

Report 63

Treaties tabled on 7 December 2004

Treaty with France concerning maritime areas in the Southern Ocean

Australia–Thailand Free Trade Agreement

Air Services Agreement with the United Arab Emirates

Agreement concerning police and assistance to Nauru

Agreement on Mutual Acceptance of Oenological Practices

Amendments to the Constitution of the Asia Pacific Telecommunity

Optional Protocol concerning the involvement of children in armed conflict

WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty

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Contents

Membership of the Committee.....	viii
Resolution of Appointment.....	X
List of abbreviations	xi
List of recommendations.....	XV

REPORT

1 Introduction	1
Purpose of the Report.....	1
Briefing documents.....	2
Conduct of the Committee's review	2
Committee comment	3
2 Treaty with France concerning cooperation in maritime areas in the Southern Ocean	5
Obligations	6
Discrepancy between the English and French treaty texts.....	7
Implementation and costs.....	8
Enforcement of the Treaty.....	9
Entry into force	10
Consultation.....	10
Future treaty action.....	11
Conclusion and recommendation.....	11

3	Australia-Thailand Free Trade Agreement	13
	Introduction	13
	Background	13
	Impact of the Agreement	15
	Trade in goods	15
	Trade in services and investment	15
	Economic impact	16
	TAFTA as a mechanism to further regional and multilateral trade.....	17
	Trade in goods	18
	General provisions.....	18
	Industry outcomes	21
	Rules of origin.....	36
	Industry-specific application of the ROOs	38
	Sanitary and Phytosanitary (SPS) measures	41
	Trade in services	43
	Investment	46
	Investment dispute resolution	46
	Temporary movement of business people	48
	Electronic Commerce.....	48
	Competition policy	48
	Intellectual Property	49
	Government Procurement.....	49
	General exceptions	50
	Institutional Provisions.....	50
	Dispute resolution	51
	Environment and labour	51
	Environmental effects of the Agreement	53
	Developing country	54
	Entry into force	55
	Implementation	56
	Costs	56
	State and Territory Governments.....	57
	Consultation with State and Territory Governments	58

Consultations.....	59
Future treaty action.....	60
Recommendation.....	61
4 Air Services Agreement with the United Arab Emirates.....	63
Background.....	64
Features of the Agreement.....	65
Implementation and costs.....	67
Entry into force.....	67
Consultation.....	67
Conclusion and recommendation.....	68
5 Agreement concerning police and assistance to Nauru	69
Background.....	69
Features of the Agreement.....	70
Jurisdiction and protections.....	73
Implementation and costs.....	74
Consultation.....	74
Entry into force	74
National Interest Exception provision.....	75
Conclusion.....	76
6 Agreement on Mutual Acceptance of Oenological Practices	77
Background.....	78
Key benefits.....	78
Key obligations	79
Australian standards.....	80
Entry into force	81
Implementation	82
Costs	82
Consultation.....	82
Conclusion and recommendation.....	83

7	Amendments to the Constitution of the Asia Pacific Telecommunity	85
	Background	85
	Features of the 2002 Amendments	86
	Implementation and costs	87
	Entry into force.....	88
	Consultation	89
	Conclusion and recommendation	89
8	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	91
	Background	91
	Features of the Agreement	93
	Australia's current compliance with the Protocol	94
	Australian Defence Force policy.....	94
	Contractors.....	97
	Peacekeeping and other operations.....	97
	Norwegian measures to protect children, and voluntary recruitment under 18 years	98
	Consultation	100
	Reservations concerning Australia's ratification.....	101
	Leadership role for Australia.....	102
	Implementation	104
	Amendment to the Criminal Code.....	104
	Possible amendment to the Defence Act.....	105
	Discrepancies between the Optional Protocol and the Defence Instruction.....	107
	Article 6.....	108
	Costs	108
	Entry into force	108
	Concluding observations and recommendation	109
9	WIPO Copyright Treaty, and Performances and Phonograms Treaty	111
	Introduction	111
	WIPO Copyright Treaty.....	112
	Performances and Phonograms Treaty.....	116

Entry into force	120
Implementation	120
Costs	121
Consultation	121
Conclusion and recommendations	123

APPENDICES

Appendix A - Submissions	125
Appendix B - Witnesses	127
Monday, 26 July 2004 – Canberra	127
Monday, 9 August 2004 - Canberra	128
Tuesday, 10 August 2004 - Canberra	129



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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

ABC	Australian Broadcasting Corporation
ACF	Australian Conservation Federation
ACMF	Australian Chicken Meat Federation
ACTU	Australian Council of Trade Unions
ADF	Australian Defence Force
AFTINET	Australian Fair Trade and Investment Network
ALIA	Australian Library and Information Association
AMWU	Australian Manufacturing Workers Union
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
APT	Asia Pacific Telecommunity
ASEAN	Association of Southeast Asia Nations
ATFTA	Australia-Thailand Free Trade Agreement
AusAID	Australian Agency for International Development
AUSFTA	Australia-United States Free Trade Agreement

CDF	Chief of Defence Force
CERFTA	Closer Economic Relations Free Trade Agreement
CIE	Centre for International Economics
CKD	'completely knocked down'
CRA	Commercial Radio Australia
CTC	Change in Tariff Classifications
DAFF	Department of Agriculture, Fisheries and Forestry
DCITA	Department of Communication, Information Technology and the Arts
DFAT	Department of Foreign Affairs and Trade
DoTARS	Department of Transport and Regional Services
EEZ	Exclusive Economic Zones
FCAI	Federal Chamber of Automotive Industries
FOB	Free on Board
FSANZ	Food Standards Australia and New Zealand
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HAL	Horticulture Australia Limited
HREOC	Human Rights and Equal Opportunity Commission
ICFTU	International Confederation of Free Trade Unions
ILO	International Labour Organisation
ITU	International Telecommunication Union

IUU	Illegal, unreported and unregulated
MAA	Agreement on Mutual Acceptance of Oenological Practices
MFN	Most Favoured Nation
MOU	Memorandum of Understanding
NPF	Nauru Police Force
NGO	Non Government Organisation
NIA	National Interest Analysis
OECD	Organization for Economic Cooperation and Development
PIC	Pacific Island Countries
PMVs	Passenger Motor Vehicles
RAMSI	Regional Assistance Mission to the Solomon Islands
RIS	Regulation Impact Statement
ROOs	Rules of Origin
RVC	Regional Value Content
SAFTA	Singapore-Australia Free Trade Agreement
SCOT	Standing Committee of Treaties
SPS	Sanitary and Phytosanitary
TAAF	French Southern and Antarctic waters
TAFTA	Thailand-Australia Free Trade Agreement
TBT	Technical Barriers to Trade
TCF	Textiles, clothing and footwear
TFIA	Council of Textiles and Fashion Industries of Australia Ltd
TRIPS	Trade Related aspects of Intellectual Property Rights
TRQ	Tariff Rate Quota

UAE	United Arab Emirates
UNICEF	United Nations Children's Fund
WCT	WIPO Copyright Theory
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WWTG	World Wine Trade Group



List of recommendations

2 Treaty with France concerning cooperation in maritime areas in the Southern Ocean

Recommendation 1

The Committee supports the *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003)* and recommends that binding treaty action be taken.

3 Australia-Thailand Free Trade Agreement

Recommendation 2

The Committee supports the *Australia-Thailand Free Trade Agreement* and Associated Exchanges of Letters and recommends that binding treaty action be taken.

4 Air Services Agreement with the United Arab Emirates

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the United Arab Emirates relating to Air Services (Dubai, 8 September 2002)* and recommends that binding treaty action be taken.

6 Agreement on Mutual Acceptance of Oenological Practices

Recommendation 4

The Committee supports the *Agreement on Mutual Acceptance of Oenological Practices (Toronto, 18 December 2001)* and recommends that binding treaty action be taken.

7 Amendments to the Constitution of the Asia Pacific Telecommunity

Recommendation 5

The Committee supports the *Constitution of the Asia Pacific Telecommunity (Bangkok, 1976) as amended (Colombo, 1991) as amended in New Delhi in 2002* and recommends that binding treaty action be taken.

8 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

Recommendation 6

The Committee recommends that the Department of Defence ensure that the appropriate implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* is readily available on the Department's website and through other means.

Recommendation 7

The Committee recommends that the Department of Defence include 'genuinely', 'fully' and 'informed' where appropriate in the implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* so as to accurately reflect the treaty.

Recommendation 8

The Committee supports the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* and recommends that binding treaty action be taken

9 WIPO Copyright Treaty, and Performances and Phonograms Treaty

Recommendation 9

The Committee supports the *WIPO Copyright Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* and recommends that binding treaty action be taken.

Recommendation 10

The Committee supports the *WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* 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 nine proposed treaty actions tabled in the 40th Parliament on 12 May¹ and 22 June 2004,² and subsequently in the 41st Parliament on 7 December 2004,³ specifically

12 May 2004

- *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003)*
- *Australia-Thailand Free Trade Agreement*

22 June 2004

- *Agreement between the Government of Australia and the Government of the United Arab Emirates relating to Air Services (Dubai, 8 September 2002)*

1 *Senate Journal*, 12 May 2004, p. 3387 and *House of Representatives Votes and Proceedings*, 12 May 2004, p. 1600.

2 *Senate Journal*, 22 June 2004, p. 3603 and *House of Representatives Votes and Proceedings*, 22 June 2004, pp. 1723-4.

3 *Senate Journal*, 7 December 2004, p. 233 and *House of Representatives Votes and Proceedings*, 7 December 2004, p. 100.

- *Agreement between Australia and Nauru concerning additional police and other assistance to Nauru (Melbourne, 10 May 2004)*
- *Agreement on Mutual Acceptance of Oenological Practices (Toronto, 18 December 2001)*
- *Constitution of the Asia Pacific Telecommunity (Bangkok, 1976) as amended (Colombo, 1991) as amended in New Delhi in 2002*
- *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)*
- *WIPO Copyright Treaty (Geneva, 20 December 1996)*
- *WIPO Performances and Phonograms Treaty (Geneva, 20 December 1996).*

Briefing documents

- 1.2 The advice in this Report refers to the National Interest Analyses (NIAs) prepared for these proposed treaty actions. Copies of the NIAs are available from the Committee's website at <http://www.aph.gov.au/house/committee/jsct/index.htm> or may be obtained from the Committee Secretariat. These documents were prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty.
- 1.3 Copies of treaty actions and NIAs can also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade (DFAT). The Australian Treaties Library is accessible through the Committee's website or directly at <http://www.austlii.edu.au/au/other/dfat>.

Conduct of the Committee's review

- 1.4 The Committee's review of the proposed treaty actions canvassed in this Report was advertised in the national press and on the Committee's website.⁴ In addition, letters inviting comment were sent
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4 The Committee's review of the Australia-Thailand Free Trade Agreement and Maritime Agreement with France were advertised in *The Australian* on 26 May 2004 and 21 July 2004. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee.

to all State Premiers and Chief Ministers and to individuals who have expressed an interest in being kept informed of proposed treaty actions such as these. A list of submissions and their authors is at Appendix A.

- 1.5 The Committee also took evidence at public hearings held on 26 July 2004 and 9 and 10 August 2004. A list of witnesses who gave evidence at the public hearing is at Appendix B. A transcript of evidence from the public hearing can be obtained from the Committee Secretariat or accessed through the Committee's internet site at <http://www.aph.gov.au/house/committee/jsct/index.htm>. The Committee in the 41st Parliament resolved that the evidence from the previous Parliament be used as a basis for this Report.

Committee comment

- 1.6 The Committee notes that, once again, legislation giving effect to treaty obligations has been introduced into the Parliament prior to the conclusion of the Committee's review of a proposed treaty action. The Committee has expressed its concern about this practice in reports tabled during the 40th Parliament and has made comments and recommendations accordingly.
- 1.7 Nonetheless, in relation to the *Australia-Thailand Free Trade Agreement* (TAFTA), legislation was introduced into the House of Representatives on 17 November 2004 and passed by the Senate the following day. This was prior to the Committee being formed in the 41st Parliament and completing its inquiry.
- 1.8 The Committee recognises that the expected entry into force of TAFTA on 1 January 2005 imposed strict deadlines that meant it was necessary for the legislation to be introduced the day after the opening of the 41st Parliament to enable its passage into law, and for relevant parties to prepare for its implementation.
- 1.9 However, the Committee reiterates its concern that the practice of introducing enabling legislation prior to the completion of any of the Committee's reviews could undermine its work, and requests that the practice be avoided where possible.

Treaty with France concerning cooperation in maritime areas in the Southern Ocean

- 2.1 The *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003)* (the Treaty) will create a framework to enhance cooperative surveillance of fishing vessels, and encourage scientific research on marine living resources in the 'Area of Cooperation' in the Southern Ocean.
- 2.2 The Area of Cooperation will include the neighbouring territorial seas and exclusive economic zones (EEZs) surrounding the Australian territory of Heard Island and the McDonald Islands, and those of the French territories of Kerguelen Islands, Crozet Islands, Saint-Paul Island and Amsterdam Island.¹
- 2.3 The National Interest Analysis (NIA) states that illegal fishing in the Southern Ocean has increased in the last decade.² The Committee is particularly aware that the Patagonian toothfish has been targeted by foreign fishing vessels in Australia's EEZ around Heard and the McDonald Islands.³
- 2.4 As Dr Greg French from the Department of Foreign Affairs and Trade (DFAT) stated, Australia and France share an interest in protecting

1 National Interest Analysis (NIA), para. 5.

2 NIA, para. 8.

3 *Transcript of Evidence*, 26 July 2004, p. 6 and NIA, para. 8.

the fisheries resources within the Area of Cooperation.⁴ As the NIA identifies, cooperation between states that share similar concerns about illegal, unreported and unregulated (IUU) fishing is one of the most effective ways to address the problem, particularly in remote areas which experience harsh weather conditions.⁵ Hence, the Treaty will help combat IUU fishing activity within the Area of Cooperation, which continues to be a serious threat to the maritime environment, and the sustainability of fish stocks that are legitimately harvested by Australian fishing operators.⁶

- 2.5 The Committee understands that Australia is a party to treaties with similar objectives, such as that with Papua New Guinea and the Convention on the Conservation of Antarctic Marine Living Resources.⁷

Obligations

- 2.6 The Treaty provides for
- cooperative surveillance of fishing vessels within the Area of Cooperation
 - the exchange of information on the location, movements and other details such as licensing of fishing vessels within the Area of Cooperation
 - assistance, such as logistical support, for the 'hot pursuit' of vessels as requested by the pursuing state
 - cooperative scientific research on marine living resources
 - further agreements for cooperative surveillance and enforcement missions.⁸
- 2.7 Concerning hot pursuits, Dr French identified the Treaty to be of particular importance. Specifically, Article 4 enables a hot pursuit to continue through the territorial sea of the other Party, provided that the other Party has been informed. Dr French advised
- under the law of the sea convention, if a vessel enters into the territorial sea of a third country while conducting hot pursuit, that hot pursuit must be broken off unless the consent of the

4 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 2.

5 NIA, para. 9.

6 NIA, para. 7.

7 NIA, para. 10.

8 NIA, paras 6 and 10-16.

coastal state is received. So this treaty actually provides for an automatic mechanism for such consent to be received to ensure that hot pursuit may be maintained.⁹

- 2.8 According to the NIA, this provision closes off ‘an avenue for the pursued vessel to break the continuity of the hot pursuit and preventing the legitimate apprehension by the pursuing Party’.¹⁰

Discrepancy between the English and French treaty texts

- 2.9 The Committee was informed that a discrepancy was ‘discovered’ between the official treaty texts produced by Australia and France.¹¹

- 2.10 Dr French advised the Committee that the French version included the words ‘and/or any other means’ in the definition of ‘cooperative surveillance missions’, for example

“Cooperative surveillance” means ... within the area defined in paragraph 1(a) above – by French surveillance vessels and/or aircraft and/or any other means.¹²

- 2.11 The Committee understands that the addition would extend the definition to include newly developed technologies. Dr French stated that this

was the original intention of both sides—that in looking at all possible means of conducting cooperative surveillance we will be looking not just at the so-called classical means of surveillance by vessels or aircraft but also at the emerging technologies, including remote sensing through satellites, as well as pilotless aerial vehicles. So this additional wording was certainly foreseen by both sides but, through a technical slip, was missed out in one of the language versions.¹³

9 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

10 NIA, para. 14.

11 Dr Greg French, *Transcript of Evidence*, 26 July 2004, pp. 3-4.

12 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 4 and 5.

13 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

2.12 Furthermore, Dr French informed that

As is normal under international law, a rectification does not require a separate treaty action because it is merely reflecting the agreement of both parties at the end of negotiations.¹⁴

2.13 The NIA states that 'France has agreed to the rectification of the two official texts of the Treaty (French, English) so as to reflect the intentions of the parties at the of (sic) negotiation'.¹⁵ In contrast, the Committee received evidence at the public hearing indicating that DFAT

expect confirmation [very shortly] from the French side that the text will be acceptable to the French as well as to us. We have sent a note to France to that effect and are expecting a note in reply shortly.¹⁶

2.14 Dr French advised the Committee that DFAT expected to receive confirmation of the rectification prior to the Treaties Committee tabling its advice to the Parliament on the proposed treaty action.¹⁷

Implementation and costs

2.15 The NIA states that the Treaty will be implemented within existing laws and policies relating to IUU fishing activity and that no new legislation will be required.¹⁸

2.16 The NIA further states that minor additional costs will result from the implementation of the Treaty.¹⁹ DFAT provided the Committee with one example of such costs, that being through the periodic consultations examining the implementation of the Treaty.²⁰ The Committee understands that these costs would not be significant. Dr French advised that the consultation process and associated costs would also arise without the Treaty as 'Australia would expect to consult with France on IUU fishing issues in the normal course of events'.²¹

14 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

15 NIA, para. 19.

16 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

17 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 6.

18 NIA, para. 17.

19 NIA, para. 20.

20 NIA, para. 20 and *Transcript of Evidence*, 26 July 2004, p. 6.

21 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

- 2.17 In addition, Dr French considered that the Treaty will create a more focused framework and forward strategy for more effectively utilising the cooperation and the consultation which does already exist between Australia and France.²²

Enforcement of the Treaty

- 2.18 The Committee considered the issues surrounding the enforcement of the Treaty and the associated costs to Australia.

- 2.19 The Committee was informed of the regular surveillance missions in the Area of Cooperation

Basically two kinds of operations are conducted. One is through civilian patrol with a leased vessel...

In addition to that, for a number of years the Royal Australian Navy has been in a position to provide enforcement capacity through Anzac class frigates, in particular, and FFG frigates to engage in apprehension when we have a reasonable idea that illegal vessels are in the area.²³

- 2.20 Dr French noted that there had been a number of successful apprehensions over the last few years, and that

In future it is intended that the civilian patrol vessels will be capable of undertaking apprehensions. A decision to that end has been made, and additional resources are being devoted to those surveillance and enforcement activities.²⁴

- 2.21 Concerning the Treaty, the Committee heard that

Pooling surveillance resources in itself should increase the likelihood of being able to enforce or apprehend and so already we would expect that it should increase efficiency and the likelihood of engaging in successful apprehensions.²⁵

22 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 3.

23 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 5.

24 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 5. See also Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 7.

25 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 7.

- 2.22 Dr French advised that 'significant recouping of the costs is possible' through the auction and sale of fish stored in the hold of the IUU fishing vessels that have been intercepted.²⁶ Further

As I understand it, the net cost of the operation should not be very high at all when we take into account the recouping of costs through sale of the catch.²⁷

- 2.23 The Committee was interested in the occurrence of the sighting of IUU fishing vessels that have not resulted in a hot pursuit. Dr French stated

In general, there are instances where Australia and/or France have been aware of illegal fishing activities where it has not been possible, because of the lack of suitable vessels on hand at the time, to undertake an apprehension.²⁸

Entry into force

- 2.24 Pursuant to article 9, the Treaty will enter into force on the date on which the Parties have notified each other in writing or through diplomatic channels, once their domestic procedures have been completed.

Consultation

- 2.25 The Committee understands that the Department of Agriculture, Fisheries and Forestry consulted with all Australian fishing industry Management Advisory Committees, the Australian Seafood Industry Council and NGOs represented in the Commission for the Conservation of Antarctic Marine Living Resources Consultative Forum.²⁹ The Committee acknowledges the widespread support for the proposed Treaty resulting from the consultation process.³⁰

26 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 4.

27 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 4.

28 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 4.

29 NIA - Consultations Annex, p. 1.

30 NIA - Consultations Annex, pp. 1-2.

Future treaty action

2.26 Annex III of the Treaty enables Parties to conclude further agreements on cooperative surveillance and enforcement operations. The Committee was advised that

Australia and France are now negotiating a related treaty that would extend bilateral cooperation in the area of operation to include cooperative law enforcement operations as a second stage. So the initial stage encompassed within this treaty is cooperative surveillance operations. It is certainly foreseen that in the future we will have an additional agreement covering actual enforcement operations where Australian vessels could conduct enforcement operations against illegal vessels within the French zone, and French vessels within the Australian zone.³¹

2.27 The Committee understands that Australia has developed a text for the new treaty and is currently in consultation with France 'with a view to concluding the agreement'.³²

Conclusion and recommendation

2.28 The Committee believes that the Treaty is an important mechanism for cooperative surveillance of fishing vessels to address IUU fishing activities in the 'Area of Cooperation' in the Southern Ocean. The Committee also supports the furthering of scientific research on valuable marine living resources.

Recommendation 1

The Committee supports the *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003)* and recommends that binding treaty action be taken.

31 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 4.

32 Dr Greg French, *Transcript of Evidence*, 26 July 2004, p. 7.

Australia-Thailand Free Trade Agreement

Introduction

- 3.1 The proposed Australia-Thailand Free Trade Agreement (TAFTA, which will also be referred to as ‘the Agreement’) will liberalise and facilitate trade and investment between the Parties.
- 3.2 Chapter 1 of the Agreement determines that the primary objectives of the Agreement are to
- liberalise trade in goods and services and create favourable conditions for trade and investment
 - build upon the countries’ World Trade Organization (WTO) commitments and to support trade liberalisation and facilitation in the Asia-Pacific Economic Cooperation forum (APEC)
 - establish a program of cooperative activities.¹
- 3.3 In addition to the core trade liberalisation commitments on goods and services, TAFTA includes provisions concerning the protection of intellectual property, customs procedures, electronic commerce, competition policy and government procurement.²

Background

- 3.4 The Committee understands that TAFTA would be Thailand’s first comprehensive free trade agreement with a developed economy, and Australia’s second free trade agreement with an Association of Southeast

1 Regulation Impact Statement (RIS), Annex 2, ‘Australian Obligations’, p. 5.

2 National Interest Analysis (NIA), para. 5.

Asian Nations (ASEAN) member nation. In 2003, Thailand was Australia's fourteenth largest export destination with two-way trade valued at \$A 5.9 billion.³

- 3.5 The Agreement reflects Australia's broader regional trade and economic interests. As the National Interest Analysis (NIA) states

The conclusion of a substantive and comprehensive FTA with Thailand will signal strong support for multilateral, regional and bilateral initiatives, help create an open global and regional trading environment and promote strength and stability in the region. The deal establishes a platform for Australia to work towards greater economic integration with the second-largest economy in South East Asia.⁴

- 3.6 Economic linkages between the two countries to date have been hampered by Thailand's high trade restrictions and barriers.⁵ The NIA identifies the most significant feature of the Agreement to be that it will eliminate all tariff barriers and tariff rate quotas on imports of merchandise from Australia that meet the Rules of Origin (ROOs) criteria, either upon entry into force or through a phased reduction. All tariffs will be reduced to zero by 2020, with the majority eliminated by 2010.⁶ Detailed information on tariff reductions is contained in Annex 2 of the Agreement.

- 3.7 Australia's Chief Negotiator, Mr Justin Brown from the Department of Foreign Affairs and Trade (DFAT), advised the Committee that

The agreement would result in the complete liberalisation over time of two-way trade in goods between the two countries, and the liberalisation of services, trade and investment conditions. The agreement would also create improved conditions for broad commercial and regulatory cooperation between the two countries.⁷

- 3.8 This Chapter will briefly examine the substantive parts of the Agreement, and will discuss the key issues raised in the evidence before the Committee.

3 NIA, para. 6.

4 NIA, para. 7.

5 NIA, para. 6.

6 NIA, para. 11.

7 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 21.

