COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: Multilateral Agreement on Investment

CANBERRA

Wednesday, 6 May 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

Mr Taylor (Chairman)

Mr McClelland (Deputy Chairman)

Senator Abetz	Mr Adams
Senator Bourne	Mr Bartlett
Senator Coonan	Mr Laurie Ferguson
Senator Cooney	Mr Hardgrave
Senator Murphy	Ms Jeanes
Senator O'Chee	Mr McGauran
Senator Reynolds	Mr Tony Smith

Matter referred for inquiry into and report on:

The potential consequences for Australia arising from the matter known as the MAI.

Advantages and/or disadvantages for Australia arising from the MAI currently being negotiated in secret by the Australian Government at the Organisation for Economic Co-operation and Development, with particular reference to:

(a) the ability of countries to impose conditions on foreign investment;

(b) the ability of countries to establish limits on foreign investment;

(c) the implications arising from the 'roll back' and 'standstill' provisions;

(d) the ability of countries to pursue social, environmental, labour, cultural, human rights and indigenous protections and the impacts for each of these sectors resulting from foreign investment regimes under the MAI;

(e) any implications for Australia's national debt and current account deficit of the growth in foreign investment the MAI is expected to bring;

(f) the MAI's dispute handling procedures;

(g) the issue of the constitutionality of the MAI for Australia;

(h) the impact on agricultural and manufacturing sectors;

(i) the impact on State, Territory and local governments; and

(j) the impact on Australian investors seeking to invest overseas.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

Multilateral Agreement on Investment (MAI)

CANBERRA

Wednesday, 6 May 1998

Present

Mr Taylor (Chairman)

Senator Abetz	Mr Bartlett
Senator Murphy	Mr Hardgrave
Senator O'Chee	Mr Tony Smith
Senator Reynolds	

Committee met at 10.12 a.m.

Mr Taylor took the chair.

CHAIRMAN—Ladies and gentlemen, I formally declare open this inaugural meeting of the inquiry into the Multilateral Agreement on Investment which addresses the terms of reference provided both by the Minister for Foreign Affairs early in March and by the Senate a few days later. Although the terms of reference of the Senate are far more detailed than that from the Minister for Foreign Affairs, which is a very broad reference, they are not incompatible and we intend, of course, to conduct only the one inquiry.

I am required to report to the Minister for Foreign Affairs on an interim basis by 25 May. We intend to meet that time scale, albeit, because of sitting patterns, it may be a couple of days adrift; nevertheless, we will meet that ministerial remit, at the same time covering what was referred to us by the Senate.

Can I just say at the opening that the secretariat has been overwhelmed by the level of submissions on this particular subject. The MAI has generated a lot of emotion, a lot of emotive comment and quite a substantial amount of disinformation; nevertheless, it has generated some very genuine concerns about a lot of issues. Of course, that was reinforced by the deferral—last week, or the week before, in Paris at the ministerial meeting—by six months to take a breather on some of the issues that are worrying other countries, and undoubtedly worrying Australians, about this particular proposed MAI.

What I can say about the submissions is that they have been a mixture of form letters, and I think it would be fair to say that some of those form letters have come from some groups who always seem to have a barrow to push in some areas. The League of Rights has certainly been mentioned. I know a number of the names; I see their names on some of these. But, that said, there is a lot of very genuine concern about what this proposed MAI is all about.

As I said, we intend to report to the minister and to the Senate in line with the requested date. We will then resume a program of public hearings right throughout Australia. It is pretty clear that this morning's hearing is only a preliminary one, although we hope to get enough information out of this hearing to provide input to the interim report to the minister and to the Senate.

Finally, before we open up for evidence, I want to respond to criticisms in submissions, and there have been a lot of criticisms in the submissions, that the committee is party to some sort of secret process. If we listen to the Ms Hansons of this world—which I do not think too many people do these days—she makes the point that there are shadowy figures in the dark corridors of the OECD in Paris. Can I just say to you—and perhaps I do not need to say it—that is a load of rubbish.

There is nothing that is being kept from the Australian public, particularly under the new treaty making provisions. This is an unusual reference to this committee. As most of you will know, this committee under normal circumstances does not accept references on the tabling of treaties until after the first signature and prior to the ratification

signature.

