangements are currently consistent with the Convention but only protect Australia from the introduction of marine pests from ships entering Australian waters. Similar arrangements are required to prevent the spread of marine pests in Australian waters from ships travelling between Australian ports that discharge ballast taken up in Australian waters.¹⁴
- 8.17 The Convention will be implemented through Commonwealth, State and Northern Territory legislation, and jurisdictions are considering

12 *International Convention for the Control and Management of Ships' Ballast Water and Sediments, London, 13 February 2004.*

13 For further details on consultation, see Annex to the NIA.

14 This requirement has been in place since 2001. See NIA, para. 8.

the legislative models that would best give full effect to the Convention within Australia.¹⁵ Although all jurisdictions have expressed support for ratification of the Convention, the Committee noted that New South Wales had, in the context of the Natural Resource Management Ministerial Council, expressed some reservations concerning implementation. DAFF confirmed that the South Wales Government had some concerns about costs: "But New South Wales continued to participate in the development of arrangements, and we are working on finding some alternative cost-sharing arrangements ... so we are very optimistic that all the relevant States and Territories will be on board."¹⁶

- 8.18 DAFF has proposed the establishment of an Australian Ballast Water Management Unit to provide a single point of contact for industry. Located within the Department, the Unit will track and monitor ships around Australia, provide advice to the shipping industry and jurisdictions, and manage the risk profiling, targeting and coordination of the compliance inspections. A phase-in transitional period with voluntary compliance will be introduced prior to mandatory requirements commencing.¹⁷
- 8.19 Following passage of the proposed legislation by the Australian Parliament and by the Parliaments of the States and the Northern Territory, it is proposed that Australia ratify the Convention by depositing an instrument of ratification with the IMO.¹⁸
- 8.20 In the period from 2007 to 2008, the cost of the regulation will be the costs of exchanging high-risk ballast water at sea and these will vary according to the management option implemented. During the transitional period between 2009 and 2016, regulation costs will be a function of the proportion of ships still using the ballast water exchange procedures and the proportion of ships using on-board treatment. From 2016, the cost of regulation will be the cost of implementing permanent on-board ballast treatment facilities on all ships.¹⁹
- 8.21 The costs incurred by government in implementing the ballast water management arrangements arising from the obligations of the
-

15 NIA, para. 20.

16 Mr Andrew Johnson, *Transcript of Evidence*, 22 June 2007, p. 48-49.

17 NIA, para. 21.

18 NIA, para. 22.

19 NIA, para. 23.

Convention will be recovered from the shipping industry via a uniform shipping levy to be applied to all ships on a quarterly basis.²⁰

- 8.22 The provision of services for implementation of the mandatory elements of the Ballast Water Management Arrangements (domestic ballast water inspections and single point of contact for the shipping industry) is expected to cost in the order of \$800,000 per annum (in addition to current costs of international ballast water management arrangements of \$1.5 million per annum). Apart from levy costs, the direct costs to the shipping industry from implementing the requirements are expected to be approximately \$5.3 million per annum.²¹ The benefits of preventing further incursions of marine pests (and the costs of incursions) via ballast water could exceed \$30 million a year.²²

Entry into force and withdrawal

- 8.23 The Convention will enter into force twelve months after the date on which not less than thirty States, the combined merchant fleets of which constitute not less than thirty-five per cent of gross tonnage of the world's merchant fleet have ratified the Convention (Article 18(1)). As at 6 April 2007, eight member countries had ratified the Convention, accounting for just over three per cent of the world's merchant shipping by gross tonnage.²³
- 8.24 Article 20 of the Convention provides that any Party may denounce the Convention by written notification to the IMO at any time after two years from the date on which the Convention enters into force for that Party. Denunciation takes effect one year after receipt or such longer as may be specified in the notification.²⁴

Conclusion and recommendation

- 8.25 The Committee welcomes this development of the Convention as an important response to the risks to the marine environment arising

20 NIA, para. 24.

21 NIA, para. 25.

22 RIS, p. 9.

23 NIA, para. 3.

24 NIA, para. 30.

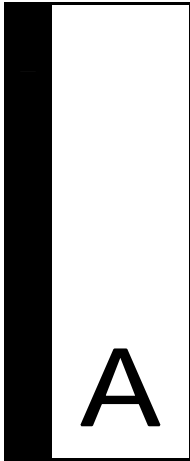
from the transfer of harmful aquatic organisms and pathogens via ships' ballast water.