Impact of the Agreement

Trade in goods

- 3.9 The NIA notes numerous direct benefits expected to occur as a result of implementation of the Agreement
- Over half of all Thailand's current tariffs on imports from Australia will be eliminated, with tariffs on over three-quarters of Australia's current exports to Thailand eliminated immediately upon entry into force
 - All Thai tariffs not immediately eliminated will be reduced when the Agreement enters into force. Almost all tariffs will be completely eliminated by 2010, and the remainder eliminated after that year
 - Tariffs on large passenger vehicles, which are currently at 80 per cent, will be eliminated upon entry into force
 - By 2010, Thailand will eliminate its tariffs on almost all industrial goods. Current tariffs are at 30 per cent
 - Thailand will eliminate its current high tariffs on agricultural products and processed foods
 - Upon entry into force, Thailand will eliminate tariffs on wheat, barley, rye and oats, in addition to its tariff and tariff quota on rice
 - Thailand will immediately eliminate current tariffs on infant formula, lactose, casein and milk albumin, and phase the tariffs on butter fat, milkfood, yoghurt, dairy spreads and ice cream to zero in 2010
 - Thailand will phase the 32 per cent current tariff on sheep meat to zero in 2010
 - Thailand will phase tariffs on most fresh fruits and vegetables (most current rates at 33 or 42 per cent) to zero in 2010
 - Sugar exports from Australia will gain immediate additional access, expanding by 10 per cent annually with tariff and quota free access to occur in 2020
 - Thailand has guaranteed more liberalisation of its services markets in a range of sectors.⁸

Trade in services and investment

- 3.10 The NIA also outlines benefits to be achieved in services and investment
- Under the Agreement, there is a commitment to further liberalise two-way services trade within three years of entry into force. An associated

8 NIA, para. 8.

exchange of letters outlines priorities for discussion in the review of commitments (financial and telecommunications services, and conditions applying to Australian business people visiting Thailand)

- Australians will be granted visas and work permits for up to five years for intra-corporate transferees and three years for contractual services suppliers, provided that they have ongoing employment and comply with Thai laws. The number of documents required for work permits and renewals of work permits will be reduced
- The Agreement incorporates provisions on investment protection which guarantee a range of rights of Australian direct investors in Thailand, including the right to transfer their funds freely.⁹

3.11 Mr Brown stated that

While not of the same magnitude as the tariff commitments in the agreement, there are also a number of important improvements provided for Australian services exporters and investors in the Thai market. In particular, Thailand will relax a number of its restrictive conditions relating to visas and work permits for Australian businesspeople. The agreement will also guarantee non-discriminatory treatment of Australian investment in Thailand. Thailand's minority foreign equity limits have been lifted in a number of sectors of importance to Australian industry—notably in mining, some distribution, management consultancy and tourism services.¹⁰

Economic impact

3.12 The NIA states that although the Agreement will bring significant economic gains for some sectors, it will not have a large overall impact on the Australian economy

[the Agreement's] impact on Australia's macroeconomic aggregates such as GDP, employment or net exports is not expected to be large (estimated by the Centre for International Economics [CIE] at \$US 2.4 billion over the first 20 years of operation). This is because Australia already has a relatively open economy, leaving room for few expected efficiency gains as a result of this FTA.¹¹

9 NIA, para. 8.

10 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 21.

11 NIA, para. 9.

3.13 However, the Committee notes that the Agreement may have some negative impacts. A submission received by the Australian Manufacturing Workers' Union (AMWU) stated that

In 2003 Australia had a merchandise trade deficit with Thailand of \$1,342 million. The AMWU notes that even according to the CIE Report (which the Government is using to support the agreement), both Australia's trade deficit with Thailand and Australia's overall trade deficit will rise as a result of the entering the proposed agreement.¹²

TAFTA as a mechanism to further regional and multilateral trade

3.14 The Regulation Impact Statement (RIS) states that the Agreement aims to 'add momentum to Australia's regional and multilateral trade liberalising efforts'.¹³

3.15 The NIA states that

implementation of the FTA will also enhance Australia's broader trade, economic and security interests in the region. A substantive and comprehensive FTA between the two countries will signal strong support for multilateral, regional and bilateral initiatives, help create an open global and regional trading environment and promote strength and stability in the region.¹⁴

3.16 In a submission to the Committee, the Ford Motor Company of Australia agreed that the Agreement would further regional trade, stating that

Ford Australia...believes this agreement, which follows on [from the] earlier free trade agreement with Singapore, will not only provide Australian producers with improved access to a very significant ASEAN automotive market, but could also expedite enhanced access to other ASEAN markets.¹⁵

And

Firstly, the agreement, together with the proposed Australia-US free trade agreement and Australia-China economic framework study can help "energise" the broader multi-lateral trade

12 Australian Manufacturing Workers' Union (AMWU), *Submission*, p. 8.

13 RIS, p. 2.

14 NIA, para. 10.

15 Ford Motor Company of Australia Limited, *Submission*, p. 1.

liberalisation process through such forums as the World Trade Organisation. Interestingly, there have recently been indications of a broader ASEAN interest in enhanced trade opportunities with Australia.¹⁶

- 3.17 However, the Australian Council of Trade Unions (ACTU) argued that trade agreement negotiations with Thailand and Singapore might have contributed to the recent invitation from ASEAN that Australia and New Zealand attend the summit in Laos later this year, but their contribution is outweighed by the change in political leadership in Malaysia. The ACTU doubts the multilateral significance of this agreement.¹⁷

Trade in goods

General provisions

National Treatment

- 3.18 The Agreement includes an obligation for each Party to extend national treatment to the goods of the other Party. Under this obligation, goods imported from the other country must be treated no less favourably than the same or similarly produced domestic goods after passage through customs.¹⁸

Anti-dumping

- 3.19 The Agreement prescribes that both countries must follow WTO anti-dumping rules and procedures. Article 206 of the Agreement outlines certain agreed practices to be used in determining the volume of dumped imports in investigations and reviews.¹⁹

Subsidies and counter-veiling measures

- 3.20 The WTO obligations of the Parties relating to subsidies and counter-veiling measures are confirmed by the Agreement.²⁰

16 Ford Motor Company of Australia Limited, *Submission*, p. 2.

17 Australian Council of Trade Unions (ACTU), *Submission*, p. 1.

18 RIS, Annex 2, 'Australian Obligations', p. 5.

19 RIS, Annex 2, 'Australian Obligations', p. 6.

20 RIS, Annex 2, 'Australian Obligations', p. 6.

Agricultural export subsidies

- 3.21 The Parties commit to work towards the elimination of agricultural export subsidies in the WTO. The Agreement provides for bilateral consultations on policies which may affect trade in food or agricultural products. Both countries agree not to introduce or maintain any agricultural export subsidy on goods exported to the other.²¹

Safeguards

- 3.22 The Safeguards Chapter of the Agreement provides a mechanism for protecting industries from injury arising from a rapid increase in imports during the transition period where tariffs are being phased to zero. Special safeguard measures are also included for a number of agricultural products.²²
- 3.23 The operation of the safeguard provisions was outlined to the Committee by Mr Brown
- the Agreement includes a range of safeguard provisions which allow for the temporary withdrawal of tariff preferences on specific products. There are two specific categories of safeguard action under the terms of the agreement: transitional safeguards, which are available subject to injury being demonstrated; and so-called special safeguards, which are volume triggered and which apply to around 50 agriculture and fisheries products.²³
- 3.24 Mr Brown stated that the transitional safeguards
- enable firms that believe they are being damaged by imports as a result of the tariff preference being provided to Thailand to seek recourse and to seek an increase in the tariff back to the MFN rate if damage can be demonstrated.²⁴
- 3.25 The special volume-triggered safeguards are available for some agricultural and fisheries products. These measures apply to industries where there is already high penetration by Thai imports, such as canned tuna and canned pineapple.²⁵

TCF industry

- 3.26 The Council of Textile and Fashion Industries of Australia Limited (TFIA) made a submission to the Committee, commenting on the safeguard

21 RIS, Annex 2, 'Australian Obligations', p. 6.

22 RIS, Annex 2, 'Australian Obligations', p. 9.

23 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 21.

24 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 24.

25 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 23.

provisions as they apply to the textiles, clothing and footwear (TCF) industry. The TFIA noted that their members saw the inclusion of adequate safeguards to address the special needs of the TCF industry as a key part of the Agreement.²⁶

3.27 The TFIA advised the Committee that it had recommended to the Government that, among other things, the Agreement incorporate a specific TCF safeguard mechanism, including an automatic 'snap-back' provision, triggered by a quantitative measure that would be in place for up to 200 days and would have a lower threshold test than those found in FTAs to which the United States is a Party. Additionally, the TCF requested involvement in the implementation of the mechanism.²⁷

3.28 The Committee notes the TFIA's statement that

In comparing the text of the agreement with these [recommended] conditions the most notable difference is the absence of a distinct TCF safeguard provision such as that existing for certain agricultural products. A separate safeguard chapter for TCF products is by no means unprecedented. Both the United States-Singapore and Australia-United States Free Trade Agreements include TCF specific safeguards. These safeguards allow for the same mechanisms as standard safeguards but generally limit compensation to only TCF chapters of the tariff code or have particular trigger mechanisms that allow the special safeguard to be applied.²⁸

3.29 However, the TFIA goes on to state that the lack of specific safeguard and snap-back mechanisms have been addressed through Article 505, which

allows provisional safeguard measures to be applied subject to a preliminary determination that there exists clear evidence that increased imports of an originating good from the other Party due to the reduction or elimination of a duty under the agreement have caused or are threatening to cause serious damage ... The inclusion of this 200-day provisional safeguard enhances the ability of this arrangement to address the industry's concerns on the application of safeguards.²⁹

3.30 Although the TFIA notes the benefit of these provisions, the Committee acknowledges the TFIA's request that

26 Council of Textiles and Fashion Industries of Australia Limited (TFIA), *Submission*, p. 3.

27 TFIA, *Submission*, p. 3.

28 TFIA, *Submission*, p. 3.

29 TFIA, *Submission*, pp. 3-4.

the Committee reviews the need to include a specific chapter on TCF safeguards and as to whether the current safeguards text provides sufficient protection for Australian TCF and other manufacturers. Additionally the Committee must assess whether the language covers a sufficiently wide number of actions or activities that enact the safeguard.³⁰

Non-tariff measures

3.31 Under the Agreement, neither country will take measures to restrict bilateral imports or exports, except where permitted by WTO rules or by other provisions in the Agreement. Non-tariff measures in these circumstances must be transparent and must not be aimed at creating unnecessary obstacles to trade.³¹

Technical barriers to trade

3.32 The Committee is aware that, as tariffs are lowered or eliminated, non-tariff measures may continue to be used to frustrate trade. The Technical Barriers to Trade (TBT) Chapter of the Agreement addresses this by affirming the Parties' rights under the WTO TBT Agreement and also includes a commitment to promote the harmonisation of technical regulations.

3.33 The Chapter encourages both Parties to consider recognising the others' technical standards as equivalent to their own where they fulfil the objectives of that Party's own standards. Further, it makes provision for conformity assessment procedures to be made compatible to the greatest extent practicable, and provides for bilateral cooperation on standards issues and establishes contact points for that purpose.³²

Industry outcomes

Horticultural products

3.34 The Committee notes the opinion of Horticulture Australia Limited (HAL) that

On balance the Australia Thailand FTA outcome is viewed as mixed for horticulture. The outcomes provide a basis for the development of horticultural produce trade with Thailand which strengthens over time as the trade is fully liberalised. These

30 TFIA, *Submission*, p. 4.

31 RIS, Annex 2, 'Australian Obligations', p. 6.

32 RIS, Annex 2, 'Australian Obligations', p. 12.

outcomes are superior to the 'pre-FTA' case. Also through these outcomes market access is likely to be achieved sooner than it could be achieved under the Doha Round, where agreement on an approach to market access has been one of the most difficult issues.³³

- 3.35 However, HAL notes that 'the overall balance in horticultural exports is strongly in Thailand's favour'.³⁴

Thai commitments

- 3.36 According to HAL, few horticultural items of significance to the Australian industry achieve immediate free trade upon the Agreement's entry into force. However, within 5 years of entry into force, Thai tariffs will be eliminated on approximately 50 per cent of the value of currently traded fresh produce (A\$ 5.4 million) and 30 per cent of the value of currently traded processed produce (A\$ 1.9 million). Remaining tariffs will be phased to zero by 2010, with the final tariff (on fresh potatoes) eliminated in 2020.³⁵
- 3.37 The Committee notes that HAL believes that these tariff reductions give Australia a competitive advantage over other exporting countries without trade liberalisation agreements with Thailand. However, they do not necessarily offer such advantage in comparison with reductions negotiated by Thailand in agreements with other countries. HAL refers particularly to Thailand's recent agreement with China, under which tariff reductions are 'significantly above' those contained in this Agreement, particularly in some product categories which are significant in terms of both Australian and Chinese exports to Thailand and which have been labelled as sensitive in this Agreement (including mandarins and fresh grapes).³⁶
- 3.38 HAL expressed to the Committee the views of the horticultural industries on these tariff reductions and the safeguard measures in place for Thai sensitive items

several horticultural industries feel that these FTA outcomes could have been improved, particularly major horticultural industries which are prominent in exports into Thailand and are faced with safeguards or TRQ...In the case of four key items namely mandarins, table grapes and prepared/preserved potatoes, these

33 Horticulture Australia Limited (HAL), *Submission*, p. 2.

34 HAL, *Submission*, p. 4.

35 HAL, *Submission*, p. 2.

36 HAL, *Submission*, p. 2.

safeguards apply very restrictive volume trigger levels which on low volumes will, by reversing the tariff reduction, negate any reduction in tariff for a particular calendar year. In the case of fresh potatoes a restrictive TRQ applies.³⁷

- 3.39 However, HAL does concede that the outcome on horticultural imports, although disappointing, is understandable, given that Thai tariff rates on many agrifoods currently range from 30 to 50 per cent, whereas Australian tariffs are currently either zero or five per cent. HAL states that ‘given this picture, it may not be expected that the Thais would move to a zero regime on the same timetable as Australia’.³⁸ Further, HAL suggests that the outcome reflects possible consideration of Thailand’s status as a developing country.³⁹

Australian commitments

- 3.40 The Committee notes HAL’s view that ‘the tariff outcomes for horticulture access in to each of Thailand and Australia from the other are far from equally balanced’.⁴⁰ Whereas Thai tariffs remain in some product categories until 2020, Australian tariffs will be immediately eliminated upon entry into force of the Agreement.⁴¹
- 3.41 According to HAL, this will cause detriment to certain Australian horticultural industries, which are expected to experience a downside from the loss of the 5 per cent import tariff.⁴²

Special safeguard measures

- 3.42 The Agreement provides for the introduction of special safeguard measures to be imposed where the volume of imports for a sensitive good exceeds the determined trigger. Under these provisions, the importing country may then increase the duty rate to the current most favoured nation (MFN) rate or base rate (whichever is lower) for the remainder of the calendar year.⁴³
- 3.43 Thailand has specified six sensitive items (mandarins, table grapes, both frozen or fresh prepared or preserved potatoes and fresh potatoes). Tariffs on four of these items are to be reduced over 10 years. Fresh and seed

37 HAL, *Submission*, p. 2.

38 HAL, *Submission*, p. 5.

39 HAL, *Submission*, p. 5.

40 HAL, *Submission*, p. 5.

41 HAL, *Submission*, p. 5.

42 HAL, *Submission*, p. 2.

43 HAL, *Submission*, pp. 5-6.

potatoes will face tariff restriction quotas until 2020.⁴⁴ Special safeguard measures will apply to these sensitive items.

- 3.44 Australian sensitive items are pineapples (prepared or preserved, either canned or not canned) and pineapple juice (unfermented and not containing added spirit). Tariffs on these items are reduced immediately upon the Agreement's entry into force, although Australia will be able to access the special safeguards until the end of 2008. In the event of a trigger, Australia may reinstate MFN tariff rate of 5 per cent.⁴⁵

Dairy

- 3.45 For dairy products and margarine, current Thai tariffs range from five to 216 per cent. There are also very strict tariffs on milk powder. Dairy is a significant export product for Australia, with total exports of \$1.9 billion in 2003, \$64 million of this going to Thailand.⁴⁶

- 3.46 The RIS states that

On the basis of Australian production capacity and the competitive advantage the FTA will provide to Australia in the Thai market, exports to Thailand of ... certain dairy products (including casein, lactose and infant formula) would appear to have the potential to expand from entry into force of the FTA. In the medium term, tariffs subject to phasing arrangements will fall to an extent which will give Australian exporters significantly enhanced opportunities.⁴⁷

- 3.47 The Committee notes the dairy industry's support for the Agreement. As outlined in a submission from the Australian Dairy Industry Council, the Agreement

provides immediate free trade from the day of entry into force for a number of valuable dairy export tariff lines—especially highly processed items such as milk protein concentrates, casein, lactose and infant formula. It also provides up-front down payments for all other dairy items and ultimate free trade in all dairy products.⁴⁸

- 3.48 However, the industry expressed some disappointment over the time-frame for liberalisation of items such as cheese and skim milk powder. Given that such items are sensitive to Thailand, tariffs will be reduced, but

44 HAL, *Submission*, p. 6.

45 HAL, *Submission*, p. 7.

46 RIS, p. 6.

47 RIS, pp. 6-7.

48 Australian Dairy Industry Council, *Submission*, p. 1.

not completely eliminated until 2025 in the case of skim milk powder.⁴⁹ The Committee is disappointed that whilst Thailand had agreed in Bogor in 1994 to reduce tariffs for some dairy items by 2020 yet the Agreement states that the tariffs will not be eliminated until 2025.

- 3.49 Of particular concern to the dairy industry is the potential for Thailand to utilise the Agreement's safeguard provisions in a manner detrimental to the Australian industry

We are concerned that the methods the Thais choose to trigger special safeguards (on such items as cheese and butter) and the way they manage the quotas (on skim milk powder and liquid milk and cream) will be crucial in determining the real value of the trade agreement to the Australian dairy industry. In this regard, we will be working closely with the Australian Government in the coming months to ensure that appropriate measures are put in place to safe guard our rights in these areas.⁵⁰

- 3.50 The Committee notes, however, that on balance the dairy industry supports the Agreement, stating that

Notwithstanding our medium term concerns, the Agreement will provide us with an important competitive advantage in this growing dairy market. We strongly endorse the proposal for the Australian Government to ratify this treaty.⁵¹

Manufacturing

- 3.51 Thai tariffs on manufactures currently range to 20 per cent for metals, and up to 30 per cent for other manufactures.⁵² Under the Agreement, Thailand will reduce these tariffs, and will achieve complete elimination by 2010.⁵³

- 3.52 According to the RIS, lower prices as a result of tariff reductions will allow Australian exporters to become more competitive in the Thai market. In addition, the lowering of Australian tariffs will increase competition for Australian manufacturers, but will also allow for more efficient production for those firms using Thai inputs.⁵⁴ However, the RIS notes that, according to economic modelling undertaken by the Centre for International Economics (CIE), the manufacturing sector in Australia will

49 Australian Dairy Industry Council, *Submission*, p. 1.

50 Australian Dairy Industry Council, *Submission*, p. 1.

51 Australian Dairy Industry Council, *Submission*, p. 1.

52 RIS, p. 1.

53 RIS, pp. 7-8.

54 RIS, p. 8.

enjoy the largest relative increase in production, amounting to an additional \$US 78 million in 2025 for durable goods, and \$US 127 for non-durable goods.⁵⁵

3.53 The RIS acknowledges that as Thailand has competitive strengths in the automotive and TCF industries, the Agreement is likely to impact upon Australian industry, particularly in Victoria and South Australia where there are large auto and TCF industries. These industries will be discussed in detail below.

3.54 The Committee notes the statement in the RIS that

Australian manufacturers in all states of a wide range of products...have expressed interest in exporting to Thailand for the first time under the FTA. The expected benefits do not necessarily show up in economic modelling, which focuses on the overall impact on the Australian economy, but the level of interest shown in the FTA since the conclusion of negotiation suggests that a wide range of exporters expect to be able to take significant advantage of the new opportunities the FTA will provide, in many cases in relation to products where Thai tariffs have been so high that no exports have taken place at all.⁵⁶

3.55 Under the Agreement, Australia has committed to eliminate all tariffs by 2010.⁵⁷ Specific arrangements for the automotive, TCF and plastics and chemicals industries will be discussed below.

3.56 The ACTU is critical of the fact that the CIE modelling does not estimate the impact of the Agreement on particular manufacturing subsectors.⁵⁸ Further, in regard to the tariff reductions, the ACTU states that

given the difficulties experienced by manufacturing in Australia and the importance of retaining policy options for a strategy to maintain and expand a high value added domestic manufacturing sector, the Commonwealth should not negotiate new free trade agreements that lock-in phase-downs of tariffs to zero. In the absence of such agreements, the Commonwealth is able to delay or amend, if appropriate for the purposes of domestic manufacturing policy, the scheduled reduction in automotive and TCF tariffs.⁵⁹

55 RIS, p. 8.

56 RIS, p. 10.

57 RIS, Annex 2, 'Australian Obligations, p. 20.

58 ACTU, *Submission*, p. 2.

59 ACTU, *Submission*, p. 3.

3.57 Similarly, the Australian Manufacturing Workers' Union (AMWU) expressed concerns to the Committee that the tariff reductions would be to the detriment of the Australian industry. Commenting on Australia's current trade deficit in manufactured products, the AMWU noted that

While Thailand has a large global trade surplus in elaborately transformed manufactures, Australia has a global trade deficit in elaborately transformed manufactures.

Given the extent and timing of tariff reductions in the ATFTA⁶⁰, it would appear that the agreement is likely to exacerbate the trend of Australia importing elaborately transformed manufactures and exporting primary products. The AMWU believes therefore that the ATFTA will contribute to the deindustrialisation or 'pastoralisation' of the Australian economy.⁶¹

3.58 Several submissions to the Committee expressed concern that the Agreement would affect employment, particularly among regional workers in the TCF and automotive industries.⁶² Dr Bill Lloyd-Smith stated that

An issue of major concern is the huge difference in wage structures between Australia and Thailand. It should be obvious to everyone that many Australian companies have moved offshore in order to take advantage of substantially lower wage costs in developing countries. It should be obvious to you that many Australians employed in local industries will probably lose their jobs.⁶³

Automotive industry

Outcomes

3.59 Australia's obligations under the Agreement include the immediate elimination of current tariffs on all passenger motor vehicles (PMVs), off-road vehicles, goods vehicles and other commercial vehicles of Thai origin. Current tariffs are 15 per cent for passenger vehicles (legislated to fall to 10 per cent on 1 January 2005) and 5 per cent for other vehicles.

3.60 The Committee notes that Thailand has made substantial commitments in regards to tariff eliminations on automotive vehicles and products. Upon entry into force of the Agreement, Thailand will eliminate its tariffs on

60 TAFTA is referred to as ATFTA in some submissions.

61 Australian Manufacturing Workers' Union (AMWU), *Submission*, p. 7.

62 Australian Fair Trade and Investment Network (AFTINET), *Submission*, p. 5; Dr Bill Lloyd-Smith, *Submission*, pp. 2-3.