This reference, and another one that is running concurrently on the international bribery convention, has been referred to us by the appropriate ministers, and we welcome that because it gives us the opportunity to put to bed well and truly some of the very extreme views of some people around this country that we are party to some sort of secret agenda. We are not, and this committee is not in any way a mouthpiece of the government. It is a formal committee of the parliament. It will report to the parliament, and therefore to the executive in terms of treaty making provisions, I would hope in a very objective way.

I wanted to make those comments before we started because of some of the suggestions that have been made, both orally and in writing, to the secretariat and to all members of this committee and, indeed, to most members and senators irrespective of where they sit in the political spectrum. We will be publishing submissions received. Our hearings will be in public and, of course, our report to the parliament will be public.

[10.18 a.m.]

BIGGS, Mr Arthur Peter, Director, Secondary Industries Section, Foreign Investment Review Branch, International and Investment Division, The Treasury, Parkes Place, Parkes, Australian Capital Territory 2600

MURPHY, Ms Janine Ruth, Assistant Secretary, Foreign Investment Review Branch, International and Investment Division, The Treasury, Parkes Place, Parkes, Australian Capital Territory 2600

NIXON, Mr Roy, Director, Primary Industries Section, Foreign Investment Review Branch, International and Investment Division, The Treasury, Parkes Place, Parkes, Australian Capital Territory 2600

THORBURN, Mr Craig, Assistant Director, Primary Industries Section, Foreign Investment Review Branch, International and Investment Division, The Treasury, Parkes Place, Parkes, Australian Capital Territory 2600

CHAIRMAN—We have received the departmental written submission. Let me just make a point before we start. Yesterday I was informed that in fact the Treasury may not be making a written submission. I personally found that unacceptable and, indeed, on discussing it with committee members, they agreed with me. We have now been presented with a written submission, which of course we welcome, albeit that it is very late and, of course, it puts us in the difficult position of having to refer to something that we just have not had time to read.

I know the Assistant Treasurer has been overseas and been involved in ministerial meetings in Paris. I understand that Treasury officials would have wanted to clear the submission with him—I assume that that is what the delay was. Let me just say to you that it has made life a little difficult for the committee. I wanted to make that point before we started. The written submission has already been accepted by the committee into evidence, but are there any amendments?

Ms Murphy—No, there are no further amendments.

CHAIRMAN—If you would like to make an opening statement in relation to it, that might bring out some of the points, which will make up for us not being able to read it in detail.

Ms Murphy—Thank you for the opportunity to appear before the committee today. We regret the inability to get the submission to you before. That is the result of two decisions: firstly, the desire to put into our submission the outcome of the discussions at the ministerial council meeting at the end of April; secondly, the need to get the submission cleared by the Assistant Treasurer, and he returned to Australia only yesterday

morning. I have thanked the Assistant Treasurer for working quite late last night to clear the submission in time to get it to you today.

CHAIRMAN—That is what he gets paid for!

Ms Murphy—I have also been asked to pass on to you the apologies of Mr Tony Hinton who until recently has been Australia's chief negotiator on the MAI. While Tony has assisted in the preparation of this submission, his obligations associated with his recent appointment as the Ambassador to the OECD prevents his attendance here today.

A new version of the MAI text is now available and we present a copy to the committee today. This latest version is also available on the OECD's Internet site, but our submission refers largely to the February 1998 version of the text.

CHAIRMAN—That is only the MAI text or is it an amended reservation list?

Ms Murphy—Only the text.

Senator ABETZ—Is the amended text underlined or bracketed so that we know what has been changed from the previous text? Otherwise, it will be a terrible task, quite frankly, to re-read the whole lot to find out what changes have been made from the original. If that has not been done, could I request from the department or whoever is responsible that that be done? Otherwise, I will have the pleasure of re-reading it all just to try to find out what changes have been made.

Senator O'CHEE—It is a very sensible suggestion.

Mr Thorburn—I will address the latest version of the text that has been presented to you dated 23 April 1998. There is a new annex to that—annex 2—which attaches the proposal of the chairman of the negotiating group on labour and environment. That is the major substantive change to the February version which you have already looked through.

CHAIRMAN—In our papers we already have the 24 April version.

Senator ABETZ—I would like to know all the other allegedly non-substantive changes as well, because some people may be of the view that those changes in fact are substantive. I would like to know what all the changes are and then I will make my determination, as my fellow committee members will, as to whether they are substantive or not.