Recommendation 8

The Committee supports the *Convention on the International Convention for the Control and Management of Ships' Ballast Water* and recommends that binding treaty action be taken.

Dr Andrew Southcott MP

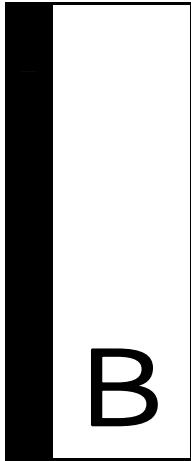
Committee Chair



Appendix A - Submissions

Treaties tabled on 13 June 2007

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 1.3 Australian Patriot Movement
- 1.4 Australian Patriot Movement
- 1.5 Australian Patriot Movement
- 2 Attorney-General's Department
- 3 Australian Federal Police
- 3.1 Australian Federal Police
- 4 The Uniting Church in Australia
- 5 The University of Sydney
- 5.1 The University of Sydney
- 6 Government of Western Australia
- 7 Tasmanian Government
- 8 New South Wales Government



Appendix B - Witnesses

Monday, 18 June 2007 - Canberra

Attorney-General's Department

Ms Joanna Cleland, Acting Senior Legal Officer, International Assistance and Treaties Branch

Mr Steven Marshall, Acting First Assistant Secretary, International Crime Cooperation Division

Mr Geoffrey Skillen, Principal Legal Officer

Department of Foreign Affairs and Trade

Mr Michael Bliss, Director, International Law and Transnational Crime Section, Legal Branch

Mr John Courtney, Director, Hong Kong Macau Taiwan Section

Ms Kate Duff, Assistant Secretary, South-East Asia North Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Ms Juliana Nam, Executive Officer, International Law and Transnational Crime Section, International Legal Branch

Friday, 22 June 2007 - Canberra

Attorney-General's Department

Ms Robyn Frost, Principal Legal Officer, Office of International Law

Australian Federal Police

Ms Kate Brookes, Europol Implementation Project Officer, Border and International

Federal Agent David Moore, Coordinator, America, Europe and Middle East Desk

Federal Agent Tim Morris, National Manager, Border and International Network

Australian Maritime Safety Authority

Ms Annaliese Caston, Supervisor

Australian Taxation Office

Mr Graham Whyte, Assistant Commissioner of Taxation, (Large Business and International)

Department of Agriculture, Fisheries and Forestry

Mr Andrew Johnson, Manager, Invasive Marine Species Program

Mr Charles Willcocks, General Manager, Australian Biosecurity System Taskforce

Department of Foreign Affairs and Trade

Mr Brendan Augustin, Director, Western Europe Section, EU and Western Europe Branch

Mr Michael Bliss, Director, International Law and Transnational Crime Section, Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Mr Adam Robertson, Director, European Union Section

Mr John Woods, Director, Canada and Latin America Section

Department of Health and Ageing

Ms Jennifer Campain, Director, Medicare Eligibility

Ms Samantha Robertson, Assistant Secretary, MBS Policy
Implementation, Medical Benefits Division

Department of the Environment and Water Resources

Ms Claire Howlett, Director, Migratory and Marine Biodiversity
Section

Department of the Treasury

Mr Michael Rawstron, General Manager, International Tax and
Treaties Division

Department of Transport and Regional Services

Ms Sharon Pearce, Senior Officer, Maritime Safety and Environment

IP Australia

Mrs Fatima Beattie, Commissioner of Patents

Mr Robert Finzi, Deputy Commissioner of Patents, Business
Development and Quality Management

Ms Caroline McCarthy, Director, International Policy Section