63 Dr Bill Lloyd-Smith, *Submission*, p. 2.

large PMVs, which are currently at 80 per cent. The tariffs on other PMVs will be reduced from 80 per cent to 30 per cent, and will then be phased down to zero by 2010.⁶⁴

Economic benefits

3.61 The benefits to be gained from tariff reductions under the Agreement were highlighted for the Committee by Holden Australia's description of current tariff structures

Australia has been operating within a tariff structure far lower than many of its neighbours for some time, and in Holden's view, the agreement offers significant benefits for Australian automotive exporters. Thailand has maintained a relatively prohibitive structure of automotive tariffs of up to 80 per cent for vehicles and 42 per cent for components. This compares with Australia's 15 per cent tariff, which will reduce to 10 per cent in 2005. The reduction of tariffs for exports to Thailand affords opportunities for Holden and other Australian carmakers and component manufacturers to build a critical mass of production, which will be important in ensuring the ongoing viability of the industry in Australia.⁶⁵

3.62 The Committee notes analysis in the RIS suggesting that differences in comparative advantage between the Australian and Thai industries

mean that the FTA can be expected to lead to new bilateral trade flows, but in the short term this will probably represent a modest increase only in Australia's total imports.⁶⁶

The RIS attributes this outcome to the following factors

- import penetration of the Australian automobile market is already relatively high at 70 per cent (60 per cent for passenger motor vehicles)
- Thailand exports small and medium PMVs and light trucks to Australia and does not compete directly in the large-car market which is still dominated by Australian-made cars
- any cost to the Australian automotive and auto parts industry would be offset by the benefits from increased exports to Thailand following the elimination of the high tariffs (up to 80 per cent). The Thai market for large PMVs is currently quite small (about 5000 units per year), but could be expected to expand under an FTA in response to more competitive pricing. While it is possible that automotive manufacturers in Australia

64 RIS, Annex 2, 'Australian Obligations', p. 9.

65 Holden Australia, *Submission 12*, p. 1.

66 RIS, Annex 2, 'Australian Obligations', p. 9.

will source some of their parts from Thailand, the FTA also creates scope for Australian automotive parts manufacturers to increase sales by taking a larger share of the Thai automotive components market.⁶⁷

3.63 However, the Committee notes the RIS' conclusion that 'the automotive industry expects exports benefiting from the FTA to be modest initially, but to rise gradually'.⁶⁸

3.64 The Ford Motor Company of Australia advised the Committee of the benefits of the Agreement for vehicle sales

Australia's new bi-lateral trade agreements have the potential to boost the Australian economy. Australia has enjoyed two successive years of record new vehicle sales with these high sales levels carrying over into 2004. A stronger and more competitive economy has the potential to boost these new vehicle sales even further.⁶⁹

3.65 Ford Motor Company notes that there is a significant trade disparity between Australia and Thailand, that

is well illustrated by automotive export/import statistics between Australia and Thailand. In 2003, for example, automotive exports from Australia to Thailand totalled \$30.75 million. However, automotive imports from Thailand were worth more than \$1.06 billion. This significant import trade largely consisted of light pick-up trucks. The significance of this trade is such that in recent years Thailand has overtaken more established automotive supply source countries like South Korea to become Australia's fourth largest motor vehicle and parts supplier.⁷⁰

3.66 The Federal Chamber of Automotive Industries (FCAI) also commented on this disparity, stating that whilst imports from Thailand had risen

the overall level of Australian automotive exports is negligible and, if anything, has declined in recent years. Until 2001, Australia was exporting a modest quantity of medium-sized cars in 'completely knocked down' (CKD) form. However, in the past couple of years, this trade has been supplanted by an expansion in the capacity of Thai domestic industry.⁷¹

67 RIS, Annex 2, 'Australian Obligations', pp. 9-10.

68 RIS, Annex 2, 'Australian Obligations', p. 10.

69 Ford Motor Company of Australia Limited, *Submission*, p. 2.

70 Ford Motor Company of Australia Limited, *Submission*, p. 1.

71 Federal Chamber of Automotive Industries (FCAI), *Submission*, p. 2.

3.67 Ford noted the potential for the Agreement to address the current trade deficit

Ford Australia believes the proposed free trade agreement will potentially provide an opportunity for the Australian automotive industry to overcome, at least in part, the present 34:1 trade deficit it has with Thailand...Where tariffs are not immediately removed, the agreement importantly provides a timetable for their removal. In doing so, the free trade agreement provides for total free automotive trade between the two countries by 2010.⁷²

3.68 Holden Australia also made a submission in support of the Agreement, noting its already substantial trade with Thailand and stating that

In Holden's view, the most significant outcome of the agreement has been the immediate elimination of Thailand's 80% tariff on large passenger motor vehicles and we commend the Government's efforts to achieve this end result. As mentioned, Holden has commenced a low volume export program to Thailand and we expect the TAFTA will enable that program to become much larger in future years. In addition, the reduction and removal of Australia's import duties on automotive goods will also provide cost savings to Holden for the vehicles and components that we import from Thailand.⁷³

3.69 Mr Peter Sturrock of the FCAI informed the Committee of the extent of benefits to the automotive industry under the Agreement

Whilst it has been frequently observed that the Australian and Thai automotive industries offer a degree of complementarity, it is also clear that this has not been fully reflected in the growth of two-way trade in automotive products. In large part, this can be attributed to the extent of tariff and non-tariff barriers which, until now, Australian exporters have faced in securing access to the Thai market.

The proposed FTA offers Australian exporters significant opportunities for improved access to the Thai market as a result of the reduction and removal of tariffs on automotive components and vehicles.⁷⁴

3.70 Despite these opportunities, the FCAI noted that

72 Ford Motor Company of Australia Limited, *Submission*, p. 1.

73 Holden Australia, *Submission*, p. 2.

74 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, pp. 33-34.

The one major area of disappointment for us relates to the treatment of passenger cars with an engine capacity of less than 3,000 ccs. For these vehicles, the existing tariff of 80 per cent will not be fully eliminated on entry into force. Rather, it will be reduced to 30 per cent initially and then progressively reduced to zero by 2010.⁷⁵

3.71 However, the FCAI assured the Committee of its support for the Agreement

FCAI believes that, on balance, the proposed agreement between Australia and Thailand is consistent with Australia's broad trade policy objectives and does secure reciprocal market access gains for Australian exporters⁷⁶

And

The proposed FTA offers Australian exporters significant opportunities for improved access to the Thai market as a result of the reduction and removal of tariffs on automotive components and vehicles.⁷⁷

3.72 In response to a question from the Committee, Mr Sturrock advised that all four of the vehicle manufacturers in Australia have expressed support for the Agreement, but noted that

it does affect the different companies in differing ways, given their individual business plans. But fundamentally there has been firm support for it since its inception and early discussion, and we have been pleased with the range of discussions we have had with trade officials in its development to this point.⁷⁸

3.73 However, Mr Sturrock noted that

some vehicle importers who do not currently source product from Thailand have expressed reservations about the competitive advantage that some of their competitors may secure as a result of the preferential tariff according to imports from Thailand.⁷⁹

3.74 Ford addressed the effect of increased competition in its submission to the Committee

Ford Australia acknowledges the reductions of tariffs on Thai-sourced vehicles and components imported into Australia under

75 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, p. 34.

76 FCAI, *Submission*, p. 1.

77 FCAI, *Submission*, p. 2.

78 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, p. 36.

79 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, p. 34.

the free trade agreement are likely to result in some additional competitive challenges. However, most of the relevant vehicle tariffs in the case of Thailand are already no more than 5%. Furthermore, Ford Australia has a proven track record of developing award-winning vehicles within a flexible and cost effective manufacturing environment. As such, the company believes it is well-placed to meet new trade challenges while also looking for opportunities that will come from the opening of the Thai market.⁸⁰

- 3.75 The RIS states that, although the Thai market for large passenger vehicles is currently quite small, it is expected to expand under the FTA.⁸¹ Mr Sturrock advised the Committee that

with the Thai economy continuing to grow and improve, we do expect that there will be greater opportunities in that semi-luxury and luxury segment of the market. It is limited, as you said, in volume, but it is attractive to Australian manufacturers because it is a style of vehicle that we build. With the luxury versions of Holden Commodore and Ford Falcon et cetera, we see an opportunity there. There may be other models further down the track, but we see an opportunity to supply the luxury versions ... These are the obvious alternatives to some of the luxury vehicles that are sold in the Thai market. The European brands tend to dominate and be predominantly visible in the luxury segment of the Thai market.⁸²

Complementary automotive industries

- 3.76 The Committee heard that the respective product focus of the Thai and Australian automotive industries is complementary, in that Australia focuses upon medium/large passenger cars, while Thailand concentrates on small passenger cars and pick-up trucks.⁸³

- 3.77 The Committee notes the view of Holden Australia that

In view of the strength in both markets and the opportunities afforded to complement the products within these markets,

80 Ford Motor Company of Australia Limited, *Submission*, p. 2.

81 RIS, p. 10.

82 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, pp. 38-39.

83 Ford Motor Company of Australia Limited, *Submission*, p. 2; Holden Australia, *Submission*, p. 2.

Holden anticipates that the free trade agreement could increase two-way trade between our countries.⁸⁴

Non-tariff barriers to trade

3.78 Although the Agreement offers substantial benefits to the Australian automotive industry through the reduction of tariffs, the Committee acknowledges the importance of the removal of non-tariff barriers to trade, and notes the Ford Motor Company's statement that

It is also important the free trade agreement can provide the basis for an on-going focus on relevant non-tariff barriers and a clear administration of rules of origin.⁸⁵

3.79 Mr Sturrock advised the Committee that

while the concessions achieved in the agreement significantly reduce the existing tariff barriers faced by Australian automotive exporters, other obstacles do remain. In particular, Thailand continues to levy significant domestic excise taxes on vehicles at varying rates based on engine capacity. Given that most Australian cars are in the upper medium and large size range, future exports of such vehicles to Thailand will continue to incur excise at rates of 41 to 48 per cent. By comparison, excise on passenger cars with smaller engine capacities and light commercial vehicles is levied at lower rates—35 per cent and three to 18 per cent respectively.⁸⁶

Parts and components

3.80 Australia will reduce its tariffs on 98 per cent of the 146 tariff items covering automotive parts and components that are currently at 10 per cent or 15 per cent. These will be reduced to five per cent upon entry into force of the Agreement, and will then be eliminated in 2010. Both Thailand and Australia will eliminate tariffs on the remaining two per cent of these items upon entry into force.⁸⁷

3.81 All Australian tariffs on automotive parts and components that are currently at five per cent or below will be eliminated upon the Agreement's entry into force.⁸⁸

3.82 The AMWU has expressed concern about the impact of the ATFTA on the auto components industry in Australia, stating that

84 Holden Australia, *Submission*, p. 2.

85 Ford Motor Company of Australia Limited, *Submission*, p. 1.

86 Mr Peter Sturrock, *Transcript of Evidence*, 26 July 2004, p. 34.

87 RIS, p. 9.

88 RIS, Annex 2, 'Australian Obligations', p. 20.

The windscreen manufacturer Pilkington, has already announced the reduction of its workforce because of the loss of a 70 year old contract with Holden. The contract was lost due to increased import competition arising out of the Australia - Thailand free trade agreement.⁸⁹

- 3.83 The RIS acknowledges that while no parts manufacturers have opposed the elimination of tariffs by 2010, some have expressed mixed views on the benefits of the Agreement.⁹⁰ It further states that the concerns of parts manufacturers have been addressed through phase-in periods for tariff reductions on sensitive items.⁹¹
- 3.84 The Committee did not receive comment from any parts manufacturers nor from the Federation of Automotive Parts Manufacturers.

Textiles, clothing, footwear

- 3.85 The Committee is aware that, as stated in the RIS, the TCF industries are among Australia's most tariff-sensitive sectors. In reflection of this, TCF tariffs levels are currently up to 25 per cent (due to reduce to a maximum of 17.5 per cent in 2005). Under the Agreement, Australia will phase its tariffs on most TCF products to zero by 2010, with an initial tariff preference margin of five per cent. For 239 product lines with current tariffs of 25 per cent, the tariff will be phased to zero in 2015.⁹²
- 3.86 The RIS states that
- In 2002, Thailand accounted for only 1.3 per cent of all Australia's clothing imports and 2.8 per cent of its textile imports. The relatively small tariff preference Australia has provided to Thailand would appear to make it unlikely that increased imports from Thailand would have any impact on domestic TCF products. The most likely scenario is that any increase in Thai exports would displace imports from other sources, including China. In addition, the FTA incorporates safeguards provisions to protect against damaging surges in imports resulting from the reduction or elimination of tariffs.⁹³
- 3.87 The Committee notes the comments of the Victorian Government that the Agreement will place pressure on the TCF industry, and that despite the phase-down of tariff reductions, the industry will 'nevertheless face

89 AMWU, *Submission*, p. 7.

90 RIS, p. 10.

91 RIS, p. 15.

92 RIS, p. 8.

93 RIS, pp. 8-9.

increased import competition from Thailand'.⁹⁴ The submission comments that this Agreement is one of a number of factors that, according to the Victorian Government, will negatively impact the TCF industry in Victoria.⁹⁵ The Government states that economic modelling estimates that these factors will affect employment in the TCF industry, a situation that would be exacerbated by the Agreement

The reduction and eventual elimination of TCF tariffs under the ATFTA could increase both the size and immediacy of job losses. On these grounds, it is critical that the Commonwealth Government put in place appropriate adjustment mechanisms to assist employees displaced by the further restructuring of the TCF industry.⁹⁶

3.88 However, the RIS states that although some industry members have claimed that the Agreement will impact production and result in job losses, the tariff commitments 'largely reflect those proposed by Australia's TCF sector during the negotiations'.⁹⁷

3.89 The TFIA provided comment to the Committee on the Agreement

The TFIA believes the agreement will have some benefit to the industry but the true extent will depend upon the pace of Thailand removing non-tariff barriers as well as tariffs.⁹⁸

3.90 The Agreement's Safeguards and Rules of Origin (ROOs) provisions as they apply to the TCF industry are discussed in those sections of this Chapter.

Plastics and chemicals

3.91 Australia will maintain current tariffs of five per cent on 71 plastics and chemical items until 2008, when these will be eliminated. The 71 items are those identified as sensitive.⁹⁹ Tariffs on other items will be eliminated upon the Agreement's entry into force.¹⁰⁰

3.92 The RIS states that the Plastics and Chemicals Industries Association of Australia expressed concern over tariff reductions throughout the negotiations. According to the RIS, phase-in periods on sensitive items

94 Victorian Government, *Submission*, p. 2.

95 Victorian Government, *Submission*, p. 3.

96 Victorian Government, *Submission*, p. 3.

97 RIS, p. 8.

98 TFIA, *Submission*, p. 1.

99 RIS, p. 10.

100 RIS, p. 10.

were negotiated in order to allow the industry to adjust to increased competition.¹⁰¹

Rules of origin

3.93 Under Article 402 of the Agreement, originating goods of a country are those that are either

- wholly produced in the country
- produced in the country wholly from originating materials, or
- produced in the country wholly or partly from non-originating materials.¹⁰²

3.94 In order for goods containing third country input to qualify as originating goods, the input must have undergone a specified change in tariff classification as a result of production processes occurring in the territory of either party. This approach to the determination of origin is known as 'change in tariff classification' (CTC).¹⁰³ The required change for specific products is set out in Annex 4.1 of the Agreement.

3.95 For certain products (including textiles, clothing and footwear and machinery), the good being exported must meet a further test of origin: it must contain a defined level of local content as a proportion of the overall value of the good.¹⁰⁴

3.96 The FCAI outlined the operation of the ROOs

In most instances there is a requirement that items have undergone a change in tariff classification from one heading, or related group of tariff headings, to a different heading. For some items, the agreement also provides that origin may be conferred if a minimum level of 'regional value content' (RVC) calculated on the basis of the 'transaction' (or adjusted 'FOB') value of the final product, using a build-down method (i.e. the value of non-originating materials is subtracted from the adjusted FOB value of the item).¹⁰⁵

3.97 According to Dr Simon Twisk from DFAT, the regional value content rule

101 RIS, p. 15.

102 RIS, Annex 2, 'Australian Obligations', p. 7.

103 RIS, Annex 2, 'Australian Obligations', p. 7.

104 RIS, Annex 2, 'Australian Obligations', p. 8.

105 FCAI, *Submission*, p. 4.

Involves 55 per cent regional value content requirement with, however, up to 25 per cent of that being able to be based on materials obtained from other developing countries. This was in reflection of Thailand's position that they would be unable to source materials domestically or from Australia in order to meet a higher content requirement.¹⁰⁶

- 3.98 The ROOs for the Agreement also include provisions for supplementary issues to be considered in determining the origin of a good.¹⁰⁷
- 3.99 Goods originating from one Party will not qualify for a tariff preference under the ROOs if they undergo further production in a third country prior to importation into the other Party.¹⁰⁸
- 3.100 The ROOs provisions of the Agreement are largely similar to those adopted in the AUSFTA, but differ from those of the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA).
- 3.101 The RIS states that the adoption of rules largely identical to those in the AUSFTA address industry concerns over the variation of ROOs systems in preferential trade agreements. The Committee agrees that limiting the number of systems applicable under various agreements eases the burden of compliance on industry.¹⁰⁹
- 3.102 The Committee notes that
- The TFIA's largest concern remains the potential for trans-shipment to occur through the agreement. While the relatively small tariff preference provided to Thai products may not see a large increase in Thai exports, the TFIA strongly pushed for adequate Rules of Origin (RoO) and safeguards to be included in the agreement. Such inclusions would ensure that trans-shipment remained difficult. The TFIA has some doubts over the extent to which the RoO and safeguards will do this.¹¹⁰
- 3.103 In regard to the issue of trans-shipment, the RIS states that
- It was not possible to agree with Thailand during the negotiations on a level of local content that Australian industry considered adequate to prevent trans-shipment of goods through Thailand from other countries. Against this background, the Government decided to adopt the approach that would be used in the

106 Dr Simon Twisk, *Transcript of Evidence*, 26 July 2004, p. 30.

107 RIS, Annex 2, 'Australian Obligations', p. 8.

108 RIS, Annex 2, 'Australian Obligations', p. 8.

109 RIS, p. 11.

110 TFIA, *Submission*, pp. 1-2.

Australia-United States Free Trade Agreement... This approach has the benefit of being closely linked to production processes, making it easier for exporters in both countries to understand and apply.¹¹¹

3.104 As noted to the Committee by Mr John Arndell from the Australian Customs Service

There is also the requirement that companies that are going to be trading with each other have to be registered. Exporters have to go through a registration process. They also have to go through a certificate of origin process to ensure that the goods qualify, that they meet the applicable rule of origin and therefore qualify for preference into the other country as well.¹¹²

3.105 The Committee notes comments by the AMWU that the ROOs are 'insufficient to ensure that only products which are substantially produced in Australia or Thailand obtain concessional treatment under the agreement'.¹¹³ The AMWU also stated that there is a degree of arbitrariness in the tariff treatment of products under the change in tariff classification approach¹¹⁴

Merely because a good may have changed (or may have not changed) tariff classification in a country does not mean that a product was (or was not) substantially produced in that country. The AMWU is not satisfied that the additional requirements attached to some products will be sufficient to remedy this problem. Regional content value requirements of between 40 and 45% would appear to be inadequate. Why should a product [which] undergoes 60% of its manufacture in another country be considered to be a product manufactured in Thailand?¹¹⁵

Industry-specific application of the ROOs

Textiles, clothing and footwear industry

3.106 The Committee notes that under TAFTA, the ROO applying to textiles significantly differs from its AUSFTA equivalent. In contrast to AUSFTA's 'yarn forward' rule, TAFTA uses a simpler CTC requirement with an RVC of 55 per cent. At least 30 per cent of the RVC must be sourced from either

111 RIS, p. 11.

112 Mr John Arndell, *Transcript of Evidence*, 26 July 2004, p. 30.

113 AMWU, *Submission*, p. 12.

114 AMWU, *Submission*, p. 12.

115 AMWU, *Submission*, p. 12.

Thailand or Australia, and the remaining 25 per cent may be sourced from a developing country, but must still undergo the same change in classification required for non-originating inputs.¹¹⁶

3.107 In explaining the operation of the TCF ROOs, and how they differed from those in the AUSFTA, Dr Twisk stated

For textiles and clothing in the US FTA there is what is called a yarn or fibre forward rule which effectively requires the materials right from the earliest stage of production to have been obtained from within the parties to that FTA. It would be pretty much impossible to meet a rule like that between, say, Australia and Thailand, given the reliance on importing materials that the industries in both countries would have. A rule like that would not allow trade to occur under the FTA. In fact, that type of rule was not one that was, I understand, favoured by the Australian industry in the US context. As I understand it, the product specific rules that we have used for the Thai FTA come from an Australian proposal which was initially prepared in the context of the US FTA through consultations with industry et cetera.¹¹⁷

3.108 However, the TFIA contradicted this statement in its submission, stating that

While the TFIA compromised from its original position on RoO — those applying under the Australia-New Zealand Closer Economic Relations Trade Agreement — to a CTC measure with a RVC of 55%, its at no time proposed nor agreed to the addition of developing country content in the origin calculation for Thai TCF products. The TFIA remains disappointed that such a decision was made and as such objects to its inclusion.¹¹⁸

3.109 The Committee notes comments in the RIS that

This ROO offers the Thai textiles and clothing industry the scope to maintain its current sourcing and production practices and to export to Australia under the FTA, which was a high priority for the Thai Government in the negotiations. However, given the size of the tariff preference that Australia has offered to Thailand in this sector under the FTA ... the ROO is unlikely to lead to any noticeable increase in imports in the first five to ten years after implementation.¹¹⁹

116 RIS, p. 12.

117 Dr Simon Twisk, *Transcript of Evidence*, 26 July 2004, p. 30.

118 TFIA, *Submission*, p. 2.

119 RIS, p. 12.

- 3.110 However, in its submission to the Committee, the TFIA expressly disagrees with this statement, commenting that
- for many TCF products the cost structures are such that even a small tariff preference would be enough to see a substantial increase in exports from a country.
- More importantly the TFIA would also question how much benefit it provides for Thailand as in many cases it will put value add outside of the Thai TCF industry. The Australia-Thailand Free Trade Agreement is meant to aid Australia and Thailand yet through these RoO many other countries will receive additional benefit from the agreement.¹²⁰
- 3.111 The TFIA argues that the rules effectively benefit countries that Australia does not have a bilateral trade agreement with vis-à-vis those with which it does.¹²¹
- 3.112 Further, the Committee notes the submission of the TFIA that
- This rule effectively allows TCF products from Thailand to enter under the preferential tariff rate where they have only 30% Thai content and 70% non-Thai or non-Australian content. The TFIA believes that this exposes the agreement to possible trans-shipment and may lead to increased imports.¹²²

Auto industry

- 3.113 For the automotive sector, the ROO requires the product to have undergone a change in tariff classification, and to have met the specified RVC, which varies between products. The specified RVC must be made entirely of Thai product.¹²³
- 3.114 Mr McKellar presented to the Committee the views of the automotive industry on the TAFTA ROOs
- Under this agreement, for most automotive products the minimum regional value content threshold is set at 40 per cent. This is a requirement that all current Australian manufactured vehicles would have very little difficulty in complying with. From that point of view, I think Australian industry is quite comfortable that there is no difficulty in meeting the threshold set in the rules of origin under this agreement...If anything, I think Australian

120 TFIA, *Submission*, p. 2.

121 TFIA, *Submission*, p. 2.

122 TFIA, *Submission*, p. 2.

123 RIS, p. 12.

industry from a defensive standpoint would have been more comfortable with a slightly higher figure.¹²⁴

3.115 The Committee also notes the comments of Holden Australia

As mentioned, the negotiations with Thailand have resulted in the adoption of a price-based methodology for determining regional value content. While Holden has been supportive of the alternative cost-based methodology due to the greater transparency in outcomes, we appreciate that for developing countries this methodology may be difficult to adopt.¹²⁵

Sanitary and Phytosanitary (SPS) measures

3.116 The Agreement reaffirms that decisions affecting quarantine and food safety will continue to be made on the basis of existing procedures, including scientific assessment of risk. The Parties' existing rights and obligations under the WTO Agreement on Sanitary and Phytosanitary Measures are affirmed.

3.117 DFAT's RIS Annex 2 states that

nothing in the Chapter undermines the right of either country to determine the level of protection it considers appropriate. The two countries have agreed to enhance consultation and cooperation on SPS issues to improve understanding of each country's measures and regulatory systems, and to work together to improve efficiencies in quarantine operations and associated regulatory processes. They will also cooperate internationally in these areas. An Expert Group will be established for this purpose, and will supplement the existing Joint Working Group on Agriculture.¹²⁶

3.118 The Australian Chicken Meat Federation (ACMF) has expressed a number of concerns to the Committee regarding the operation of the SPS Chapter. The ACMF outlined for the Committee the threat that imported chicken meat product from Thailand presents to the Australian industry

Thailand has numerous exotic strains of avian diseases — most notably at the present time highly pathogenic Avian Influenza (Asian Bird Flu) — from which Australia is free. More recently

124 Mr Andrew McKellar, *Transcript of Evidence*, 26 July 2004, p. 35.

125 Holden Australia Ltd, *Submission*, p. 3.

126 RIS, Annex 2, 'Australian Obligations', p. 11.

there has been an outbreak of virulent Newcastle disease in Thailand.