CHAIRMAN—Is that possible?

Ms Murphy—We will endeavour to get a marked copy back to you.

Senator ABETZ—That is very kind, thank you.

Ms Murphy—Our submission seeks to address the issue of the potential consequences for Australia arising from the MAI by pointing out the potential benefits of a satisfactory agreement being reached. It also highlights particular areas of concern for Australia as the draft is progressing. The submission also seeks to address many of the 10 specific issues put for consideration, although we have not responded directly to each. We have not attempted to make any assessment of the likely impact of the MAI on particular sectors of the Australian economy, Australian investors overseas and Australian governments. These are matters that are best assessed if and when the MAI is signed and the government submits it for formal treaty making procedures.

However, as Australia is negotiating on the basis that all current laws, policies and practices will be protected, and as we have a relatively open and transparent foreign investment regime, any adverse implications are likely to be negligible. We have not addressed the issue of constitutionality on the understanding that our colleagues from the Attorney-General's Department will cover this in their submission. The MAI should have no negative implications for Australia's national debt and current account deficit. Foreign debt and foreign equity investment into Australia reflect the shortfall between Australia's domestic savings and investment decisions.

Overall, foreign investment has many advantages for economies. It brings with it an exchange of new technology and management know-how, work force skills, export markets and increased employment for both exporters and importers of capital. Foreign investment therefore leads to increased domestic and world economic growth and improved living standards through its impact on productivity and competitiveness.

Increasingly, countries both export and import capital, reflecting, for example, their comparative advantage in developing certain industries or products and a desire to spread investment risk geographically. This in part reflects the growing role of funds managers in pooling and investing the superannuation and other savings of individuals. For example, over 1996-97, levels of Australian investment abroad increased from $170 billion to $199 billion. The great majority of Australia's investment abroad—over two-thirds—is in OECD countries, although Australia's investment levels in non-OECD countries is increasing.

Growth in foreign investment has far outstripped growth in trade, but flows of investment have largely been between OECD countries which are attributed with 85 per cent of outflows and roughly 65 per cent of inflows. This reflects the relatively open foreign investment regimes in OECD countries, assisted by the over 1,600 bilateral and regional investment agreements between OECD countries, and between OECD countries and non-OECD countries.

There is also scope for non-OECD countries to benefit substantially from well-directed foreign investment both into and out of their countries. Increasingly, non-OECD

countries are themselves investing overseas, but from a very low base. The interest of non-OECD countries is also reflected in their attendance at and participation in the MAI negotiations.

Non-OECD countries increasingly are recognising the benefits of more open foreign investment regimes for the development of their economies. A recent example is the Korean decision to open its financial system to greater foreign investment. Foreign investment is an effective means of tapping into world best practice, financial risk management and prudential supervision.

The recent OECD report *Open markets matter: the benefits of trade and investment liberalisation*, the executive summary of which is attached to our submission, highlights the benefits of foreign investment to investors and investment recipients. Importantly, it concludes that the efficiency benefits of an open trade and investment regime contribute to economic growth and, hence, rising incomes. Although it recognises that there can be painful periods of adjustment from structural changes, including as a result of trade and investment liberalisation, protectionist policies are not an effective long-term solution as they depress growth and reduce job creation and innovation.

The OECD report also concludes that trade and investment liberalisation can work to improve the environment by promoting a more efficient allocation of resources, removing restrictions and distortions that are damaging to the environment and improving the speedier transfer, adoption and diffusion of environmentally friendly technologies. The wealth creation associated with liberalisation should also reduce poverty, which is often an underlying cause of environmental degradation.

The objectives of the MAI are to provide a broad multilateral framework for international investment, with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures. It is to be a free-standing international treaty, open to all OECD members and the European communities and to accession by non-OECD member countries, which will be consulted as negotiations progress.

The MAI seeks to achieve national treatment and most favoured nation treatment subject to countries' rights to identify exceptions to those obligations in particular domestically sensitive areas. Importantly, the MAI must be read as a package that contains both the text containing those obligations and country exceptions. The exceptions serve both to protect sovereign rights to determine and maintain domestic policies and to provide transparency as to those domestic policies that are inconsistent with the obligations of the MAI.