Relaxation of Australia's strict, quarantine protection would result in a flood of low cost subsidised chicken meat imports from the world's major exporters, including Thailand, which could not only devastate the Australian industry and its environment with exotic diseases, but also result in huge economic costs.¹²⁷

- 3.119 Of particular concern to the ACMF is the possibility that because of the unique WTO "MFN" principles governing SPS and quarantine, Chapter 6 of the TAFTA will have to be extended to all countries ...Chapter 6 when extended multilaterally will significantly change Australia's quarantine regime and the justifiable biosecurity protection on which Australian industries have relied.¹²⁸

3.120 Further

ACMF is concerned that Chapter 6 of the TAFTA establishes new mechanisms and consultation arrangements on quarantine, including the establishment of an Expert Group on SPS supplementing a Joint Working Group on Agriculture, which will allow Thailand - through the back door - to continue its campaign to break down Australia's quarantine regime on chicken meat, and by-pass Australia's existing IRA processes.¹²⁹

3.121 ACMF also notes that

Australia provides in the TAFTA a significant new relaxation in its control over quarantine by agreeing not to ban trade on the breach of SPS and food standards by another country but only to investigate and remedy the particular shipment in question while trade continues. This appears to be a fundamental change to Australia's existing strict quarantine control.¹³⁰

3.122 Further concerns expressed by the ACMF include

- that there is no obligation for industry consultation on the work program of the Expert Group¹³¹

127 Australian Chicken Meat Federation (ACMF), *Submission*, p. 1.

128 ACMF, *Submission*, p. 2.

129 ACMF, *Submission*, p. 2.

130 ACMF, *Submission*, pp. 2-3.

131 ACMF, *Submission*, p. 3.

- that the SPS Chapter does not exclude retrospective application to Australia's existing quarantine Protocols, and IRAs already underway¹³²

3.123 The Committee acknowledges the concerns of the ACMF, but is satisfied by DFAT's statement that

there is nothing in this agreement that would compromise Australia's SPS quarantine regime. As I said in my opening statement, the chapter in the agreement on sanitary and phytosanitary measures essentially reiterates both countries' commitments under the WTO agreement. It does establish an officials-level committee to regularise the contacts between the relevant authorities in both countries on these issues. But is clear from the chapter and from the terms of reference for that committee that the science based approach to quarantine in both countries remains the overall guiding principle.

Therefore, we continue to maintain the position that there is no way in an FTA that countries can somehow or other create a preferential scientific track for FTA partners. It is simply not possible and it is inconsistent with the WTO agreement.¹³³

Trade in services

3.124 The Committee notes that the Services provisions of the Agreement take a positive-list approach, similar to that in the General Agreement on Trade in Services (GATS), whereby those services to which the Services Chapter applies are listed definitively. This differs to the negative-list approach of the AUSFTA.

3.125 The Services provisions do not apply to subsidies or grants provided for the supply or consumption of a service or in relation to an investment, or to services supplied in the exercise of government authority, or to government procurement or measures affecting individuals of one Party seeking access to the other for employment purposes. The right of Parties to regulate services in their territories is preserved under the Agreement.¹³⁴

3.126 The Services Chapter applies to all modes for the supply of services and is based on the GATS. The Chapter incorporates those GATS provisions

132 ACMF, *Submission*, p. 3

133 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 28.

134 RIS, Annex 2, 'Australian Obligations', pp. 12-13.

relating to domestic regulation, monopoly service providers, financial services, air services and telecommunications. It also provides for the cooperation of relevant bodies in each country in developing arrangements for the recognition of professional or educational qualifications granted in the other country. The Chapter provides for enhanced cooperation in a range of areas, in addition to specific commitments for liberalisation relating to market access and national treatment. Where a country extends better access to a third country, the other country may request that such treatment also be extended to it, but there is no obligation to do so under the Agreement.¹³⁵

3.127 The Committee notes that the Australian Fair Trade and Investment Network (AFTINET) and the ACTU both supported the 'positive list' approach of the Services provisions.¹³⁶ However, AFTINET stated that

TAFTA contains the same flawed definition of "public services" used in the GATS agreement...Article 803 clause 2 of TAFTA provides that the services chapter shall not apply to 'a service supplied in the exercise of governmental authority... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'...Ambiguity arises about which services are covered by this exemption because in Australia, as in many other countries, public and private services are provided side by side. This includes education, health, water, prisons, telecommunications, energy and many more.¹³⁷

3.128 Although acknowledging DFAT assurances that public services will not be caught under this definition, AFTINET asserts that public services should be 'formally and unambiguously exempted from trade agreements, including TAFTA'.¹³⁸

3.129 The ACTU submission alleges that, according to 'officials of DFAT', the consistency with GATS commitments is 'Thailand's policy, and falls short of Australia's ambitions for the services sector and the Services Chapter of the agreement'.¹³⁹

3.130 Further, the ACTU expressed concern that

Australia's services sector commitments may be altered as a result of the second round of negotiations prescribed by Articles 812.1.

135 RIS, Annex 2, 'Australian Obligations', p. 13.

136 AFTINET, *Submission*, p. 6; ACTU, *Submission*, p. 1.

137 AFTINET, *Submission*, p. 7.

138 AFTINET, *Submission*, p. 7.

139 ACTU, *Submission*, p. 1.

The ACTU cannot be comfortable with the ATFTA outcome on services until this second stage process is completed.¹⁴⁰

3.131 The Committee inquired into the reason for the statement in the NIA that the TAFTA includes 'binding commitments that go beyond Australia's existing WTO obligations and limit the Government's flexibility in adopting new regulations in some areas in the future.'¹⁴¹ Mr Brown responded that there are

some differences between the commitments we have made to Thailand and those that are currently bound by Australia in the WTO as part of the Uruguay Round package. The approach we took with Thailand was to essentially bind the services offer that has been tabled as part of the current Doha Round of negotiations ... So what this sentence is saying is that the commitments we have made as part of the TAFTA do go beyond our Uruguay Round commitments but, very importantly, they are essentially identical to those commitments that we have tabled as a conditional offer as part of the Doha Round.¹⁴²

3.132 Further to this, he stated that the commitments in the Agreement, although essentially the same as those made in the Doha Round

do exceed in a number of respects the commitments made 10 years ago in the Uruguay Round. The difference between the two is simply that more sectors have been added ... Very importantly, the commitment that we have made to Thailand is, again, a so-called standstill commitment. It does not represent any undertakings by Australia to liberalise or to roll back existing levels of regulation. The differences are essentially that, as part of our final range of commitments to Thailand, some sectors and subsectors have been added that were not included in our Uruguay Round commitments on services.¹⁴³

3.133 Mr Brown highlighted particularly

the commitments we have made in relation to Thai massage services and Thai chef cooking services, which were particular issues of interest to the Thai government and which do not form part of our multilateral commitments at the moment.¹⁴⁴

140 ACTU, *Submission*, p. 1.

141 NIA, para. 14.

142 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 27.

143 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 31.

144 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 27.

Investment

- 3.134 The Committee notes that the Investment Chapter includes commitments to liberalise investment in non-services sectors, but that these commitments do not apply to subsidies or grants or to government procurement.¹⁴⁵
- 3.135 The Chapter includes provisions concerning the national treatment of investors of the other Party (with exceptions) and the protection of investments, including an agreement not to expropriate investments made by investors of the other Party except for a public purpose, on a non-discriminatory basis, and with compensation. Investors may transfer funds freely, except where the other Party is facing difficulties in balance of payments or external finances.¹⁴⁶

Investment dispute resolution

- 3.136 The Investment Chapter of the Agreement provides for a dispute resolution process for disputes arising under the Chapter. These provisions allow an investor of one country to directly challenge the other country in either the other country's courts or in an international arbitral tribunal with the power to make binding decisions. The RIS states that this provision is 'designed to give additional protection to Australian investors in Thailand.'¹⁴⁷
- 3.137 The Committee notes that this dispute settlement arrangement differs from that of the AUSFTA, which allows investors of one country to challenge the other country in that country's courts, but not in an international arbitral tribunal.
- 3.138 The Committee received submissions expressing concern that the inclusion of an investor-state dispute mechanism
- gives investors significantly increased rights to directly bring challenges to laws and policies of the other country. These disputes are arbitrated by panels of trade law experts, although the questions raised by them frequently impact on public policy questions. The dispute panels are not open to the public, unlike the domestic court processes of a country...AFTINET has consistently opposed this process, as it gives corporations

145 RIS, Annex 2, 'Australian Obligations', p. 13.

146 RIS, Annex 2, 'Australian Obligations', p. 14.

147 RIS, Annex 2, 'Australian Obligations', p. 14.

unreasonable legal powers to challenge government law and policy.¹⁴⁸

3.139 However, in relation to the statement that the dispute panel would not be open to the public, the Committee notes comments by Mr Stephen Bouwhuis of the Attorney-General's Department that the tribunal would make public its decision, including the reasons for that decision, which would be widely available through legal journals and law reports and on the Internet.¹⁴⁹

3.140 Further, the Committee notes comments by Mr Bouwhuis in response to AFTINET's claim that the provisions would give corporations 'unreasonable legal powers to challenge government law and policy'

Investor-state provisions have been common in all of the investment agreements which Australia has entered into...They are also a common feature of the some 2,000 bilateral investment treaties concluded worldwide. They basically provide investors with an alternative to relying on domestic courts where there is some sort of question about the procedures in the domestic courts. Generally, it is common to include these sorts of provisions when a developed state is concluding an agreement with a developing state...To date, there has not been a single action brought against Australia under any of those 19 investment agreements or under the Singapore-Australia free trade agreement, which contains similar provisions. I think the kinds of comments made in some of the submissions are perhaps a little overstated in relation to investor-state provisions generally.¹⁵⁰

3.141 In response to a question from the Committee regarding the decision-making process of an arbitral tribunal set up to review a dispute, Mr Bouwhuis advised the Committee that the tribunal

would look primarily at the provisions of the agreement and any kind of clarifying statements the government has put out with regard to the agreement. They may have regard to general international law and there may be cases which they take into account. That would be fairly common practice...They would look at the body of jurisprudence which may exist in relation to the various articles. I should stress that, primarily, they would be looking at the text of the agreement and the kinds of comments

148 AFTINET, *Submission*, p. 8. Similar concerns were also expressed by the ACTU, *Submission*, p. 2 and the Australian Conservation Foundation (ACF), *Submission*, p. 2.

149 Mr Stephen Bouwhuis, *Transcript of Evidence*, 26 July 2004, p. 26.

150 Mr Stephen Bouwhuis, *Transcript of Evidence*, 26 July 2004, pp. 26-27.

which governments have put out interpreting those various provisions.¹⁵¹

- 3.142 The Committee acknowledges those concerns expressed in submissions, but is assured by the response provided by the Attorney-General's Department.

Temporary movement of business people

- 3.143 The Agreement makes provision for the temporary entry of intra-corporate transferees, contractual service suppliers and business visitors. These provisions permit 90 days for business visitors and longer periods for intra-corporate transferees and contractual service suppliers. Entrance for longer periods is permitted in accordance with the commitments in Annex 8 to the Agreement. Applications for immigration will be processed expeditiously and will be transparent. Thailand will notify Australia of its documentary requirements for application for temporary entry, which are simplified under the Agreement. The Agreement does in no way affect the rights of either country to regulate immigration.¹⁵²

Electronic Commerce

- 3.144 The Electronic Commerce Chapter of the Agreement contains provisions to ensure that trade conducted electronically between Australia and Thailand remains free. The two countries have agreed to work together to promote electronic commerce. Both countries have agreed to maintain the current practice in not imposing customs duties on electronic transmissions between the two countries. The Chapter's provisions detail the aims of the Parties in relation to domestic regulation, electronic authentication, the protection of customers and personal data and paperless trading.¹⁵³

Competition policy

- 3.145 In the Competition Policy Chapter, the Parties affirm that they will facilitate trade and investment through the promotion of competition and

151 Mr Stephen Bouwhuis, *Transcript of Evidence*, 26 July 2004, p. 25.

152 RIS, Annex 2, 'Australian Obligations', pp. 14-15.

153 RIS, Annex 2, 'Australian Obligations', p. 15.

the curtailment of anti-competitive practices. The Parties will cooperate on competition law enforcement.¹⁵⁴

Intellectual Property

3.146 The Agreement's Intellectual Property Chapter aims to increase benefits from trade and investment by protecting and enforcing intellectual property rights. The Parties affirm the provisions of the WTO Agreements on Trade Related Aspects of Intellectual Property (TRIPS) and other relevant multilateral agreements. The Parties agree to take measures to prevent the export of goods that infringe copyright or trade marks, and will cooperate to eliminate trade in goods that infringe intellectual property rights, and to increase awareness of intellectual property rights.¹⁵⁵

Government Procurement

3.147 The Chapter establishes that a bilateral working group of officials are to report within 12 months of the Agreement's entry into force on the scope for commencing negotiations aimed at developing rules, procedures and transparency standards to be applied in the conduct of government procurement. Pending this, the Parties agree to apply transparency, value for money, open and effective competition, fair dealing, accountability and due process and non-discrimination in their procurement procedures. The Chapter also provides for the exchange of information on relevant laws and policies.¹⁵⁶

3.148 The Committee notes the statement by the Queensland Government that no commitments will be made on government procurement except to consider in the first twelve months of the CERFTA whether to enter into negotiations on government procurement. As any agreement of this nature would have significant implications for Queensland I look forward to the opportunity for Queensland to be consulted on, and provide input into, any future discussions regarding government procurement arrangements.¹⁵⁷

154 RIS, Annex 2, 'Australian Obligations', p. 16.

155 RIS, Annex 2, 'Australian Obligations', p. 16.

156 RIS, Annex 2, 'Australian Obligations', p. 17.

157 Queensland Government, *Submission 10.1*, p. 1.

General exceptions

3.149 There are a number of general exceptions that will apply to the Agreement. These relate to the General and Security Exceptions of GATT Articles XX, XXI, and GATS XIV and XIV bis. The Agreement will not require the disclosure of confidential information contrary to the public interest or legitimate commercial interests. The Parties are allowed flexibility under the Agreement in facing serious balance of payments or other external financial difficulties. Neither Party is prevented from taking action to protect investors, depositors, policy holders or others owed a fiduciary duty by a service supplier, nor to ensure the integrity and stability of its financial system. The Agreement only imposes rights or obligations with respect to taxation measures where there is a corresponding right or obligation under the WTO Agreement or in relation to the expropriation of assets. Where there is an inconsistency between the Agreement and the 1989 double tax agreement between the Parties, the tax agreement will prevail.¹⁵⁸

Institutional Provisions

3.150 A Free Trade Agreement Joint Commission (FTA Joint Commission) is established to ensure the proper implementation of the Agreement and to periodically review the economic relationship and partnership between the Parties. The FTA Joint Commission will meet within one year of the Agreement's entry into force and then again each year, or as otherwise agreed. There will also be general review of the operation of the Agreement at ministerial level within five years of entry into force and at least once every subsequent five years.¹⁵⁹

3.151 Mr Brown advised the Committee that these provisions are intended to provide opportunities to revisit and review various parts of the agreement as circumstances change. These reflect the intention of both countries that the agreement should not be static and that modification should be considered where that would be consistent with the aim of the agreement to boost trade and investment linkages.¹⁶⁰

158 RIS, Annex 2, 'Australian Obligations', p. 18.

159 RIS, Annex 2, 'Australian Obligations', p. 19.

160 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 22.

Dispute resolution

- 3.152 Under the Agreement, dispute resolution is to occur through a ‘fair, transparent, timely and effective procedure’.¹⁶¹ Any disputes occurring between the Parties are to be resolved firstly through consultations. Where these fail, disputes may be referred to an arbitral tribunal. The tribunal is to consist of three members, one appointed by each Party, and the third (the Chair) appointed by the two members.¹⁶²
- 3.153 The dispute settlement provisions of the Agreement do not apply to the SPS chapter. Disputes arising over SPS issues will be determined by WTO provisions. The dispute settlement procedure is also not applicable to chapters where the provisions do not confer specific rights.¹⁶³
- 3.154 Dispute resolution provisions concerning disputes that arise under the Investment Chapter of the Agreement have been considered at Paragraph 3.139 of this report.

Environment and labour

- 3.155 The Committee notes that criticisms have been levelled at the TAFTA because, unlike the AUSFTA, it does not contain specific provisions on labour or the environment.¹⁶⁴
- 3.156 The Committee notes the concerns expressed in submissions over Thailand’s labour record, particularly in the TCF industry.¹⁶⁵ In reference to a report prepared by the International Confederation of Free Trade Unions (ICFTU) for the WTO General Council, the ACTU stated that

According to the ICFTU report, Thailand has ratified only four of the eight core ILO [International Labor Organisation] labour conventions. Thailand has not ratified the Conventions on the Right to Organise and Collective Bargaining, Freedom of Association, Discrimination, and Minimum Age. The Report provides examples of problem with Thai labour law, restrictions on the right to organise, conditions in the garment industry, the prevalence of forced labour and child labour, exploitation of

161 RIS, Annex 2, ‘Australian Obligations’, p. 19.

162 RIS, Annex 2, ‘Australian Obligations’, p. 19.

163 RIS, Annex 2, ‘Australian Obligations’, p. 19.

164 ACF, *Submission*, p. 1; AFTINET, *Submission*, p. 8; ACTU, *Submission*, p. 3.

165 ACTU, *Submission*, p. 3; AFTINET, *Submission*, p. 8; AMWU, *Submission*, p. 9; The Uniting Church in Australia, *Submission*, pp. 1-2.

migrant workers, and punitive actions by employers to prevent the establishment of unions in their premises.¹⁶⁶

3.157 It was stated that, given these conditions, the failure to include provisions on labour is ‘particularly damaging’¹⁶⁷ and may ‘further entrench human rights abuses’¹⁶⁸.

3.158 The Australian Conservation Foundation (ACF) states that the omission of labour and environment provisions

underscores the federal government’s continual failure to acknowledge any link between the pursuit of trade liberalisation, on the one hand, and the many issues surrounding sustainable development on the other. This omission is particularly troubling when one considers that the FTA has been negotiated with Thailand, a developing country with numerous environmental and social problems.¹⁶⁹

3.159 In response to a question from the Committee as to why such provisions were not included, Mr Brown stated

this agreement is very much modelled on the Singapore example, which as you can see excludes any provisions chapters on environment and labour. It is Australian government policy in relation to this particular FTA not to include chapters on environment and labour.¹⁷⁰

3.160 The Committee also requested comment on the impact the Agreement would have on labour conditions and environmental degradation in Thailand, given that provisions on these matters were excluded. Mr Brown replied

As to your question on the impact on labour standards and environmental standards and performance in Thailand of the exclusion of those from this agreement, I guess that opens up the question as to how effective trade leverage might be in improving those standards. Frankly, it is not something which I am very well qualified to comment on. Opinions vary. In the United States, for example, there is a view that they can act as a valuable mechanism for improving labour and environmental standards. The Australian government’s position, particularly in relation to

166 ACTU, *Submission*, p. 3.

167 AMWU, *Submission*, p. 9.

168 The Uniting Church in Australia, *Submission*, pp. 1-2.

169 ACF, *Submission*, p. 6.

170 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 29.

developing country FTA partners, is that they are counterproductive and would, in many respects, compromise some of our other core objectives in these agreements. As to their overall impact, in terms of our limited economic power with countries such as Thailand, they are some of the factors that have driven, or have been reflected in, the government's policy not to pursue these kinds of provisions in FTAs with developing countries.¹⁷¹

- 3.161 Mr Brown also assured the Committee that it was expected that, over time, Thailand would take on additional labour and environmental commitments

Thailand aspires to developed country status, so I think, over time, it is reasonable to assume that it will begin to take on commitments not only in the trade field but also in the environment and labour field which reflect those aspirations. But that will be a process that will take some time. We are seeing some progress in Thailand. There has certainly been an enhanced determination by the current Thai government to improve its performance in this area as a result of a lot of criticism that you have just referred to. At the moment, though, I think it is fair to say that their domestic regulatory regime is not yet at developed country standard, but it is improving, and Australia is working with Thailand, both bilaterally and in multilateral agreements, to try to continue that improvement.¹⁷²

Environmental effects of the Agreement

- 3.162 The Committee notes concerns that the potential environmental impacts of the Agreement, for both Australia and Thailand, have not been assessed in either the NIA or the RIS.¹⁷³
- 3.163 In its submission to the Committee the ACF expressed concern that the TAFTA threatens Australia's existing environmental laws and fetters Australian governments seeking to legislate to protect the environment or act on other matters important to Australia's economic and social welfare.¹⁷⁴

171 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 29.

172 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, pp. 29-30.

173 ACF, *Submission*, pp. 1 and 8.

174 ACF, *Submission*, p. 1.

- 3.164 The ACF argues that this can occur under the Investment Chapter of the Agreement, where an investor challenges the laws of a country in regard to regulation or expropriation of an investment.¹⁷⁵ The ACF is also concerned that the services provisions of the Agreement liberalise services such as construction and engineering, environmental (waste management and biodiversity and landscape), tourism services and transport services, which could result in a negative impact on the environment.¹⁷⁶

Developing country

- 3.165 The Committee notes that the Minister for Foreign Affairs has listed Thailand as a developing country for the purposes of Australian overseas aid.¹⁷⁷ The Committee received a submission from AFTINET which states that

the RIS and NIA do not address the issue of how Australia's approach to these negotiations fits within Australia's foreign policy objectives regarding developing countries.¹⁷⁸

The submission then states AusAID's objective as 'advancing Australia's interests by assisting developing countries to reduce poverty and achieve sustainable development'.¹⁷⁹

- 3.166 AFTINET goes on to state that

It is notable that there is no discussion in the DFAT and Ministerial documents of how this trade agreement will promote or otherwise affect these development goals. Accordingly, it is difficult to know whether the goals are more than mere rhetoric when it comes to trade negotiations with developing countries.¹⁸⁰

- 3.167 The Committee questioned DFAT over the consistency of its approach to trade and development matters. In response to this, Mr Brown stated:

I might preface my answer by pointing out that the Thai government is very keen to promote Thailand as a developed

175 ACF, *Submission*, pp. 2-3.

176 ACF, *Submission*, p. 5.

177 List of Developing Countries as Declared by the Minister for Foreign Affairs, <<http://www.ausaid.gov.au/ngos/display.cfm?sectionref=2789411849>> (accessed 27 August 2004).

178 AFTINET, *Submission*, p. 3.

179 Australian Agency for International Development (AusAID), *AusAID Strategic Plan: Improving effectiveness in a changing environment*, Canberra, 2001, cited in AFTINET, *Submission*, p. 3.

180 AFTINET, *Submission*, p. 3.

country in the future and that Prime Minister Thaksin has spoken about his desire for OECD membership and for terminating all aid flows. Be that as it may, at the moment Thailand is a developing country and it is treated as such by Australia...all free trade agreements are different and certainly this agreement in many respects is very different to the agreements we have concluded with Singapore and the United States. Those differences reflect the fact that Thailand is a developing country and it has capacity constraints and other factors which do not enable it to reach the same degree of commitment¹⁸¹

3.168 Mr Brown then explained how these constraints influenced Australia's approach to negotiations

we have set some boundaries, some markers, which in our view are not negotiable, such as comprehensive liberalisation of trade flows. But in other respects there is flexibility in the FTA model to take account of the developing country status of the partner...there is scope in the agreement to make allowances where the developing country partner has some concerns or issues for which they feel they need some consideration.¹⁸²

3.169 Mr Brown noted that, in comparison to Agreements with the United States and Singapore, allowances were made for Thailand's developing country status in provisions such as those for intellectual property, government procurement, and in the tariff phasing arrangements.¹⁸³

Entry into force

3.170 The TAFTA will enter into force 30 days after both Parties provide written notice that their internal processes for entry into force have been fulfilled. The NIA states that entry into force is expected to occur at the beginning of 2005.¹⁸⁴

3.171 The Committee notes that Thailand requires only administrative, rather than legislative action for implementation of the Agreement, and that this process is currently well advanced.¹⁸⁵

181 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 28.

182 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 28.

183 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 28.

184 NIA, para. 2.

185 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 23.

Implementation

- 3.172 Implementation of the Agreement will require amendment to the *Customs Tariff Act 1995* and the *Customs Act 1901* to incorporate the preferential tariff rates that will apply to goods imported from Thailand under the Agreement. Amendments to these Acts may also be required to implement the Agreement's provisions on safeguards.¹⁸⁶
- 3.173 The Committee notes that the Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004 and the Customs Tariff Amendment (Thailand-Australia Free Trade Agreement Implementation) Bill 2004 were presented to the House of Representatives on 11 August 2004 but lapsed with the dissolution of the House of Representatives on 31 August 2004. Both bills were reintroduced to the House on 17 November 2004 and were passed by the Senate without amendment on 18 November 2004.

Costs

- 3.174 The NIA states that, according to estimates undertaken by the Treasury, the financial cost of the Agreement to the Commonwealth Government will be \$45 million in 2004/05, \$90 million in both 2005/05 and 2006/07 and \$110 million in 2007/08.¹⁸⁷
- 3.175 These estimates are based upon the expected loss of tariff revenue from imports from Thailand, and include assumptions that the Agreement will enter into force on 1 January 2005 and that imports from Thailand would grow steadily over time in line with the domestic economy. The estimates do not account for additional lost tariff revenue that could arise if imports from Thailand displaced imports from other countries. However, estimates also do not account for the potential economic growth that the Agreement may generate, or for any additional taxation revenue that may result from such growth.¹⁸⁸

186 NIA, para. 12.

187 NIA, para. 15.

188 NIA, para. 15.

State and Territory Governments

3.176 According to the NIA, the Agreement ‘will not have a substantial impact on the States and Territories’, and no change will be required to State or Territory legislation.¹⁸⁹

3.177 The Victorian Government outlined for the Committee the benefits it expected to receive from the Agreement

Victorian industry stands to gain from increased export opportunities, particularly the automotive, agriculture (particularly dairy, beef and cereals) wine, confectionery, energy and aluminium industries. While there are no substantive gains in services, the ATFTA will provide opportunities for services liberalisation in the medium term (especially in education and flexibility in the movement of business people). The ATFTA will also provide for increased investment flows as a result of Australian firms gaining the ability to take-up majority equity participation in a range of sectors, including mining.¹⁹⁰

3.178 The Queensland Government also expects benefits as a result of the Agreement

Thailand has traditionally been a difficult market for many Queensland exporters to access because of high average tariffs and very high tariff peaks in products of interest to Queensland companies. I am optimistic that the proposed agreement will make a range of Queensland products more competitive in the growing Thai market.¹⁹¹

3.179 However, both the Queensland and Victorian Governments noted concerns over the impact of the Agreement, with the Queensland Government submitting that

reductions in some Thai tariffs, particularly on a range of agricultural products, will occur over long phase-in periods, yet the removal of the majority of Australian tariffs on Thai imports will occur from entry into force. It is therefore likely that some industry sectors would be at risk of being negatively affected by this agreement¹⁹²

189 NIA, para. 16.

190 Victorian Government, *Submission*, p. 2.

191 Queensland Government, *Submission 10.1*, p. 1.

192 Queensland Government, *Submission 10.1*, p. 1.

and the Victoria Government stating

The Victorian Government supports in principle the ATFTA and recognises the potential flow-on benefits for the Victorian economy. An effective ATFTA will increase trade and investment with Thailand and improve economic links generally. However, while some Victorian industry sectors stand to gain from increased export opportunities, the ATFTA is likely to negatively impact on Victoria's Textiles, Clothing and Footwear (TCF) industry.¹⁹³

Consultation with State and Territory Governments

3.180 The NIA states that

The States and Territories were consulted throughout the negotiations through meetings in capitals, joint meetings in Canberra and through other forums such as the National Trade Consultations.¹⁹⁴

3.181 The Victorian Government agreed that

Over the course of the ATFTA negotiations, the Commonwealth Government consulted with the Victorian Government and was aware of its key concerns regarding a potential ATFTA.¹⁹⁵

3.182 The ACT Government has stated that it has no objection to Australia taking binding treaty action in relation to the Agreement, but expressed concern that

Although the consultation annex of the National Interest Analysis on TAFTA states that consultation with States and Territories was a 'high priority during the negotiations', it should be understood that the level of consultation on this agreement was much less substantial than that undertaken in relation to both the Australia-Singapore Free Trade Agreement and Australia-United States Free Trade Agreement (AUSFTA).¹⁹⁶

3.183 In response to questions from the Committee regarding the level of consultation, Mr Brown stated

We consulted with the state and territory governments throughout the negotiations and none of the other state and territory governments have raised these kinds of concerns...An important

193 Victorian Government, *Submission*, p. 1.

194 NIA, para. 16.

195 Victorian Government, *Submission*, p. 1.

196 ACT Government, *Submission*, p. 1.

difference between the Singapore FTA and the Thai FTA is that, in respect of Singapore, many of the consultations with the states and territories were over issues such as government procurement and services. In that case a negative list approach was taken and therefore the potential implications for state and territory regulatory flexibility were quite significant. In this case, those concerns simply do not arise. The substance, if you like, of the negotiations was not as relevant to the states and territories. I can only assume that the reservations or concerns that have been raised by the ACT government reflect a misunderstanding of the differences between the two agreements and perhaps they have not yet studied the fine print on government procurement and services in TAFTA as yet.¹⁹⁷

Consultations

- 3.184 The consultation process for the Agreement involved ‘extensive consultations’ with peak industry bodies and a limited number of individual companies. The NIA states that

Meetings were held in most states, as well as in Canberra. In addition, information was posted on the website, and updates on the progress of the negotiations were emailed to contacts on a regular basis.¹⁹⁸

- 3.185 Ms Kathy Klugman of DFAT outlined for the Committee DFAT’s post-negotiation consultation process

Our department has been working in close cooperation with Austrade. We have drawn on the Australian Ambassador to Thailand, whom we brought out for these purposes. We have been undertaking a series of joint presentations. All the capital cities have now been done. The turnout from business has been quite strong...We are taking that process and expanding it over September to key regional centres outside the capital cities.¹⁹⁹

- 3.186 The Committee heard concerns in relation to the lack of consultations undertaken with community organisations and unions. AFTINET states

The RIS makes extensive mention of DFAT’s efforts to ascertain the views of industry bodies and manufacturers throughout the

197 Mr Justin Brown, *Transcript of Evidence*, 26 July 2004, p. 31.

198 NIA, para. 17.

199 Ms Kathy Klugman, *Transcript of Evidence*, 26 July 2004, p. 31.

negotiations. It is important to recognise that workers also have legitimate interests in negotiations such as these, and that their representative bodies should be entitled to an equal level of consultation. There is little mention within the RIS of efforts made by DFAT to consult with unions during or after the negotiations regarding the impacts of the agreement.²⁰⁰

3.187 The AMWU made similar comments

The AMWU strongly submits that the consultation process for the ATFTA was inadequate. No non-business community organisations or unions appear to have been consulted on the contents of the agreement. Despite representing the interests of tens of thousands of members in the automotive sector - one of the most sensitive sectors dealt with in the agreement - the AMWU was not approached in relation to the proposed reductions of assistance to the automotive sector.²⁰¹

3.188 The Committee acknowledges that no mention is made of consultations with any union or community groups. However, the Committee notes that according to the RIS, the DFAT consultation process commenced with a call for public submissions,²⁰² and that according to information provided by DFAT at the request of the Committee, no unions or community groups are listed as having made a submission to DFAT.²⁰³

Future treaty action

3.189 The Agreement requires regular review. An initial review will take place within one year of entry into force, and annually thereafter. Certain provisions also require consultation and review. Amendment of the Agreement is subject to the normal Australian treaty process.²⁰⁴

200 AFTINET, *Submission 6*, p. 5.

201 AMWU, *Submission 8*, p. 3.

202 RIS, Annex 1, p. 1.

203 Department of Foreign Affairs and Trade, *Submission 14*.

204 NIA, para. 20.

Recommendation

Recommendation 2

The Committee supports the *Australia-Thailand Free Trade Agreement* and Associated Exchanges of Letters and recommends that binding treaty action be taken.

Air Services Agreement with the United Arab Emirates

- 4.1 The proposed *Agreement between the Government of Australia and the Government of the United Arab Emirates relating to Air Services (Dubai, 8 September 2002)* will provide a legal framework for designated airlines from Australia and the United Arab Emirates (UAE) to operate scheduled air services carrying passengers and cargo on specified routes between the two countries.
- 4.2 The Agreement will provide legal certainty for air services operating between Australia and the UAE.¹ This will facilitate trade and tourism, through freight and passenger transportation.² The National Interest Analysis (NIA) states that the Agreement will increase the opportunities for the Australian community to access Middle East markets by enabling Australian airlines to access Middle East aviation markets, and provide greater air travel options for Australian consumers.³
- 4.3 The Agreement includes reciprocal provisions on a range of aviation related matters such as safety, security, capacity, customs regulation and commercial aspects of airline operations.⁴

1 National Interest Analysis (NIA), para. 6.

2 NIA, paras 6 and 8 and Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 9.

3 NIA, para. 8. See also Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 10.

4 NIA, para. 9 and Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 10.

Background

- 4.4 The NIA states that aviation arrangements of less than treaty status have preceded the Agreement since December 1995.⁵ Mr Stephen Bogiatzis from the Department of Transport and Regional Services (DoTARS) advised the Committee of the difference between the aviation arrangements and the Agreement

The memorandum of understanding is much more limited than the treaty, so the treaty will introduce broader provisions. But, again, they are standard provisions that we utilise.⁶

By way of example

Issues such as our security provisions...are not spelt out in detail in a memorandum of understanding. The treaty would cover those provisions. The treaty covers a range of issues around customs duties and the broader range of interests that we would need to express in a treaty that an MOU would not normally address.⁷

- 4.5 The aviation arrangements have enabled Emirates and Gulf Air to operate services between the two countries and have provided similar opportunities for Australian carriers.⁸
- 4.6 Mr Bogiatzis advised the Committee that 'the UAE is rapidly growing in importance for Australia as a bilateral aviation partner'⁹

Over the past 10 years the Australia-UAE yearly origin destination passenger market has grown from a base of just over 8,000 in 1993 to nearly 65,000 in 2003, an average annual growth rate of 23 per cent. Australian residents made up over 46 per cent of the total in 2003. Emirates was the dominant airline of the market, carrying 67.7 per cent of origin destination passengers.¹⁰

- 4.7 The Committee understands that the 'only airline operating between the UAE and Australia, Emirates is also a major player in the Australia-United Kingdom market'.¹¹ Mr Bogiatzis stated

5 NIA, para. 5.

6 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 14.

7 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 14.

8 NIA, para. 5.

9 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 10.

10 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

11 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

Emirates provides significant competition in the Australia-United Kingdom market for the other main airlines—Qantas, Singapore Airlines, British Airways and Malaysia Airlines—as well as providing consumers with connections to many cities in Africa, the Middle East and Europe. The emergence of Etihad as the national airline of Abu Dhabi and Gulf Air's interest in operating between Abu Dhabi and Sydney are likely to add to pressure for expanded air services arrangements with the UAE. There are clear competition, consumer and national interest considerations for Australia in developing a number of alternative routes and services to the United Kingdom and continental Europe in case some of those routes become unavailable or are less attractive to air travellers ... However, these need to be balanced against the interests of Australian airlines that are competing with sixth freedom airlines for passengers travelling between the United Kingdom and Australia and between continental Europe and Australia.¹²

- 4.8 In relation to air freight, Mr Bogiatzis advised the Committee that in the year ending March 2004, total air freight exports destined for the UAE were \$110 million.¹³ For the year ending March 2003, the total air freight imports originating from the UAE were \$17 million.¹⁴
- 4.9 The Committee understands that Australia has a standard draft air services agreement, and that the Agreement with the UAE does not differ in substance from that standard draft.¹⁵

Features of the Agreement

- 4.10 As identified in the NIA, the key provisions of the Agreement are
- the right to designate an airline or airlines to operate the agreed services (Article 2)
 - grants to the designated airlines of the other party the aviation rights necessary to establish and operate agreed services, and to other airlines to overfly its territory and make stops for non-traffic purposes (Article 3)

12 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

13 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

14 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

15 NIA, para. 10.

- provisions to revoke or limit authorisation of an airline's operations if the airline does not comply with certain laws and regulations (Article 5)
- recognition of certificates of airworthiness, competency and licences issued by the other Party (Article 7)
- provisions for a party to request consultations on safety standards (Article 8)
- protection of civil aviation security against acts of unlawful interference (Article 9)
- provision of fair and equal opportunity for the designated airlines to operate the agreed services on the specified routes (Article 11)
- exemption for specified equipment and stores used in operation of services from customs duties and other charges (Article 13)
- ability for airlines to establish tariffs for international air transportation based on commercial considerations in the marketplace and general competition and consumer law in each party (Article 14)
- a framework enabling airlines to establish themselves in the territory of the other Party (Articles 15 and 16).¹⁶

4.11 Further, the NIA states that the Agreement allows scheduled air services to only operate in accordance with the Route Annex to the Agreement, and does not provide for the transport of domestic passengers by a designated airline.¹⁷

4.12 In relation to the provision of the right to designate an airline, Mr Bogiatzis stated

When an airline is designated by a particular country, it becomes the airline of that country and therefore it has access to all the rights negotiated through the treaty, so there are quite complex international procedures in relation to designation which currently hinge on the extent of ownership and control of that airline. Provided both parties are satisfied that ownership and control rests with the other party, both parties can then agree to the designation of that airline.¹⁸

16 NIA, paras 12-21.

17 NIA, para. 22.

18 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 12.

Implementation and costs

- 4.13 The Agreement will be implemented through existing legislation, to which no legislative amendments will be required.¹⁹ Further, there will be no financial costs to the Australian Government as a result of the Agreement.²⁰

Entry into force

- 4.14 Pursuant to article 22, the Agreement will enter into force when the parties have notified each other in writing that their domestic requirements for its entry into force have been completed. Mr Bogiatzis advised the Committee that UAE notified Australia on 22 February 2004 that 'it had adhered to the requirement regarding constitutional procedures to implement the Agreement'.²¹
- 4.15 According to customary international and established Australian practice, the aviation arrangements have included the application of the provisions of the Agreement before it enters into force, pending the completion of domestic requirements.²²

Consultation

- 4.16 Consultations were conducted with relevant government departments and agencies, and aviation and tourism stakeholders prior to the negotiations with aeronautical authorities of the UAE in November 1999.²³
- 4.17 The NIA states that all stakeholder comments were taken into account in developing the Australian negotiating position.²⁴ Mr Bogiatzis advised the Committee of the extent to which stakeholder concerns and suggestions were incorporated into the final text
- They were quite substantially and almost fully incorporated. There is a standard procedure by which we consult quite fully with stakeholders and then we work quite closely with

19 NIA, para. 23.

20 NIA, para. 24.

21 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 9.

22 NIA, para. 5.

23 NIA, para. 24 and Consultations Annex, pp. 1-2.

24 NIA, Consultations Annex, p. 2.

key stakeholders on both developing the text and agreeing on the text during the negotiations.²⁵

4.18 The Committee understands that all major stakeholders supported the Agreement.²⁶

4.19 The Committee was interested to learn that DoTARS remain in regular contact, both formally and informally, with our stakeholders. We do that through things like stakeholder conferences, whereby we twice a year, if not more regularly, formally address our range of stakeholders. We run through a range of issues and allow them to raise issues of concern in relation to our treaties. Similarly, there is regular and constant informal contact with our stakeholders in relation to each of our treaties, MOUs and commercial arrangements. There have been no concerns expressed whatsoever in relation to the treaty arrangements in this particular case.²⁷

Conclusion and recommendation

4.20 The Committee appreciates the benefits the Agreement will generate by providing legal certainty for air services operating between Australia and UAE. The Committee agrees with DoTARS that the Agreement will increase the opportunities for Australian community to access Middle East markets, by facilitating trade and tourism.

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the United Arab Emirates relating to Air Services (Dubai, 8 September 2002)* and recommends that binding treaty action be taken.

25 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 11.

26 NIA, para. 26.

27 Mr Stephen Bogiatzis, *Transcript of Evidence*, 26 July 2004, p. 14.

Agreement concerning police and assistance to Nauru

- 5.1 The purpose of the *Agreement between Australia and Nauru concerning additional police and other assistance to Nauru (Melbourne, 10 May 2004)* (the Agreement), pursuant to Article 2, is to enable Australia to deploy police and other personnel to Nauru to work in partnership with the Government of Nauru to address core issues in the areas of governance, law and order and justice and financial management. Moreover, the Agreement provides part of the necessary legal framework at international law for Australia to deliver such assistance to Nauru.¹

Background

- 5.2 Mr Damien White from the Department of Foreign Affairs and Trade stated that 'Nauru's governance problems are so serious that Nauru could have been said to be on the verge of state failure'.² The National Interest Analysis (NIA) states that Nauru has
- squandered the proceeds of phosphate mining and its phosphate reserves are largely exhausted. Government financial planning is non-existent, replaced instead by repeated requests to Australia for short-term bail-outs to keep essential services operational. Without outside assistance, the Nauru government's inability to manage its own resources

1 National Interest Analysis (NIA), para. 5.

2 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 7. See also NIA, para. 4.

could have resulted in its economic collapse and ultimately in Nauru's failure as a state, creating a humanitarian crisis and the possibility that Nauru would become a haven for transnational crime.³

- 5.3 In this context, and to be consistent with Australia's policy on the importance of sound economic management and good governance for Pacific Island Countries (PICs), Australia agreed to provide assistance to Nauru to address the key issues in the areas of governance, law and order and justice and financial management.⁴
- 5.4 The Committee understands that Australia and Nauru signed the third of a series of memoranda of understanding (MOU) on 25 February 2004, the 'Memorandum of Understanding For Cooperation in the Management of Asylum Seekers and Related Issues',⁵ that included an outline of humanitarian and development assistance to be provided to Nauru by Australia.⁶ This assistance includes the deployment of a number of Australian officials and police to assist the Government of Nauru address key economic, financial and policing reforms. Accordingly, the Agreement will enable the deployment of Australian officials and provide them with appropriate legal protections and powers to perform their duties by establishing the obligations, rights and duties of each Party.⁷

Features of the Agreement

- 5.5 Mr White told the Committee that the Agreement is similar in nature to the Solomon Islands Short-Term Multilateral Assistance Agreement that concerns the Regional Assistance Mission to the Solomon Islands (RAMSI), and is signed by all PICs.⁸ The Agreement is also similar to some extent to the *Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea*.⁹

3 NIA, para. 4.

4 NIA, para. 6 and Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 7.

5 Mr Peter Hunter advised the Committee at the public hearing that the MOU is presently in place until the end of June 2005, *Transcript of Evidence*, 9 August 2004, p. 10.

6 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 7.

7 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 7.

8 *Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security (Townsville, 24 July 2003)*. See Joint Standing Committee on Treaties Report 55.

9 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 7.

- 5.6 The Agreement establishes a number of obligations, rights and duties on both Parties in respect to the deployed officials, including
- provisions concerning the deployment of Assisting Australian Police (Article 3)
 - provisions concerning uniforms, and the carriage of weapons, by Assisting Australian Police (Article 4)
 - provisions concerning the status and exchange of information concerning other personnel deployed (Article 5)
 - measures concerning family members and/or dependants of deployed personnel in Nauru (Article 6)
 - jurisdiction over deployed Australians (Article 7)
 - compliance with obligations under international law (Article 8)
 - management of claims involving deployed Australians (Article 9)
 - provisions for entry into and departure from Nauru of deployed Australians (Article 10).¹⁰
- 5.7 Mr White advised the Committee that one of the features of the Agreement is that the Australian officials will be deployed to in-line positions in the Nauru bureaucracy.¹¹ The NIA states that Australia intends to provide a Secretary of Finance and Director of Police to address Nauru's most serious and immediate challenges.¹² These two Australian officials will each be supported by two Australian advisers.
- 5.8 The Australian Secretary of Finance and two financial specialists will be deployed to work towards reversing Nauru's economic decline. The National Interest Analysis states that the finance team will
- assume full and complete authority and responsibility for the management of all of Nauru's financial and other assets. The team will be responsible for the formulation and disbursement of Nauru's budget, as well as auditing and assessing Nauru's remaining assets as the basis for economic reforms geared to meeting Nauru's longer-term needs.¹³
- 5.9 The Committee understands that the Agreement and implementing legislation within Nauru enables the Australian Secretary of Finance

10 NIA, paras 9-14.

11 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 10.

12 See NIA, paras 4, 7-8.

13 NIA, para. 7.

to 'exercise all of the powers that a Nauruan secretary of finance could exercise'.¹⁴

- 5.10 The NIA states that the Australian Director of Police and two advisers will ensure the professional standards of the Nauru Police Force (NPF) are strengthened.¹⁵ The Committee understands that the main focus of the policing team is training and reform. Mr Peter Hunter from DFAT stated that the police force is 'oversized and needs significant retraining and re-evaluation'.¹⁶ The NIA states that on the 'Commissioner's assessment, the NPF will be restructured to best meet Nauru's law and order needs'.¹⁷ The Australian policing team will also provide training and guidance to the NPF, and 'facilitate the provision of Australian support for legislative drafting, including updating Nauru's criminal code'.¹⁸
- 5.11 The NIA notes that in 'practice it is likely that an Australian will be appointed to be the Director of the Nauru Police'.¹⁹
- 5.12 The Committee understands that the current Nauru Government has placed a high priority on economic reform.²⁰ The Committee was therefore interested in the rationale behind the Agreement predominately focusing on policing assistance. Mr Hunter explained that the Agreement in part reflects the higher priority of the previous Nauru government. Specifically, it
- was concerned to have the police deployment occur more or less simultaneously with the deployment of its finance officials. The new government sees a higher priority being placed on the need for economic reforms and economic measures to get Nauru back on track and it is interested in discussing further with us the possibility of delaying the policing deployment slightly to give a slightly higher priority to the economic measures. That said, it is still pushing ahead with the policing deployment.²¹
- 5.13 Further, Mr Hunter stated that in the drafting of the Agreement it was necessary to 'reassure them' that the 'Australian police deployment

14 Mr Damien White, *Transcript of Evidence*, 9 August 2004, pp. 7-8.

15 NIA, para. 8.

16 Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 9.

17 NIA, para. 8.

18 NIA, para. 8.

19 NIA, para. 9.

20 Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 9.

21 Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 9.

would be conducted in a manner that would protect Australians and Nauruans, so there was an emphasis there'.²²

Jurisdiction and protections

5.14 As reported previously, the Agreement will provide the deployed Australians with appropriate legal protections and appropriate powers. Mr White stated that

It is important to note that these immunities for Australian officials are designed to prevent those officials from being exposed to vexatious litigation in Nauru which could prevent them from carrying out their duties. Australians working in Nauru, in both the policing and finance sectors, could potentially be engaged in sensitive work. In order for them to work free from interference, it was desirable to agree to these immunity provisions, Australia can waive these immunities if it considers it appropriate in a particular case.²³

5.15 In addition, Mr White advised the Committee that from the deployment of Australians to PICs under similar treaties

the protections that have been offered to Australians have been assessed as adequate by the agencies deploying people. You could probably say that this treaty represents the high-water mark in terms of protections.²⁴

5.16 Under Article 7 of the Agreement, the deployed Australians are obliged to observe and respect the laws of Nauru but are not subject to the civil jurisdiction of courts of Nauru.²⁵ With respect to criminal or disciplinary matters, the Australians are subject to the exclusive jurisdiction of Australia.²⁶ In accordance with the *Crimes (Overseas) Act 1964*, Australia is able, amongst other things, to enforce criminal jurisdiction over the deployed Australian officials.²⁷ Mr White explained that this 'represent the maximum immunities you could expect in a treaty of this type'.²⁸

22 Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 9.

23 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 8.

24 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 10.

25 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 10.

26 NIA, para. 16 and Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 10.

27 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 8.

28 Mr Damien White, *Transcript of Evidence*, 9 August 2004, p. 10.

Implementation and costs

- 5.17 The NIA states that no legislation was required to implement Australia's obligations under the Agreement.²⁹
- 5.18 The Committee recognises that there will be costs incurred in association with the deployment of Australian officials. Article 11 of the Agreement establishes that the Australian Government is responsible for the salary, allowances, removal expenses, costs of transport to Nauru, and medical and dental expenses of Australian officials deployed to Nauru.³⁰ Also, under Article 12 Australia is responsible for the accommodation and transport costs of Australian officials within Nauru.³¹

Consultation

- 5.19 The NIA states that the Government of Nauru was consulted in the development of the Agreement.³² In addition, relevant Commonwealth agencies, including the Department of Immigration and Multicultural and Indigenous Affairs, the Treasury, Department of Finance and Administration, Australian Federal Police and the Attorney-General's Department were consulted in the preparation of the treaty text.³³
- 5.20 The Committee understands that the departments of the State and Territory Premiers and Chief Ministers have been notified by DFAT according to the Commonwealth-State-Territory Standing Committee on Treaties process.³⁴

Entry into force

- 5.21 The Agreement was signed on 10 May 2004 and entered into force on 29 July 2004 following the exchange of diplomatic notes between the two Parties in accordance with Article 19.³⁵ At the time of the

29 NIA, para. 16.

30 NIA, paras 15 and 18.

31 NIA, paras 15 and 18.

32 NIA Annexure 1, p. 1.

33 NIA, para. 19.

34 NIA Annexure 1, p. 1.

35 NIA, para. 2 and Mr Damian White, *Transcript of Evidence*, 9 August 2004, p. 8.

Committee's public hearing on 9 August 2004 the Australian finance team had been deployed to Nauru and commenced its work.³⁶

Mr Mark Sewell from the Treasury advised the Committee that at that stage it was thought the finance team would be working through to the middle of 2005.³⁷ The Committee understands that two members of the Australian policing team were deployed to Nauru on 22 November 2005 and that a third member will be deployed in early 2005.