Of course, the MAI is very much in draft stage. There is much work to be done and many obstacles to be overcome before an agreement could be reached. Our comments must also be taken in the context that nothing in the MAI is agreed until everything is

agreed. This government will not sign the agreement unless it is satisfied that it is in Australia's national interest to do so. In protecting Australia's national interest, the government has stated that it will ensure that the MAI will not override or weaken Australia's existing policies. Australia will lodge all exceptions required to protect current policies.

Some areas where there are major differences of view in the negotiations are highlighted in the Treasury submission, with particular reference to Australia's position. General and country exceptions to the provisions of the MAI are therefore also very preliminary. For example, the Commonwealth is still seeking preliminary input from states and territories as to their laws and policies that may conflict with the MAI. The MAI is not seeking to override non-discriminatory domestic laws, and all foreign investors are required to obey the laws of the country in which they operate.

Equally, there is nothing in the MAI that requires budget intervention or constrains budget policies regarding the funding of public institutions such as for health and education. Non-discrimination only requires that we do not treat foreign investors differently in like circumstances.

Similarly, taxation matters are largely carved out of the MAI. Moreover, the MAI will make it clear that governments will not be required to pay compensation for losses which an investor or investment may incur as a result of regulation, revenue raising and other normal government activity in the public interest. This change reflects the negotiators' response to the Ethyl case being heard under the provisions of the NAFTA, the North American Free Trade Agreement.

Turning to the state of play, at the OECD ministerial council meeting on 27 and 28 April which the Assistant Treasurer attended, ministers agreed to continue the MAI negotiations. Ministers agreed that the next meeting of the negotiating group will be held in October 1998, allowing for a period of assessment and further consultation between the negotiating parties and with interested parts of their societies. These decisions were announced by ministers following the meeting and a copy of that announcement is attached to our submission.

Since the outset of the MAI negotiations in 1995, Australia has undertaken a very wide-ranging and extensive consultative process. Australia is participating in the negotiations for the MAI on the basis that it can lodge all exceptions necessary to ensure that current policies are protected and that no current policy is overridden. To ensure that Australia's exceptions will produce this outcome, the Treasury has been consulting all relevant Commonwealth government departments. It has also briefed and consulted all state and territory governments on the MAI, with particular focus on identifying those particular laws and policies that may not conform with the draft MAI obligations.

Information on the MAI has also been provided to and comments have been sought

from many non-government organisations and industry and other umbrella organisations—for example, the Australian Conservation Foundation, the Australian Chamber of Commerce and Industry, the Australian Bankers Association, the Australian Consumers Association, the Education Union, the Australian Vice-Chancellors' Committee, the Australian Council of Trade Unions, the Australian Mining Industry Council and the Business Council of Australia.

Briefing sessions on the MAI have been provided also for parliamentarians and their staff. In addition, the OECD and Treasury have distributed information on the MAI to the wider public through posting MAI documents and briefings on the Internet sites.

Finally, I should stress that the MAI is a highly complex agreement. It is a tops down agreement, starting with very high aspirations, and countries are required to identify those domestic laws and policies that conflict with those aspirations. It is very different from most international trade agreements, for example, which build from a common base of measures that countries are able to accept. It is therefore difficult for a few individuals to be fully across all the detail of the 124-page agreement and 55 pages of commentary and the many linkages and inter-linkages within the agreement. Accordingly, while we shall try to answer all your factual and technical questions, we may have to take some of those on notice. Thank you very much.

CHAIRMAN—Thank you very much. One particular aspect that this committee continually touches on in all of its reports is that word 'consultation'. Perhaps we should just start with the consultative processes, both external and internal. In terms of the OECD mechanism, you indicated that October is the next meeting of the group. The ministerial group meets when—May 1999, is it? That is the next ministerial—

Ms Murphy—Roughly April of each year, yes.

CHAIRMAN—And they are the two dates that you are working to, one for the official level and the other one at the ministerial level?

Ms Murphy—The October 1998 meeting would be the next meeting of the negotiating group. Following previous practice, we expect there would be several meetings between then and April 1999.

CHAIRMAN—That is with the OECD. You covered some of this in your opening comments, but I am sure we want to hear a little more detail about it—to what extent have you consulted with state and territory governments and with non-government organisations, and you mentioned some, and what was their reaction? It is an area where we have been critical. It is improving, but we have been critical in almost every report that we have tabled. The consultative machinery is getting better but has not yet reached an optimum level. Could we just hear a bit more about with whom you have consulted and when? It will overcome some of these criticisms about undue secrecy, bearing in mind

that this has been going on for three years, since 1995. Perhaps you could just take us through the time scale as well as the authorities with which you have consulted.