- 5.22 At the Public Hearing Mr Hunter informed the Committee that the Australian Government was in the process of discussing the appointment of an Australian as Director of the NPF.³⁸
- 5.23 Under Article 19, the Agreement shall expire at the mutual agreement of the Parties expressed in writing.

National Interest Exception provision

- 5.24 Generally, after treaties have been signed for Australia they are tabled in both Houses of Parliament for at least 15 sittings days prior to binding treaty action being taken. During this period the Committee normally reviews the proposed treaty action and presents its conclusions and recommendations to the Parliament.
- 5.25 Where it is in Australia's national interest to proceed with an urgent treaty action, however, the 15 or 20 sitting day tabling requirement may be varied or waived. The National Interest Exception provision was invoked in relation to the Agreement concerning the additional police and other assistance to Nauru.
- 5.26 On 27 April 2004, the Minister for Foreign Affairs and Trade, the Hon Alexander Downer MP, wrote to the Committee advising of the urgent need for the Agreement to be in force to enable the Australian police and officials to deploy on 3 May 2004. The Agreement was subsequently tabled in Parliament on 22 June 2004.

36 Mr Damian White, *Transcript of Evidence*, 9 August 2004, p. 8 and Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 11.

37 Mr Peter Sewell, *Transcript of Evidence*, 9 August 2004, p. 12.

38 Mr Peter Hunter, *Transcript of Evidence*, 9 August 2004, p. 9.

Conclusion

- 5.27 The Committee supports the Agreement enabling the deployment of Australian Police and other officials to deliver assistance to Nauru to address core issues in the areas of governance, law and order and justice and financial management. The Committee also acknowledges the urgent need for the Agreement to be in force prior to the treaty action being tabled in Parliament and parliamentary consideration of the Agreement.
- 5.28 Given that there have been a number of treaties relating to the stability of PICs which have entered into force before being tabled in Parliament, the Committee believes that it is timely to review the national interest exemption. A possibility may be for the Committee to receive an urgent briefing in the case of these national interest exemptions.
- 5.29 While it is not within the Committee's area of review, the Committee does believe that a Parliamentary review of governance in PICs is warranted, with a view to identifying where urgent action may be required.

Agreement on Mutual Acceptance of Oenological Practices

- 6.1 The *Agreement on Mutual Acceptance of Oenological Practices (Toronto, 18 December 2001)* (MAA) was developed by the World Wine Trade Group (WWTG).¹ The purpose of the MAA is to facilitate trade in wine among the state parties to the Agreement through the mutual acceptance of oenological practices.² Parties to the MAA are Argentina, Australia, Canada, Chile, New Zealand and the United States of America.³
- 6.2 The MAA promotes a liberal approach to trade in wine by limiting the basis of an importing country's objections to wine imports to health and safety grounds, rather than oenological practices that differ from the importing country's own standards. Under the MAA, countries will accept wine imported from other member countries, regardless of whether the production methods used in the other country are legal in the importing country.⁴ This is qualified only by the provision that acceptance of the other country's production methods is subject to health and safety considerations,⁵ recognising that oenological practices vary between countries 'for a variety of climatic and other reasons'.⁶

1 National Interest Analysis (NIA), para. 5.

2 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 2.

3 NIA, para. 11 and Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 2.

4 NIA, para. 6.

5 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, pp. 2-3.

6 NIA, para. 6.

Background

- 6.3 The WWTG is 'committed to examining initiatives and proposals for facilitating the international trade in wine'.⁷ Its members are Argentina, Australia, Canada, New Zealand, Chile, the United States and South Africa.⁸ The Group includes government and industry representatives from its member countries. The Australian delegation includes representatives from the Department of Agriculture, Fisheries and Forestry (DAFF), the Department of Foreign Affairs and Trade (DFAT), the Australian Wine and Brandy Corporation and the Winemakers' Federation of Australia.⁹
- 6.4 Exports are a significant component of Australian wine sales. The NIA states that in 2002-03, Australia's \$2.4 billion of wine exports represented 56 per cent of the nation's total wine sales.¹⁰ Exports to the USA and Canada, both parties to the MAA, were worth over \$1 billion.¹¹

Key benefits

- 6.5 The Committee notes that the MAA is expected to advantage the Australian wine industry. According to evidence presented to the Committee, benefits include
- greater security of access for Australian exports to overseas wine markets. Mr Michael Alder of DAFF advised the Committee that this was particularly important with regard to accessing the North American markets. He stated that the US is Australia's largest export market by value, and Canada is the third largest¹²
 - encouraging the development and adoption of new wine technologies¹³
 - the provision of an important alternative principle to the European Community's multilaterals which use a more prescriptive regulatory approach to oenological practices, taking into account non health and safety related aspects.¹⁴ According to Mr Alder, the

7 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 2.

8 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 2.

9 NIA, para. 12.

10 NIA, para. 7.

11 NIA, para. 7.

12 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 3.

13 NIA, para. 8.

14 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 3 and NIA, para. 8.

MAA represents ‘an important step forward in terms of the way in which we wish to regulate that trade’.¹⁵

- 6.6 The flexible approach of the MAA contrasts with previous import restrictions based upon oenological practices. By limiting obstacles to only those related to health and safety, the MAA will facilitate trade in wine between member countries,¹⁶ while countries retain control over health and safety matters for both domestically produced and imported wine.¹⁷
- 6.7 The Committee notes that failure to ratify the treaty may be a detriment the Australian wine industry. The NIA states that if Australia does not ratify the MAA, then
- the current and future level of market access for Australia’s wine may be exposed to possible restrictions based on grounds such as differences in wine making practices rather than on health and safety requirements. In particular, USA legislation is in the process of being amended with the intention that wine imported into the USA from countries that have not ratified the MAA will be required to go through a more detailed certification system.¹⁸

Key obligations

- 6.8 The Committee understands that Australia’s main obligation under the MAA is the mutual acceptance of the other Parties’ mechanisms for regulating oenological practices, subject to these practices meeting Australia’s health and safety requirements.¹⁹
- 6.9 Australia must immediately notify all other Parties if it has reason to believe that wine ‘produced in, exported from or imported into its territory would compromise human health and safety’.²⁰ Further, Australia must notify the Council of Parties if it proposes to amend laws, requirements or regulations that relate to oenological practices. It must allow the other Parties opportunity to comment on proposed amendments.²¹ The other Parties may only reject proposed

15 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 3.

16 NIA, para. 9.

17 NIA, para. 10.

18 NIA, para. 13.

19 NIA, para. 14.

20 NIA, para. 17.

21 NIA, para. 18.

amendments on health and safety grounds.²² If agreement cannot be reached over the rejection of a practice, the matter can be raised under the WTO dispute process.²³

- 6.10 The MAA commits Parties to enter into negotiations on a multilateral wine labelling agreement.²⁴
- 6.11 The MAA does not impose any commercial obligations on Parties to purchase products that come under the MAA.²⁵

Australian standards

- 6.12 This new approach is consistent with that of the Australia-New Zealand Joint Food Standards Code (the Code) for wine, which is primarily health and safety based.²⁶ The Committee understands that in order to ratify the MAA, it was necessary to ensure that Australian legislation conforms with the treaty provisions and to undertake an assessment of the oenological practices used by other Parties. Food Standards Australia New Zealand (FSANZ) conducted detailed health and safety assessments of the other members' laws, regulations and requirements concerning oenological practices to ascertain whether they complied with the Code.²⁷ Approximately eleven practices were identified which were inconsistent with the Code, and following normal public consultation processes, the Code was amended to conform with Australia's MAA obligations.²⁸
- 6.13 Amendments to the Code were made under the *Food Standards Australia New Zealand Act 1991*, and were approved by the FSANZ Board on 17 March 2004 and came into force on 29 April 2004. The Committee notes that according to the NIA, the Australian wine industry was consulted, and supported the proposed amendments.²⁹
- 6.14 The amendments to the Code were for the
- inclusion for use in wine of the food additives gum arabic, calcium ascorbate, sodium ascorbate and sodium erythorbate;

22 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 5.

23 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 5.

24 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 5.

25 NIA, para. 16.

26 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 3.

27 NIA, para. 20.

28 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 3.

29 NIA, para. 22 and Annexure A, p. 1.

- inclusion for restricted use in wine of the food additives ethyl maltol and maltol (flavourings and flavour enhancers), with use limited to wine made with non-*Vitis vinifera* grapes; and
 - inclusion of argon, ammonium sulphite and the enzyme urease, as new processing aids in the Code.³⁰
- 6.15 According to Mr James Gruber of FSANZ, those practices that were the subject of the amendments to the Code were, in most cases, already approved for use in other foodstuffs under the Code.³¹ They had not previously been approved for wine simply because they were not traditionally used by the Australian wine industry and so did not necessitate inclusion.³² Mr Gruber confirmed that there was no reason for those additives to be excluded on health and safety grounds.³³
- 6.16 FSANZ will conduct assessments of signatories' oenological practices again in the future if these countries use new practices or if other countries become Parties to the MAA. Where any party fails to meet Australian health and safety requirements, Australia will not permit wine using the offending practice to enter the country. Future assessments will continue to be conducted by FSANZ as part of its standard operating procedures, and will include the opportunity for public consultation.³⁴

Entry into force

- 6.17 Australia signed the MAA on 18 December 2001. The MAA came into force generally on 1 December 2002, following ratification by Canada and the United States of America.³⁵ Chile ratified the MAA in 2003.³⁶ Signatories must ratify within 30 months of entry into force. Australia, Argentina and New Zealand are yet to ratify the MAA.³⁷ The MAA will enter into force for Australia on the first day of the month following the date of deposit of an instrument of ratification or accession.³⁸

30 NIA, para. 23.

31 Mr James Gruber, *Transcript of Evidence*, 9 August 2004, p. 4.

32 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, pp. 4-5.

33 Mr James Gruber, *Transcript of Evidence*, 9 August 2004, p. 4.

34 NIA, para. 11.

35 NIA, para. 2.

36 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 2.

37 NIA, para. 2.

38 NIA, para. 3.

- 6.18 The Committee acknowledges Mr Alder's explanation that the completion of internal processes for ensuring consistency between the MAA and existing Australian legislation was the reason for the delay between Australia's signing the MAA in December 2001 and its tabling in Parliament in June 2004.³⁹
- 6.19 Australia may withdraw from the MAA by lodging written notification. Withdrawal takes six months from the date of receipt of such notification and would be subject to the Australian treaty process.⁴⁰

Implementation

- 6.20 As Australia's Food Standards laws are based on health and safety considerations, no legislative change is required in order for Australia to implement the MAA. All oenological practices must meet the Code.⁴¹ As noted previously, the Code was amended to incorporate acceptance of oenological practices of Parties to the MAA.

Costs

- 6.21 The NIA states that FSANZ will incur some costs associated with the maintenance of the Code if it is necessary to assess new practices of existing Parties or the practices of new Parties to the MAA. According to the NIA, these 'costs are difficult to estimate as they depend on the extent and need of any future assessment.'⁴² DAFF and DFAT may also incur costs relating to attendance of meetings of the WWTG or the MAA Council.⁴³

Consultation

- 6.22 The Australian wine industry, represented by the Winemakers' Federation of Australia and the Australian Wine and Brandy

39 Mr Michael Alder, *Transcript of Evidence*, 9 August 2004, p. 6.

40 NIA, para. 36.

41 NIA, para. 26.

42 NIA, para. 27.

43 NIA, para. 28.

- Corporation, participated in the negotiation of the MAA. The NIA states that the industry strongly supported ratification of the treaty.⁴⁴
- 6.23 Consultations were conducted during the development of the MAA with State and Territory governments, FSANZ, the Australian Customs Service, the Australian Quarantine and Inspection Services, DAFF, DFAT and the Department of Health and Ageing.⁴⁵
- 6.24 The Committee notes comments from the Queensland Government requesting that the Ministerial Council of Consumer Affairs be consulted in regard to the development and implementation of a wine labelling agreement, as required by the MAA.⁴⁶
- 6.25 The Committee did not receive any submissions advising against accession to the MAA.

Conclusion and recommendation

- 6.26 The Committee acknowledges the benefits expected to occur as a result of ratification of the MAA and supports the efforts of the WWTG in facilitating the liberalisation of trade in wine through the removal of technical barriers to such trade, other than those based on health and safety considerations.

Recommendation 4

The Committee supports the *Agreement on Mutual Acceptance of Oenological Practices (Toronto, 18 December 2001)* and recommends that binding treaty action be taken.

44 NIA, para. 30.

45 NIA, para. 29.

46 Queensland Government, *Submission*, p. 2.

Amendments to the Constitution of the Asia Pacific Telecommunity

- 7.1 The proposed treaty action concerns Australia's accession to the amendments to the Constitution of the Asia Pacific Telecommunity (APT) made at New Delhi in 2002.
- 7.2 The Constitution is the primary treaty instrument of the APT, establishing the rights and obligations of its Members.¹ The amendments under the *Constitution of the Asia Pacific Telecommunity (Bangkok, 1976) as amended (Colombo, 1991) as amended in New Delhi in 2002* (the 2002 Amendments) will not change these commitments or impose new obligations on Members.² The amendments will assist the APT to become a stronger, more effective and influential regional telecommunications body.³

Background

- 7.3 The APT was established in 1979 as a joint initiative of the United Nations Economic and Social Commission for Asia and the Pacific and the International Telecommunication Union (ITU).⁴ It aims to foster the development of telecommunications services and

1 National Interest Analysis (NIA), para. 11 and Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 16.

2 NIA, para. 11.

3 NIA, para. 7 and Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 16.

4 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 15.

information infrastructure in the region.⁵ In doing so, the APT promotes the expansion of telecommunications and information services in a cooperative manner to the benefit of its members.⁶ It also provides a forum for regional governments to build consensus on communications issues for coordinated input to meetings of the ITU.⁷

- 7.4 Mr Bill Scott of the Department of Communications, Information Technology and the Arts (DCITA) advised the Committee that there are currently 32 members of the APT, four associate members and 93 affiliate members.⁸ Australia has been a Member of the APT since it was established.⁹
- 7.5 The National Interest Analysis (NIA) states that Australia has been advocating Secretariat and Constitutional reform since 1999.¹⁰ Further, the 2002 Amendments reflect the advocacy of Australia and other Members towards greater efficiency and relevance in the APT's operation.¹¹

Features of the 2002 Amendments

- 7.6 As summarised in the NIA, the 2002 Amendments will
- strengthen the APT's ability to foster the development of telecommunication services and information infrastructure throughout the region (article 1)
 - encourage exchange of information to ensure balanced development of telecommunications services and information infrastructure and to strengthen the region's international position (article 2)
 - expand the category of Affiliate Membership to include any organization (article 3)
 - rename the positions of Director-General and Deputy-Director-General, and provide for these positions to be elected, and their terms of employment to be determined by the General Assembly (article 8)

5 Asia Pacific Telecommunity, 'Objectives of the Asia Pacific Telecommunity', <www.apsec.org/apt/aptObj.html> (accessed on 18 August 2004).

6 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 16.

7 NIA, para. 5.

8 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 16.

9 NIA, para. 3.

10 NIA, para. 8.

11 NIA, para. 10.

- provide for a simple majority of Members as a requisite for Extraordinary sessions of the General Assembly to be convened; and a quorum for a meeting of the General Assembly (Article 8)
- enable the Management Committee to act on behalf of the General Assembly between meetings (Article 9)
- create two categories of budgets (the General Budget and Special Budget) (Article 11).¹²

7.7 The Committee was interested in the need to create two categories of budgets. Mr Scott advised

Certainly we were very careful about this particular aspect of things because we want both flexibility and transparency in budgeting. The reason for having the special budget is that there are special contributions made between the times that the budget is put in place and they needed the flexibility for the organisation to expend that money on worthwhile projects. At the moment, through its arrangements, it has some difficulty in expending money that comes in through special payments.¹³

7.8 The NIA concludes that the 2002 Amendments will update and expand the APT's role to ensure the balanced development of infrastructure, the exchange and discussion of information, and ensure active participation of Members.¹⁴

Implementation and costs

7.9 The NIA states that the proposed 2002 Amendments would not require any change to the *Telecommunications Act 1997* or related primary legislation.¹⁵ However, the *Telecommunications (Compliance with International Conventions) Declaration No. 1 of 1997* and *Telecommunications (International Conventions) Notification No. 1 of 1997* will need to be updated following ratification to refer to the amendments.¹⁶ Mr Scott informed the Committee that this

12 NIA, para. 13.

13 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 19.

14 NIA, para. 9.

15 NIA, para. 15.

16 NIA, para. 15.

would ensure that carriers and carriage service providers and the Australian Communications Authority are aware of the latest version of the treaty.¹⁷

- 7.10 The 2002 Amendments will not change the Australian Government's obligations under the Constitution, and no action would be required by State or Territory Governments as a result of ratification.¹⁸
- 7.11 In addition, no extra costs will arise as a result of the 2002 Amendments.¹⁹

Entry into force

- 7.12 Article 21 states that amendments shall enter into force on the 30th day following the deposit of instruments of ratification or acceptance with the Depository of such amendments by two-thirds of the Members.
- 7.13 As at 10 June 2004, the 2002 Amendments had not entered into force as only 10 out of 32 Members had deposited their instruments of ratification or acceptance.²⁰ At the Committee's public hearing on 26 July 2004, DCITA was not aware of any more Members ratifying the amendments.²¹
- 7.14 The Committee was concerned at the slow rate of ratification by Members since November 2002 when the Amendments were accepted. Mr Scott believes that there is a strong likelihood of there being two-thirds support and that
- we have been a little bit slower than we would have wanted to be. I do not think it is a lack of commitment but simply that processes move rather slowly in many member countries.²²
- Mr Scott further advised that the management committee of the APT will meet in the later part of 2004, and
- I imagine that a high priority would be members committing before they go to that meeting or pressure from the organisation itself to move to ratification.²³

17 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 16.

18 NIA, para. 17.

19 NIA, para. 18.

20 NIA, para. 4.

21 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, pp. 17 and 19.

22 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 17.

23 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 18.

Consultation

- 7.15 Consultations with industry and key government agencies were undertaken during 2002.²⁴ The consultation with industry involved the three APT Affiliate Members: Telstra Corporation Ltd; Macquarie Corporate Telecommunications Pty Ltd and Reach Communications.²⁵
- 7.16 The Committee was interested in the response from industry stakeholders in relation to the 2002 Amendments. Mr Scott explained the nature of the final text was no surprise to them...Australia was instrumental in the development of the text and officers from our department were very involved in drafting the words so that, yes, industry approves of the final text.²⁶

Conclusion and recommendation

- 7.17 The Committee believes that the 2002 Amendments will ensure the balanced development of infrastructure, the exchange of information, and the participation of Members. The Committee agrees with DCITA, that the proposed treaty action will make the APT stronger, more effective and influential as a regional telecommunications body.

Recommendation 5

The Committee supports the *Constitution of the Asia Pacific Telecommunity (Bangkok, 1976) as amended (Colombo, 1991) as amended in New Delhi in 2002* and recommends that binding treaty action be taken.

24 NIA – Consultations Annexure A and Mr Michael Moynihan, *Transcript of Evidence*, 26 July 2004, p. 17.

25 NIA – Consultations Annexure A.

26 Mr Bill Scott, *Transcript of Evidence*, 26 July 2004, p. 19.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

- 8.1 The *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* (the Optional Protocol) is intended to establish minimum safeguards to prevent the involvement of children in armed conflict.
- 8.2 The Optional Protocol strengthens the protections contained in the *Convention on the Rights of the Child* (the Convention), to which Australia is a Party.¹ Moreover, the Optional Protocol establishes 18 as the minimum age for direct participation in hostilities, for compulsory recruitment by State Parties, and for recruitment into armed groups. It determines that State Parties shall raise the minimum age for voluntary recruitment beyond the current minimum of 15.

Background

- 8.3 The recruitment and use of children in armed conflict continues to be a serious problem for the international community. The United Nations Children's Fund (UNICEF) estimates that 300,000 child soldiers, persons under the age of 18, are involved in more than 30 conflicts worldwide.² Mr Richard Sadleir, from the Department of Foreign Affairs and Trade (DFAT), stated

1 National Interest Analysis (NIA), para. 5.

2 NIA, para. 5.

The use of child soldiers in conflicts in the Asia-Pacific region demonstrates that this is a problem which directly affects Australia. It affects us by negatively impacting on the social cohesion, economic prospects and stability of our region. It is in our interests to see a prosperous, stable and peaceful Asia-Pacific region, and we believe that ratification of this optional protocol would positively contribute to this aim.³

- 8.4 Mr Sadleir advised the Committee that Australia had been active in ratifying international instruments that seek to enshrine in law and practice the rights of the child. Australia was among the first countries to sign and ratify the Convention on the Rights of the Child in 1990 and we have been active in progressing ratification of the optional protocol to the convention on the involvement of children in armed conflict.⁴
- 8.5 The *Convention on the Rights of the Child* (the Convention) entered into force generally on 2 September 1990.⁵ The Human Rights and Equal Opportunity Commission (HREOC or the Commission) advised the Committee that the Convention is 'the most widely ratified international human rights instrument with 192 state parties'.⁶
- 8.6 Under Article 38 of the Convention, Australia is obliged to prevent persons who have not attained the age of 15 from being directly involved in hostilities or recruited into the Australian Defence Force (ADF). In addition, when recruiting among those who have attained the 15 years, but who have not attained the age of 18, Australia must endeavour to give priority to those who are oldest.
- 8.7 The National Children's and Youth Law Centre advised the Committee that that during the drafting of the Convention, Article 38 was
- one of the Articles that caused greatest dissension amongst the countries present at the working sessions. The Australian delegation (and delegates from Scandinavian and other western countries) argued strongly that the restriction in

3 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, p. 23.

4 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, p. 23.

5 Multilateral Treaties Deposited with the Secretary-General, Part I, United Nations Treaties, Chapter IV. Human Rights, 11. Convention on the Rights of the Child, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>> (accessed 4 December 2004).

6 Human Rights and Equal Opportunity Commission (HREOC), *Submission 18*, p. 9.

Article 38 be set at a higher age than 15 years. The the age of 15 was eventually decided on as a compromise.⁷

Features of the Agreement

- 8.8 The National Interest Analysis (NIA) states that Australia was an ‘active participant throughout the negotiation of the Protocol and the final outcome fully reflects our preferred position’.⁸
- 8.9 The Agreement establishes a number of key obligations, including
- to take all feasible measures to ensure that members of a State Party’s armed forces who are not 18 years old do not take a direct part in hostilities (Article 1)
 - to ensure that persons who are not 18 years old are not compulsorily recruited into a State Party’s armed forces (Article 2)
 - to raise the minimum age for voluntary recruitment above 15 years, as established in the Convention, and that State Parties deposit a binding declaration upon ratification specifying their minimum age for voluntary recruitment and description of the safeguards adopted to ensure that such recruitment is not forced or coerced (Article 3)
 - that those State Parties permitting voluntary recruitment into their armed forces under the age of 18 shall maintain safeguards to ensure that the recruitment is genuinely voluntary, it occurs with the informed consent of the person’s parents or guardians, the persons are fully informed of the duties involved in military service, and that the person provides reliable proof of age prior to acceptance into the armed forces (Article 3)
 - that armed groups, as opposed to a State’s armed forces, do not recruit or use in hostilities persons under the age of 18 years (Article 4)
 - that State Parties take all feasible measures to prevent recruitment and the use of children by armed groups (including the adoption of legal measures necessary to prohibit and criminalise such practices) (Article 4)
 - to proscribe the preclusion of provisions in the law of a State Party or in international instruments and international humanitarian law

7 National Children’s and Youth Law Centre, *Submission*, p. 1.

8 NIA, para. 6.

that are more conducive to the realisation of the rights of the child (Article 5)

- that State Parties take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the Optional Protocol, and to make its principles and provisions widely known and promoted to adults and children (Article 6)
- that State Parties take all feasible measures to demobilise or otherwise release from service persons recruited or used in hostilities contrary to the Optional Protocol and provide appropriate assistance for their recovery (Article 6)
- to cooperate in the implementation of the Optional Protocol and provide assistance through multilateral, bilateral or other programmes, or through a voluntary fund established in accordance with the General Assembly rules (Article 7)
- reporting procedures allowing the Committee on the Rights of the Child to monitor the implementation of the Optional Protocol (Article 8).⁹

Australia's current compliance with the Protocol

Australian Defence Force policy

8.10 The ADF is already in compliance with the Optional Protocol.¹⁰ The NIA states that on 28 June 2002, the Chief of the Defence Force and the Secretary of the Department of Defence jointly signed Defence Instructions (General) PERS 33-4 (the Defence Instruction).¹¹ The purpose of the Defence Instruction is to give effect to the provisions of the Optional Protocol, detailing the ADF's minimum voluntary recruitment age and the conditions of employment that apply to ADF members under 18 years of age.¹² The Committee understands that the Defence Instruction was effective as at 30 June 2004, before Australia signed the Optional Protocol.¹³

9 NIA, paras 11-17.

10 NIA, para. 7 and Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 7.

11 NIA, para. 18 and Air Commodore Roberts, *Transcript of Evidence*, 10 August p. 8.

12 NIA, para. 18 and Defence Instructions (General) PERS 33-4 (the Defence Instruction), para. 4.

13 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

8.11 The Defence Instruction determines that the minimum voluntary recruitment age is 17 years. Air Commodore Lee Roberts stated that

We require, on the day that they are actually signed up into the Defence Force, that they be 17 years of age. They have to provide proof of that. They have to have a full birth certificate or a certified copy of one. That is in accordance with the Defence Instruction, so all commanders are aware of that. On top of that, within the Defence Force Recruiting Organisation we have our own internal policy which says that, at the time they are (sic) actually go through the assessment day, they must be a minimum of 16 years and nine months. That is to ensure that we are not wasting their time and our time, because we would not be able to sign them up for at least three months after that. The other aspect is that, because a lot of people who join us now are in technical trades, the testing is quite extensive. It involves psychological tests. The younger they are, the less relevant those tests are.¹⁴

8.12 The Defence Instruction determines that entrants to military schools, apprentices and members of Service cadet schemes are exempt from the minimum voluntary recruitment age of 17 years.¹⁵ Moreover

Age limitations do not apply to entrance to military schools. This exemption extends to civilian institutions used by the ADF to train members, and in particular, apprentices.¹⁶

And

As members of Service cadet schemes are not recruited into the ADF, and are therefore not members of the ADF, age restrictions do not apply.¹⁷

8.13 The NIA states that

candidates under 17 years must have approval from the single Service Career Management Agency and must reach 17 years of age prior to completion of training in a designated military school.¹⁸ Defence interviewers endeavour to ensure that these candidates have the maturity to cope with

14 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

15 Defence Instruction, para. 4.

16 Defence Instruction, para. 17.

17 Defence Instruction, para. 18.

18 NIA, para. 19.

separation from family and the psychological rigours of military training.¹⁹

8.14 Air Commodore Roberts advised the Committee of the number and proportion of permanent force personnel in the ADF under 18 years

Within the trained force—in other words, people who are fully trained and in units—there are 12 members under 18 years of age. They are currently 17. There are 10 men and two women. Within the training course—those who are with training units or in some form of training—there is a total of 242, which brings the total number of permanents aged 17 in the permanent Defence Force to 254. Of those, 46 were under 17½ on 30 June. The other 208 were over 17½...The percentage of members under 18 in the Defence Force was 0.5 per cent on 30 June.²⁰

8.15 Also

The Defence Force Academy takes 290 students each year, and the majority of that first year would be at least 17. So there is your first 100. And then a large number of Army come in as general entry...So, generally, the Army would be the one which would have the younger members coming in. In the case of Air Force and Navy, they tend again to be in technical trades where they might be a year older and, if not, they will certainly be in training for lengthy periods.²¹

8.16 The Department of Defence submission to the Committee advised that the ‘number of personnel aged 17 in the Reserves is 129 males and 9 females’.²² At the public hearing on 10 August 2004 the Committee sought clarification on the application of age limits under the Optional Protocol to reservists. Air Commodore Roberts affirmed that they are treated ‘just the same as anyone else through the recruiting system’.²³ Further

In terms of them going to an operational area, they have to be brought onto full-time service. To come onto full-time service, they come under the normal command structure. Again, the 18 years applies.²⁴

19 NIA, para. 19. See also Mr Richard Sadlier, *Transcript of Evidence*, 9 August 2004, pp. 24-25.

20 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

21 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 5.

22 Department of Defence, *Submission*, p. 1.

23 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 6.

24 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 6.

Contractors

- 8.17 The Committee was interested in the protections afforded to contractors and apprentices working for the Department of Defence in hostile environments. Air Commodore Simon Harvey stated

I do not know the detail of what protocols would be applicable. I think the point is made that it is an unlikely scenario—that we would actually deploy contractors into a situation where they would be directly involved in operating in a platform environment. I imagine there are mechanisms in place to ensure that those people are quarantined as best as is possible from operations.²⁵

Group Captain Michael Maher added

generally, because we will be paying extra premiums for the contractors to take people into a theatre we would probably not allow them to take people into a theatre we would probably not allow them to take an apprentice in who needs constant supervision, because effectively you need 1½ or two people to do one person's job. So that would not be cost effective, and I doubt that we would agree to that.²⁶

- 8.18 To this point HREOC's submission to the Committee considers that the ADF should take measures to ensure that minors are not directly or indirectly involved in armed conflict.²⁷ Further, the Commission advised that as a minimum

the *Convention on the Rights of the Child* provides that State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.²⁸

Peacekeeping and other operations

- 8.19 The Defence Instruction determines that

Where a minor is on the strength of a unit that is required to deploy to an area of hostility, the minor is not to deploy with the unit. In the case of a unit that is in transit or on exercise,

25 Air Commodore Simon Harvey, *Transcript of Evidence*, 10 August 2004, p. 5.

26 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 5.

27 HREOC, *Submission 18.1*, p.

28 HREOC, *Submission 18.1*, p.

and is required to deploy at short notice, minors in that unit are to be returned to a safe area without undue delay.²⁹

- 8.20 The Committee sought clarification on ADF policy in relation to participation of persons under 18 in peacekeeping or armed conflict overseas. Group Captain Maher stated

That same rule is applied to everything that is an operation. It is less of a problem when we go on those UN peacekeeping missions because generally there are only a few personnel required, and they are generally much more experienced and take up quite responsible jobs in the UN peacekeeping force. Generally, the minimum ranks are around the sergeant or captain level, in which case they are well and truly over 18.³⁰

- 8.21 He further explained that only in the most extreme cases will a minor be left of a unit, such as a ship, that goes into an operation.³¹

Norwegian measures to protect children, and voluntary recruitment under 18 years

- 8.22 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia advised the Committee of Norway's legislation that enables 17 year olds to have a military career without formally becoming members of the armed forces.³²

- 8.23 HREOC explained that it

understands, from the limited information available to it, that Norway has recently prohibited the recruitment, both compulsory and voluntary, of persons under the age of 18 years.³³ While it does allow persons above the age of 16 to join the Home Guard Youth, and volunteers over the age of 17 years to be affiliated with the armed forces, for example under apprenticeships, person under the age of 18 years enjoy the following protections

- they are not considered to be members of the armed forces in any other way

29 Defence Instructions, para. 12.

30 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 3.

31 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 3.

32 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2.

33 The Commission understands that the amendments came into force under Om lov om endringer i lov 17. juli 1953 nr. 28 om Heimevernet og lov 17. juli 1953 nr. om verneplikt (heving av aldersgrenser for militær teneste) and that no English translation is available.

- they are not permitted to form part of the mobilisation force or in any other way be affected by mobilisation plans;
- they are free at any time to terminate their affiliation with the armed forces with immediate effect
- they are to be immediately be released from their affiliation with the armed forces if an armed conflict breaks out or becomes imminent, or if the armed forces or any part thereof has been ordered on a war footing
- they shall not be allowed to receive training in combatant disciplines nor shall they be allowed to participate in any form of combatant activities.³⁴

8.24 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia considers that it would be beneficial for Australia to adopt a similar scheme.³⁵

8.25 In addition, HREOC notes that during the negotiation of the Optional Protocol

many delegations and NGOs as well as the International Committee of the Red Cross, the UN High Commissioner for Human Rights and the special representative of the Secretary-General for children in armed conflict advocated a minimum age of 18 for voluntary recruitment. In addition, the Committee on the Rights of the Child has repeatedly recommended that states do not voluntarily recruit persons below the age of 18 years.³⁶

8.26 The Commission suggests that

the Australian government consider taking measures to incrementally implement this recommendation. In the interim it might consider providing further protections for voluntary recruits under the age of 18 years (remembering that the

34 HREOC, *Submission 18.1*, pp. 3-4. This information is taken from a paper circulated by the Norwegian Delegation to the European Conference on the Use of Children as Soldiers, Berlin, (18-20 October 1999), cited on the Coalition to Stop the Use of Child Soldiers website <http://www.child-soldiers.org/cs/childsoldiers.nsf/0/367475ace298ace080256ble00533747?OpenDocument>

35 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2.

36 HREOC, *Submission 18*, pp. 5-6 and Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 29. See also HREOC, *Submission 18.1*, p. 4, The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2, and National Children's and Youth Law Centre, *Submission*, p. 3.

requirements of the Optional Protocol are minimum standards).³⁷

Also

if the ADF decides to continue recruiting persons under the age of 18 years the Commission would strongly support Australia implementing measures similar to the Norwegian model for their protection.³⁸

8.27 The Committee was interested as to whether the ADF had considered the example of Norway. Air Commodore Robert advised

No, we have not. There are two issues with that. The first is how it would fit into the way we regard military service in Australia and in the Australian Defence Force. We are quite restricted in the numbers we are allowed to have and we are constantly striving to have anyone that we have in the Defence Force as close to combat ready as possible. That is one issue. The second issue, which affects me more in my primary work, is actually getting the number of young people that are available in the community into the Defence Force to meet the numbers we require. A lot of that is based on the fact that the majority of students completing high school throughout Australia are 17; a lot of them are under 18 at that stage. If we do not recruit them at that stage—because, again, most of the training these days in all three services is reasonably high skills training—it will be too late; they will have gone on somewhere else.³⁹

Consultation

8.28 The Committee is aware that there is broad community interest in, and support for Australia's ratification of the Optional Protocol.⁴⁰ Mr Sadleir advised that ratification would accord with the expectations of the public following Australia's signature to the Optional Protocol in 2002.⁴¹

8.29 The Committee understands that the state and territory governments were advised of the proposed treaty action through the Standing

37 HREOC, *Submission 18*, p. 6.

38 HREOC, *Submission 18.1*, p. 4.

39 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, pp. 2-3.

40 NIA, para. 6.

41 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, p. 24.

Committee on Treaties and Standing Committee of Attorneys-General.⁴²

8.30 The ACT and Queensland Governments advised the Committee that they support Australia's ratification and recognise that it is 'a significant step forward in efforts to protect the human rights of children worldwide'.⁴³

8.31 HREOC advised the Committee that it supports ratification and implementation of the Optional Protocol as it 'is in the best interests of children as it contains important safeguards against their use in armed conflict'.⁴⁴

8.32 The Committee is aware that the Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia also supports Australia's ratification and believes that it would be a 'step towards building a global moral repugnance to the use of child soldiers'.⁴⁵ The Mission also acknowledged that they were 'aware that there are veterans from the Vietnam War that report that they continue to suffer trauma' from their experiences with child combatants.⁴⁶ Moreover, the Mission considers that wide support for the Optional Protocol

is likely to reduce the possibility that Australian Defence Force personnel will face the situation of having to deal with child combatants.⁴⁷

Reservations concerning Australia's ratification

8.33 The National Children's and Youth Law Centre advised the Committee of one reservation they have in relation to Australia's ratification of the Optional Protocol concerning the involvement of young people in peacekeeping and reconstruction activities overseas.⁴⁸ The Centre states that as the Australian military regularly

42 NIA, para. 23 and NIA, Consultations Annex A.

43 ACT Government, *Submission*, p. 1 and Queensland Government, *Submission*, p. 1.

44 HREOC, *Submission 18*, p. 10.

45 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 1.

46 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, pp. 1 and 2.

47 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 1.

48 National Children's and Youth Law Centre, *Submission*, p. 3.

undertakes peacekeeping and reconstruction activities in states that are recovering from conflict

We are not opposed to young people playing their part in such activities in some circumstances, whether through the military or through volunteer organisations as long as appropriate safe measures are employed, and they are not permitted or required to be involved in combat.⁴⁹

8.34 The Committee believes that the Defence Instructions adequately address the National Children's and Youth Law Centre concerns (as discussed in paras 8.19-8.21).

8.35 The Australian Patriot Movement, whilst supporting Australia's ratification, suggests that major states should also address the conditions that lead to children becoming involved in armed conflict.⁵⁰ The Committee acknowledges the importance of prevention in this issue and understands that the Optional Protocol encompasses these concerns under Article 7, whereby

State Parties shall cooperate in the implementation of the Optional Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance.

8.36 The Committee hopes that the Government will actively enforce Article 7 through the work of Australia's foreign aid program in conjunction with the Department of Defence and DFAT.

Leadership role for Australia

8.37 The Committee agrees with HREOC that ratification and implementation of the Optional Protocol would allow Australia to show leadership on the issue of children in armed conflict, and add further momentum to the international effort to protect children's rights.⁵¹ The ACT Government states that

Positive action by Australia to encourage the widest possible adherence and implementation of this important convention would be particularly valuable.⁵²

8.38 Moreover, HREOC considers that

49 National Children's and Youth Law Centre, *Submission*, p. 3.

50 National Patriot Movement, *Submission 19.1*, pp. 1-2.

51 HREOC, *Submission 18*, p. 9.

52 ACT Government, *Submission*, p. 1.

As the current Chair of the United Nations Commission on Human Rights, Australia has a unique opportunity to demonstrate human rights leadership in the field of children's human rights. Australia's signature and ratification of the Optional Protocol to (sic) would send a clear signal to the international community of the importance of these principles and Australia's continued commitment to their implementation.⁵³

8.39 The Committee understands that many states in the Asia Pacific region are yet to ratify the Optional Protocol.⁵⁴ Mr Sadleir stated that Australia's

ratification of the optional protocol would enhance our ability to encourage states in our region which have not yet done so to accede to this important instrument. Ratification of the optional protocol would also align our international obligations with the active approach of our development and cooperation program to assist countries in the Asia-Pacific deal with the effects of the recruitment and use of child soldiers.⁵⁵

For example

In Sri Lanka, the Australian Government is funding a number of activities aimed at the reintegration and rehabilitation of child soldiers from conflict-affected areas. These activities include the provision of humanitarian assistance, counselling, training, and identifying employment opportunities. The aid program also funds assistance for displaced children in conflict areas in Mindanao, particularly psycho-social services.⁵⁶

8.40 The NIA states that ratification will signal Australia's strong support and continuing commitment to the promotion and protection of child rights in this area, and also to the broader objectives of the Convention.⁵⁷

53 HREOC, *Submission 18*, pp. 10-11.

54 NIA, para. 8.

55 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, pp. 23-24. See also NIA, para. 9.

56 NIA, para. 9.

57 NIA, para. 6.

Implementation

- 8.41 As the ADF is already in compliance with the Optional Protocol no changes to Defence policy or regulations are required.⁵⁸

Amendment to the Criminal Code

- 8.42 The NIA states that it is necessary for there to be one amendment to the Commonwealth *Criminal Code* to implement the Optional Protocol.⁵⁹ It suggests that section 268.88, that creates criminal offences of using, conscripting or enlisting persons under the age of 15 years in an internal armed conflict, be amended as it

does not fully accord with article 4 of the Optional Protocol requiring states to adopt legal measures to prohibit the recruitment or use in hostilities of children under 18 years of age by armed groups that are distinct from the armed forces of a State.⁶⁰

- 8.43 However, HREOC's submission states that it is

of the view that if Australia wished to implement its obligation under article 4(2) in this way it would also be necessary to amend s 268.68 of the *Criminal Code*, which contains the same offences as s 268.88, but applies in international, as opposed to internal, armed conflict.⁶¹

- 8.44 At the Committee's public hearing on 9 August 2004 Mr Geoff Skillen, from the Attorney-General's Department, advised that the Government intends to introduce legislation that amends both sections of the Criminal Code referred to in the HREOC submission.⁶²

- 8.45 Mr Craig Lenehan, from HREOC, subsequently stated

An alternative and possibly preferable approach would be to create a new provision which more closely reflects the wording of article 4 of the optional protocol. In particular, such a provision might make use of the term 'hostilities' and pick up the notion of armed groups distinct from the armed forces of a state.⁶³

58 NIA, para. 7.

59 NIA, para. 20.

60 NIA, para. 20.

61 HREOC, *Submission 18*, p. 7.

62 Mr Geoff Skillen, *Transcript of Evidence*, 9 August 2004, p. 26.

63 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 29.

Possible amendment to the Defence Act

8.46 The Committee is aware that HREOC considers it appropriate for the protections in the Defence Instructions to be incorporated into the *Defence Act*. Mr Lenehan explained that

Amending the Defence Act would place responsibility for these important protections with parliament rather than the Secretary of Defence and Chief of Defence Force and, as such, would better entrench those protections.

Including those protections in the Defence Act would also assist Australia to meet the obligation in article 6(2) of the optional protocol, which requires that Australia make the principles and provisions of the optional protocol widely known. Incorporating those provisions in the Defence Act would, in the commission's view, raise the profile of those protections and ensure that they are easily accessible to members of the public. In that regard, the commission understands that the Defence Instruction is only available on written request to the Department of Defence.⁶⁴

8.47 At the Committee's public hearing on 10 August Air Commodore Harvey advised

The Defence position is that the defence instruction provides the implementing mechanism for the requirements of the optional protocol. We do not see a requirement for that to be enshrined in legislation *per se*, recognising that that is obviously a policy call rather than a strict legal requirement. The point I would make is that its being in a defence instruction, which is issued by the CDF and the secretary under their powers under section 9A of the Defence Act, means that it does have a source of sorts in legislation already. Obviously, the CDF and the secretary are accountable to the Minister for Defence and, through that mechanism, to the parliament.

I might add that one of the suggestions which was raised in the submission was that by putting it in legislation it would be more openly available to members of the general public. In my experience, if you are a 16- or 17-year-old, you probably do not spend a lot of time reading legislation. I think the more likely scenario would be that they would do a search on the

64 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 28.

Internet and, it being a treaty, it would be recognisable and discoverable for that mechanism.

The short answer to your question is that Defence does not see a need legally to give effect to it. I might also point out that there is a requirement, as I understand it, under the optional protocol to provide a report after two years and also regular reporting under the primary convention. That is again a mechanism which will make sure that we comply with our requirements, notwithstanding the fact that it is not enshrined in legislation.⁶⁵

- 8.48 In response, HREOC submitted to the Committee that as a matter of policy, all rules, instructions, regulations and legislation should be accessible to members of the public in accordance with the principle of open and responsible government. This is particularly important in the case of Australian laws that implement fundamental protections such as those contained in the Optional Protocol. Actual and potential members of the ADF who are minors, their parents and (if necessary) their legal representatives, should have ready access to that information – including on the internet – which they may require at short notice (for example, at a time of imminent conflict).⁶⁶
- 8.49 The Committee considers that it is not necessary to incorporate the protections of the Defence Instruction into the *Defence Act*. However, the Committee is concerned that the inquiry evidence indicates that the Defence Instruction is only available on written request to the Department of Defence. The Committee particularly believes that all important policy documents should be readily accessible by the Australian community through a range of means. Further, as the Optional Protocol is available on the DFAT website, Australia's implementing mechanism should be available on the Department of Defence website.

65 Air Commodore Simon Harvey, *Transcript of Evidence*, 10 August 2004, p. 4.

66 HREOC, *Submission 18.1*, p. 5.

Recommendation 6

The Committee recommends that the Department of Defence ensure that the appropriate implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* is readily available on the Department's website and through other means.

Discrepancies between the Optional Protocol and the Defence Instruction

- 8.50 The Committee acknowledges HREOC's recognition that there are discrepancies between the wording of the Optional Protocol and the protections contained in the Defence Instruction. Specifically, the Defence Instruction does not require that the recruitment of persons under the age of 18 be 'genuinely' voluntary, or that the minor be 'fully' informed about their duties, or that their parents or legal guardians give 'informed' consent, as is required under Article 3(3) of the Optional Protocol.⁶⁷ HREOC considers that the Defence Instruction 'be strengthened to better match the wording of the optional protocol'.⁶⁸ The Committee considers that the Department of Defence should amend the implementing document to include the three additional aforementioned words.

Recommendation 7

The Committee recommends that the Department of Defence include 'genuinely', 'fully' and 'informed' where appropriate in the implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* so as to accurately reflect the treaty.

67 HREOC, *Submission 18*, p. 5 and HREOC, *Submission 18.1*, p. 4.

68 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 28.

Article 6

8.51 HREOC also considers that

Article 6(3) is likely to have limited significance for Australia given the absence of armed conflict in Australian territory. However, it would seem to require Australia to ensure that asylum seekers under the age of 18 years who have been involved in armed conflict are given all appropriate assistance for their physical and psychological recovery and their social reintegration. That might include creating a special category of visa for such children. This would also give effect to the pre-existing obligations in articles 22 and 39 of the *Convention on the Rights of the Child* to which Australia is already a party.⁶⁹

Costs

8.52 The NIA states that ratification of the Optional Protocol will have no financial implications at Commonwealth or State and Territory levels.⁷⁰ However, Parties to the Optional Protocol are required to submit a report to the Committee on the Rights of the Child concerning their compliance to the treaty within two years of it entering into force for the Party.⁷¹ According to the NIA, the associated costs for Australia with presenting the report to the Committee in Geneva can be covered by existing resources.⁷²

Entry into force

8.53 The Optional Protocol was adopted by the UN General Assembly on 25 May 2000 and entered into force generally on 12 February 2002. As at 4 December 2004, there were 117 signatories and 88 parties to the Optional Protocol.⁷³

⁶⁹ HREOC, *Submission 18*, p. 8.

⁷⁰ NIA, para. 22.

⁷¹ See Article 8.

⁷² NIA, para. 22.

⁷³ Multilateral Treaties Deposited with the Secretary-General, Part I, United Nations Treaties, Chapter IV. Human Rights, 11.b. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty21.asp>> (accessed 4 December 2004).

- 8.54 Australia signed the Optional Protocol on 21 October 2002. Under Article 10, it would enter into force for Australia one month after the date of the deposit of Australia's instrument of ratification with the UN Secretary-General.

Concluding observations and recommendation

- 8.55 The Committee believes that responsibility lies with the international community to condemn and prevent the involvement of children in armed conflict and that the Optional Protocol is an important mechanism to this effect. Australia's ratification of the Optional Protocol would not only reflect the protections afforded through current Australian law and institutions, but it would contribute to the international effort to address the serious issue of the involvement of children in armed conflict.

Recommendation 8

The Committee supports the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (New York, 25 May 2000) and recommends that binding treaty action be taken

WIPO Copyright Treaty, and Performances and Phonograms Treaty

Introduction

- 9.1 Article 17.1.4 of the Australia-United States Free Trade Agreement (AUSFTA) requires that Australia accede to the World Intellectual Property Organisation (WIPO) *Copyright Treaty (Geneva, 20 December 1996)* (WCT) and *WIPO Performances and Phonograms Treaty (Geneva, 20 December 1996)* (WPPT). Accession is to have occurred prior to entry into force of the AUSFTA on 1 January 2005.¹
- 9.2 The WPPT and WCT were adopted at the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva in December 1996. The treaties supplement the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).²
- 9.3 The WCT entered into force generally on 6 March 2002, after being ratified or acceded to by 30 countries, in accordance with its

1 World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WPPT) National Interest Analysis (NIA), para. 2; WIPO Copyright Treaty (WCT) NIA, para. 2.

2 WPPT NIA, para. 6; WCT NIA, para. 6.

provisions.³ The WPPT entered into force generally on 20 May 2002, after being ratified or acceded to by 30 countries.⁴

9.4 Australia actively participated in the making of these treaties and has worked towards accession since the conclusion of negotiations in 1996. Australia was one of the first countries to implement the main obligations of the treaties, with its enactment of the *Copyright Amendment (Digital Agenda) Act 2000*.⁵

9.5 The treaties expand the rights of copyright owners in works, films and sound recordings and for performers in the online environment. They also standardise the criteria for exceptions to copyright as applicable in the digital environment.⁶ The WCT and WPPT mark ‘an important advance in improving international copyright standards to meet the challenges posed by digital technology’.⁷

9.6 According to Ms Helen Daniels of the Attorney-General’s Department,

Australian accession to the two treaties will help to secure better protection abroad for Australian works, films, sound recordings and performers. This is a clear benefit to the important cultural sector of our community. The treaty standards with which Australian law has to comply were painstakingly negotiated with active Australian participation and enjoy wide and growing acceptance by countries around the world. Accession will also strengthen Australia’s support for the work and role of WIPO in promoting international cooperation in the protection and use of intellectual property. Australia continues to be an active participant in WIPO consideration of the adequacy of international copyright standards and the negotiation of possible new standards.⁸

WIPO Copyright Treaty

Background

9.7 The National Interest Analysis (NIA) states that the WCT will benefit Australian copyright owners and performers by

3 WCT NIA, para. 3.

4 WPPT NIA, para. 3.

5 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

6 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

7 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

8 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

providing adequate economic benefits to Australian copyright owners by securing improved protection for their works and productions in the markets of our major trading partners and a growing number of other overseas markets.⁹

9.8 Ms Daniels explained to the Committee that,

The WIPO Copyright Treaty adds to protection under the Berne convention in the following ways. It provides for expanded rights for owners of copyright in works and films; protection of new categories of works; and specific obligations concerning the protection of technological protection measures and concerning rights management information. In addition, contracting parties must comply with substantive provisions of the Berne convention. This last requirement was included because non Berne convention members are eligible to accede to the WIPO Copyright Treaty without also acceding to the Berne convention.¹⁰

9.9 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WCT, it is beneficial to ratify the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia.¹¹

Key benefits of the WCT

9.10 The NIA outlines numerous benefits expected to occur as a result of Australian ratification of the WCT

- There are currently 46 countries party to the WCT, including major trading partners of Australia such as the USA and Japan.¹² The WCT requires member countries to extend the protection provided under the treaty to Australian copyright owners. Further, Article 3 of the WCT requires members to apply a provision of the Berne Convention regarding national treatment, whereby they must extend all protection offered to their own nationals (where this exceeds the rights required under the WCT) to the nationals of other member countries. Thus, Australian copyright owners would have increased protection in key overseas markets.¹³

9 WCT NIA, para. 6.

10 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

11 WCT NIA, para. 6.

12 WCT NIA, para. 7.

13 WCT NIA, para. 11.

- Australia already complies with the WCT's main obligations. The enactment of the *Copyright Amendment (Digital Agenda) Act 2000* brought Australia considerable international standing as one of the first countries to implement the WCT obligations. The passage of further legislation to achieve full compliance with the WCT would fulfil the Government's 2001 electoral commitment under its *Arts for All* policy to extend the duration of photographic copyright (50 years from publication) to life of the author plus 50 years, as required under the WCT.¹⁴ In accordance with the requirements of the AUSFTA, this will be extended to life plus 70 years.¹⁵
- Australia is obliged to accede to the WCT under both the AUSFTA and the Singapore-Australia Free Trade Agreement (SAFTA). Failure to meet this obligation may potentially damage Australia's relationship with these important trade and investment partners.¹⁶
- Australia made substantial contribution to the negotiation of the WCT and actively participates in WIPO's consideration of international copyright standards. Accession to the WCT will further strengthen Australia's support for WIPO in promoting international cooperation in the protection and use of intellectual property.¹⁷

Key obligations under the WCT

9.11 The NIA also notes obligations to be incurred by Australia upon accession to the WCT

- Parties to the WCT are required to provide expanded rights for copyright owners, such as rights over distribution, rental and communication of works to the public. Further, new categories of works, such as computer programs and databases, are protected, and Parties incur specific obligations regarding the protection of technological measures and rights management information¹⁸
- Parties must grant authors of literary and artistic works rights of distribution over their works. Parties may determine the conditions in which the right will be exhausted after the first sale or transfer of ownership of the original or copy of the work¹⁹

14 WCT NIA, para. 8.

15 WCT NIA, para. 22.

16 WCT NIA, para. 9.

17 WCT NIA, para. 10.

18 WCT NIA, para. 12.

19 WCT NIA, para. 13; WCT Article 6.

- Authors are granted commercial rental rights over their works including computer programs, cinematographic works, and works embodied in sound recordings. The Committee notes that these provisions of the WCT are modelled on Article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁰
- Parties must ensure that the Internet transmission of literary and artistic works is subject to exclusive authorisation rights. Further, Parties must ensure that works available online are available ‘in such a way that members of the public may access [them] from a place and at a time individually chosen by them’²¹
- Photographic works are protected by a standard term of life of the author plus 50 years²²
- The WCT imposes new obligations regarding computer programs and databases. Parties must recognise programs as literary works protected by copyright within the meaning of Article 2 of the Berne Convention.²³ Compilations of data and other material in any other form are also protected as long as they constitute intellectual creations²⁴
- Parties are required to meet new obligations to protect rights in the digital environment, by ensuring that appropriate legal sanctions are available to support technological measures used to protect author’s rights²⁵
- Where a Party seeks to limit an obligation incurred under the WCT or the Berne Convention, such limitation must be confined to ‘certain special cases’ that ‘do not conflict with normal exploitation of the work’ and ‘do not unreasonably prejudice the legitimate interests of the author’.²⁶ The WCT does not permit reservations to be made²⁷
- Parties are obliged to provide effective enforcement procedures against infringement of rights provided under the WCT and the

20 WCT NIA, para. 14; WCT Article 7.

21 WCT NIA, para. 15; WCT Article 8.

22 WCT NIA, para. 16; WCT Article 9.

23 WCT NIA, para. 17; WCT Article 4.

24 WCT NIA, para. 17; WCT Article 5.

25 WCT NIA, para. 18; WCT Articles 11 and 12.

26 WCT NIA, para. 19; WCT Article 10.

27 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

Berne Convention. Such procedures must include measures to both prevent infringements and deter future infringements²⁸

- Parties must provide national treatment to the nationals of other WCT member countries.²⁹

Performances and Phonograms Treaty

Background

- 9.12 The NIA states that the WPPT will benefit Australian copyright owners and performers by
- securing improved protection for their productions and performances in the markets of our major trading partners and other overseas markets.³⁰
- 9.13 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WPPT, it is beneficial to ratify the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia.³¹
- 9.14 The NIA explains that the WPPT
- provides for the protection of rights of performers, other than rights in relation to audiovisual fixations of their performances, and the rights of producers of phonograms (ie, sound recordings). The WPPT provides for expanded rights for both producers and performers (notably rights of reproduction, distribution, rental and making available online to the public). It also provides for specific rights for performers, including moral rights and rights authorising the broadcasting and communication of unfixed (ie, unrecorded) performances. Specific obligations are also placed on Contracting Parties concerning protection of technological measures and rights management information, which parallels provisions in the WCT.³²
- 9.15 The operation and development of the WPPT will be governed by the Assembly of Contracting Parties, which will meet every two years.³³

28 WCT NIA para. 20; WCT Article 14(2).

29 WCT NIA, para. 21; WCT Article 3; Berne Convention Articles 2 - 6.

30 WPPT NIA, para. 7.

31 WPPT NIA, para. 7.

32 WPPT NIA, para. 14.

33 WPPT NIA, para. 27; WPPT Article 24.

Key benefits of the WPPT

- 9.16 The NIA outlines numerous benefits expected to occur as a result of Australian ratification of the WPPT
- There are currently 43 countries party to the WPPT, including major trading partners of Australia such as the USA and Japan. Under Article 3(1) of the WPPT, all member countries must extend the protection provided under the treaty to Australian copyright owners³⁴
 - Australia already complies with the WPPT's main obligations. The enactment of the *Copyright Amendment (Digital Agenda) Act 2000* brought Australia considerable international standing as one of the first countries to implement the WPPT obligations. The passage of further legislation to achieve full compliance with the WPPT would fulfil the Government's 2001 electoral commitment to 'work with the performing arts community to devise workable performers' copyright legislation which recognises the value attached to the recording and communicating of performances', under its *Arts for All* policy³⁵
 - Australia is obliged to accede to the WPPT under both the AUSFTA and the SAFTA. Failure to meet this obligation may potentially damage Australia's relationship with these important trade and investment partners³⁶
 - Australia made substantial contribution to the negotiation of the WPPT and actively participates in WIPO's consideration of international copyright standards. Accession to the WPPT will further strengthen Australia's support for WIPO in promoting international cooperation in the protection and use of intellectual property³⁷
 - In situations where the nationals of a member country are given more favourable treatment than that required under the WPPT, the WPPT's national treatment obligation requires that country to extend such treatment to the nationals of all member countries.³⁸

34 WPPT NIA, paras. 8 and 12.

35 WPPT NIA, para. 9.

36 WPPT NIA, para. 10.

37 WPPT NIA, para. 11.

38 WPPT NIA, para. 13.

Key obligations under the WPPT

- 9.17 The NIA also notes obligations to be incurred by Australia upon accession to the WPPT
- Parties to the WPPT must meet obligations regarding protection of technological measures and rights management information, which parallel provisions in the WCT³⁹
 - Parties must extend national treatment to the nationals of other Parties in relation to rights under the WPPT and to the right to equitable remuneration for the broadcasting and communication to the public of sound recordings that have been published for commercial purposes. This latter obligation does not apply where the other Party has limited or avoided the equitable remuneration obligation under Article 15(3) of the WPPT.⁴⁰ National treatment requires that a Party accord the same treatment to nationals of another Party as it does to its own nationals⁴¹
 - Performers' rights are expanded, with Parties being required to provide moral rights in relation to live performances or performances fixed in sound recordings. Separate from economic rights, moral rights exist over attribution and integrity of performances.⁴² Performers are also given exclusive rights over broadcasting and communication to the public of unrecorded broadcasts and performances and the exclusive right to the recording of these⁴³
 - Rights for performers and the producers of sound recordings are also expanded under the treaty. Parties must give these performers and producers exclusive rights of 'authorising the direct or indirect reproduction' of sound recordings, regardless of the manner or form of reproduction.⁴⁴ Performers and producers of sound recordings are also granted exclusive distribution rights over the public availability of their sound recordings. Parties may determine at what stage such right is extinguished after the first sale or transfer of ownership of the original or copy of the sound recording.⁴⁵ Parties are obliged to recognise the rights of producers and performers over the authorisation of commercial rental to the

39 WPPT NIA, para. 14.

40 WPPT NIA, para. 15; WPPT Article 4(1).

41 WPPT NIA, para. 13.

42 WPPT NIA, para. 16; WPPT Article 5(1).

43 WPPT NIA, para. 17; WPPT Article 6.

44 WPPT NIA, para. 18; WPPT Articles 7 and 11.

45 WPPT NIA, para. 19; WPPT Articles 8 and 12.

public of recordings, even after authorised distribution.⁴⁶ The transmission of sound recordings over the Internet and similar future networks in a way that members of the public may access such recordings at a place and time individually chosen by them, is subject to the exclusive right of authorisation of producers and performers of the recordings⁴⁷

- Parties are obliged to provide equitable remuneration for performers and producers for the broadcasting and communication of sound recordings to the public. Partial or total reservation may be taken to this obligation.⁴⁸ A minimum term of protection of at least 50 years after a performance is first fixed in a sound recording is required under the treaty. Recordings are protected for 50 years after their first publication, or after their recording if they are not published.⁴⁹ Under the AUSFTA, this term is increased to 70 years.⁵⁰ Under the national treatment provision of the WPPT, Australia must extend this term of protection to performances or sound recordings of other WPPT members⁵¹
- The treaty creates new obligations for the protection of rights in the digital environment. Parties must ensure that legal sanctions are available to support technological measures used to protect the rights of performers and producers of sound recordings⁵²
- Conditions are placed on the limitations and exceptions that Parties may make to rights granted under the WPPT⁵³
- Parties are obliged to provide effective enforcement procedures against breach of the rights granted under the WPPT. Enforcement procedures must include both remedies and deterrent aspects.⁵⁴

Reservations

9.18 Generally, reservations to the WPPT are not permitted.⁵⁵ However, Parties may take advantage of those limitations permitted in the Rome Convention, regarding the extent to which protection will be

46 WPPT NIA, para. 20; WPPT Articles 9 and 13.

47 WPPT NIA, para. 21; WPPT Articles 10 and 14.

48 WPPT NIA, para. 22; WPPT Article 15.

49 WPPT NIA, para. 23; WPPT Article 17.

50 WPPT NIA, para. 23; AUSFTA, Article 17.4.4.

51 WPPT NIA, para. 23.

52 WPPT NIA, para. 24; WPPT Articles 18 and 19.

53 WPPT NIA, para. 25; WPPT Article 16.

54 WPPT NIA, para. 26; WPPT Article 23.

55 WPPT NIA, para. 38; WPPT Article 21.

extended to the nationals of other Parties, based on the criteria of nationality, fixation and publication.⁵⁶

- 9.19 Due to the interaction between Articles 15(1) and 15(3) of the WPPT and Article 17.1.6 of the AUSFTA, Australia may take advantage of a reservation to the WPPT made by the United States, regarding an exception to national treatment with respect to the secondary use of phonograms in analogue communications and free-to-air radio broadcasting.⁵⁷

Entry into force

- 9.20 The WPPT entered into force on 20 May 2002, and will bind Australia from the end of three months after Australia's deposit of its instrument of accession.⁵⁸

Implementation

- 9.21 The main obligations of the WPPT and WCT were implemented by the *Copyright Amendment (Digital Agenda) Act 2000*. Further obligations are met by the *US Free Trade Agreement Implementation Act 2004*.⁵⁹
- 9.22 Implementation of the WPPT will require amendment to the Copyright Act to extend performers' rights over sound recordings of their performances.⁶⁰ Further, performers must be granted moral rights performers as required by the WPPT. These moral rights are provided for in the *US Free Trade Agreement Implementation Act 2004*.⁶¹
- 9.23 Consistent with implementation of the WCT, *US Free Trade Agreement Implementation Act 2004* amended the Copyright Act to extend the duration of the term of photographic copyright to life of the author plus 70 years.⁶²

56 WPPT NIA, para. 38; WPPT Article 3(3).

57 WPPT NIA, para. 37; Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

58 WPPT NIA, para. 3.

59 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

60 WPPT NIA, para. 28.

61 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

62 WCT NIA, para. 22.

- 9.24 The *Copyright (International Protection) Regulations 1969* will also be amended to extend protection granted under the Copyright Act to nationals of WPPT and WCT member countries.⁶³
- 9.25 Other requirements of the WPPT and WCT regarding copyright in the digital environment were incorporated into Australian law by the *Copyright Amendment (Digital Agenda) Act 2000*.⁶⁴
- 9.26 The Committee notes that advice was sought from the Office of International Law to ensure that all aspects of Australian copyright law, notwithstanding the above mentioned amendments, are in compliance with the WPPT and the WCT.⁶⁵

Costs

- 9.27 There will be no costs incurred as a result of Australia's accession to the WPPT and WCT apart from those associated with participating in the WPPT's Assembly of Contracting Parties and the WCT's Assembly of Members States. As Australian law is compliant with the majority of the obligations of both treaties, the enforcement of these rights will not incur additional costs.⁶⁶

Consultation

- 9.28 The Committee notes that these treaties have been the subject of formal and informal consultations with copyright stakeholders over a period of years from 1996 to 2004.⁶⁷
- 9.29 In 1997 the Attorney General's Department sought comment on those aspects of the WPPT and WCT to be incorporated into the *Copyright Amendment (Digital Agenda) Act 2000*, legislation relating to performers' rights and the proposed extension of the copyright term over photographs.⁶⁸
- 9.30 Meetings have been held with representatives from the record, film, television and radio industries, including performers, producers and broadcasters. The NIA states that 'most stakeholders do not object to

63 WPPT NIA, para. 29; WCT NIA, para. 23.

64 WPPT NIA, para. 30; WCT NIA, para. 24.

65 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

66 WPPT NIA, para. 31; WCT NIA, para. 25.

67 WPPT NIA, Annex 1; WCT NIA, Annex 1.

68 WPPT NIA, Annex 1; WCT NIA, Annex 1.

amending the law to give new rights to performers and thus for Australia to be in a position to accede to the WPPT treaty'.⁶⁹

9.31 Recently, consultations were carried out with 64 copyright stakeholders.⁷⁰ These stakeholders were contacted in May 2004 to seek their views on possible accession to the WCT and WPPT. As of June 2004, four submissions were received, from the Australian Broadcasting Corporation (ABC), Commercial Radio Australia (CRA), the Australian Library and Information Association (ALIA) and the Australian War Memorial (which did not comment).⁷¹ ALIA's concern related to the speed of the AUSFTA implementation process.⁷²

9.32 In regard to the ABC, the NIA states that

The ABC has raised concerns about being adversely affected by new laws pertaining to performers rights due to the breadth of material that it administers.⁷³

9.33 Mr Christopher Creswell of the Attorney-General's Department advised the Committee that the ABC's concerns were due to the fact that

through the diversity of activities, they are both a producer and a broadcaster of sound recordings and also employ performers so they have to consider these various capacities in which they operate in considering the impact of the proposed new performers' rights.⁷⁴

Mr Creswell reassured the Committee that

after these extensive consultations in which we have carefully responded to their comments of substance, they are reasonably satisfied that they can manage the impact of the new rights.⁷⁵

9.34 The concerns of CRA are also outlined in the NIA

The CRA has recommended that national treatment in relation to remuneration for broadcasting rights be provided only on a reciprocal basis. It should be noted that the AUSFTA contains an exception in Article 17.1.6 allowing a

69 WPPT NIA, Annex 1; WCT NIA, Annex 1.

70 WPPT NIA, para. 33; WCT NIA, para. 27.

71 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, pp. 16-17.

72 WPPT NIA, Annex 1; WCT NIA, Annex 1.

73 WPPT NIA, Annex 1; WCT NIA, Annex 1.

74 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

75 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

Party to the agreement to limit the rights of performers and producers of the other Party with respect to the secondary use of phonograms by means of analogue communications and free over-the-air radio broadcasting.⁷⁶

9.35 Mr Creswell assured the Committee that the CRA's concerns are addressed in the AUSFTA exception and national treatment provisions, and that Australian radio stations will not have to pay remuneration for broadcasting US recordings when this does not occur in the US.⁷⁷

9.36 In regard to consultation with State and Territory Governments, the NIA states that

The States and Territories were notified of Australia's proposed accession to the WPPT in the Standing Committee on Treaties (SCOT) through the SCOT Schedule of Treaties. To date there has been no request for further information. Given that copyright falls within the legislative power of the Commonwealth, Australia's proposed accession to the WPPT will have a negligible impact on the legislative and administrative functions of the States and Territories.⁷⁸

Conclusion and recommendations

9.37 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WPPT and WCT, it is beneficial to accede to the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia. Accession will also be beneficial in fulfilling Australia's obligations under the AUSFTA and the SAFTA.

76 WPPT NIA, Annex 1; WCR NIA, Annex .

77 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

78 WPPT NIA, para. 32; WCT NIA, para. 26.

Recommendation 9

The Committee supports the *WIPO Copyright Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* and recommends that binding treaty action be taken.

Recommendation 10

The Committee supports the *WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* and recommends that binding treaty action be taken.

Dr Andrew Southcott MP
Committee Chair



Appendix A - Submissions

- 1 Ford Motor Company of Australia Ltd
- 2 Horticulture Australia Ltd
- 3 Dr Bill Lloyd-Smith
- 4 Australian Conservation Foundation
- 5 Australian Capital Territory Government
- 5.1 Australian Capital Territory Government (supplementary)
- 5.2 Australian Capital Territory Government (supplementary)
- 6 Australian Fair Trade and Investment Network
- 7 Uniting Church in Australia
- 7.1 Uniting Church in Australia (supplementary)
- 8 Australian Manufacturing Workers' Union
- 9 Australian Council of Trade Unions
- 10 Queensland Government
- 10.1 Queensland Government (supplementary)
- 11 Federal Chamber of Automotive Industries
- 12 Holden Ltd
- 13 Victorian Government
- 14 Department of Foreign Affairs and Trade

- 15 Australian Chicken Meat Federation Inc
- 16 Council of Textile and Fashion Industries of Australia Limited
- 17 Australian Dairy Industry Council Inc
- 18 Human Rights and Equal Opportunity Commission
- 18.1 Human Rights and Equal Opportunity Commission
(supplementary)
- 19 Australian Patriot Movement
- 19.1 Australian Patriot Movement (supplementary)
- 19.2 Australian Patriot Movement (supplementary)
- 19.3 Australian Patriot Movement (supplementary)
- 19.4 Australian Patriot Movement (supplementary)
- 19.5 Australian Patriot Movement (supplementary)
- 19.6 Australian Patriot Movement (supplementary)
- 19.7 Australian Patriot Movement (supplementary)
- 19.8 Australian Patriot Movement (supplementary)
- 20 National Children's and Youth Law Centre
- 21 Department of Defence
- 22 Queensland Government



Appendix B - Witnesses

Monday, 26 July 2004 – Canberra

Attorney-General's Department

Mr Stephen Bouwhuis, Principal Legal Officer, Office of International Law

Australian Customs Service

Mr John Arndell, Acting National Manager, Trade Branch

Ms Lyndall Milward-Bason, Manager, Origin, Trade Branch

Department of Agriculture, Fisheries and Forestry

Mr William Withers, Manager, Asia and APEC Section, Trade Policy Branch, Market Access and Biosecurity Business Group

Department of Communications, Information Technology and the Arts

Ms Gabrielle Crick, Deputy Director

Mr Michael Moynihan, Assistant Director

Mr Philip O'Brien, Policy Officer

Mr Bill Scott, Director, Trade Policy Section

Department of Foreign Affairs and Trade

Ms Margaret Adamson, Assistant Secretary, European Union and Western Europe Branch

Mr Justin Brown, Ambassador for the Environment

Dr Greg French, Assistant Secretary, Legal Branch, International Organisations and Legal Division

Mr Peter Hooton, Director, Middle East Section

Ms Kathy Klugman, Assistant Secretary, Mainland South-East Asia and South Asia Branch, South East Asia Division

Mr Paul Panayi, Executive Director, Treaties Secretariat

Mr Bill Paterson, First Assistant Secretary, South-East Asia Division

Ms Leanne Smith, Executive Officer, Sea Law, Environment Law and Antarctic Policy Section, Legal Branch, International Organisations and Legal Division

Dr Simon Twisk, Director, Industrials and Market Access Section

Department of Industry, Tourism and Resources

Ms Ruth Gallagher, Manager, Tariff and Trade Policy, Trade and International Branch

Department of Transport and Regional Services

Mr Nicholas Bogiatzis, Assistant Secretary, Transport Markets, Policy and Research Group

Mr Wayne Kelly, Assistant Director, International Aviation

Mr Iain Lumsden, Director, International Aviation

Federal Chamber of Automotive Industries

Mr Andrew McKellar, Director, Government Policy

Mr Peter Sturrock, Chief Executive

Monday, 9 August 2004 - Canberra

Attorney-General's Department

Mr Christopher Creswell, Copyright Law Consultant, Copyright Law Branch

Ms Helen Daniels, Assistant Secretary, Copyright Law Branch

Ms Kirsti Haipola, Senior Legal Officer, Copyright Law Branch

Mr Christopher Hodges, Principal Legal Officer

Mr Mark Jennings, Senior Counsel, Office of International Law

Mr Geoff Skillen, Principal Legal Officer, Public International Law
Branch, Office of International Law

Department of Agriculture Fisheries & Forestry

Mr Michael Alder, Manager, Wine Policy, Crops, Wine and
Horticulture, Food and Agriculture

Department of Foreign Affairs and Trade

Mr Peter Hunter, Executive Officer, Pacific Islands Branch

Mr Paul Panayi, Executive Director, Treaties Secretariat

Mr Richard Sadleir, Assistant Secretary, International Organisations
Branch

Mr Steve Thom, Executive Officer, International Organisations Branch

Mr Damian White, Executive Officer, International Law and
Transnational Crime Section

Department of Treasury

Mr Mark Sewell, Senior Adviser, Pacific and Assistance Division

Food Standards Australia New Zealand

Mr James Gruber, Principal Food Technologist

Mr John Taylor, Senior Legal Adviser

Human Rights and Equal Opportunity Commission

Mr Craig Lenehan, Acting Director, Legal Section

Tuesday, 10 August 2004 - Canberra

Attorney-General's Department

Mr Geoff Skillen, Principal Legal Officer, Public International Law
Branch, Office of International Law

Australian Defence Force

Air Commodore Simon Harvey, Director General, Australian Defence
Force Legal Service

Department of Defence

Group Captain Michael Maher, Director of Joint Operations, Strategic Operations Division

Mr David Mason, Director of Operations and International Law

Air Commodore Lee Roberts, Director General Workforce Planning Recruitment and Retention

Department of Foreign Affairs and Trade

Mr Paul Panayi, Executive Director, Treaties Secretariat

Mr Richard Sadleir, Assistant Secretary, International Organisations Branch

Mr Steve Thom, Executive Officer, International Organisations Branch