Ms Murphy—Can you just bear with me?

CHAIRMAN—For example, we would be interested in whether that consultation, particularly with non-government organisations, only started recently or whether it started back in 1995. We need to get a feel for when you started to consult and with whom.

Ms Murphy—The consultations in fact have been, if you like, in two parts. The OECD itself has arranged a number of briefing sessions, consultative sessions, et cetera, and we have set that out. It is in attachment B to our submission, page 16. That highlights the processes that the OECD itself has gone through, outreach activities with a number of countries, conferences and seminars—of which there was one in Wellington, New Zealand in 1995 and one in Brisbane, Australia in September 1997—and other meetings with non-government and industry and environment groups.

Importantly, if you refer to paragraph 9, in October 1997 the OECD arranged for informal consultations with representatives of non-government organisations. Representatives of over 40 such organisations, covering a wide range of interests and activities, in many parts of the world attended that meeting. From Australia's point of view, we have covered that in a little more detail to what I have said in my opening statement on page 10 of our submission, paragraphs 47 and 48. Right from the beginning of the negotiations, we began consultations between the Treasury and other Commonwealth government departments. That was the first process.

As negotiations started to develop the treaty somewhat, we then extended those consultations to state and territory governments. We have had both written and oral briefings with those states and territories, mainly focusing on those obligations or provisions of the draft MAI which may impact on their current practices and policies.

CHAIRMAN—But how long have they been involved? In 1995, the whole thing started. When did you start involving state and territory governments and then moving on to the NGOs? When were they all brought into the loop?

Ms Murphy—My colleague tells me that the states have had written material on the MAI right from the word go, and on an ongoing basis. We cannot at the moment recall the first time we had a face-to-face meeting with them, but it was probably 1996. We can confirm that.

Senator ABETZ—Can you take that on notice?

Ms Murphy—Yes, we can take that on notice.

CHAIRMAN—We will be asking DFAT when they come before us about the SCOT procedures—the Standing Committee on Treaties. I assume that was involved as well in terms of the states and territories—involving Treasury, DFAT, A-G's, et cetera.

Ms Murphy—Yes, that is right. As the negotiations further progressed the draft text, we then opened up our consultations more widely to cover the union and industry-type organisations and non-government organisations. At this stage we tended to focus on umbrella organisations with the intention that they would go back to organisations that are affiliated with them. We have always had an open door to anybody who had any particular concern regarding the MAI.

CHAIRMAN—The bottom line as far as you are concerned has been an open consultative process since 1995?

Ms Murphy—That is right.

Mr HARDGRAVE—With regard to these consultations, can you assure me that it is not just a one-way street? You say your door is open. What has happened to any of the concerns raised? What concerns have been raised in a general sense and what has happened to them? Have they been factored into negotiations or have they simply been popped into a filing cabinet?

Ms Murphy—I can answer that in general terms, but perhaps my colleagues can add something more specific.

Mr HARDGRAVE—You might like to give us an example of a concern that was raised by an organisation, to appease my general cynicism about this whole thing.

Ms Murphy—Probably the two obvious examples are in the areas of environment and labour, where we have very much been consulting with relevant departments on the position Australia should take on those issues, reflecting government policy. They would be particular examples.

Where other bodies have indicated particular concerns, the way it is taken on board in a general sense is to make sure that we can live with the wording as it is being negotiated within the negotiating group, knowing what the concerns are in a domestic sense.

Mr HARDGRAVE—What carries the greatest weight? The domestic concerns or keeping the international group happy?

Ms Murphy—We have ministerial direction to say that the greatest weight is on domestic policies being maintained. That is the fundamental basis on which we are negotiating.

CHAIRMAN—Do committee members have any other questions in terms of the consultative mechanisms? We need to cover that first.

Senator MURPHY—On page 10 of your submission you state:

> The Commonwealth has briefed and consulted all State and Territory Governments on the MAI. The briefings have comprised both face to face . . .

Can you provide the committee with the dates and who was present at those meetings.

Ms Murphy—We may not have the names of everybody who was present. With regard to the last round of meetings held with the states over March-April, at the ones I attended there were over 24 representatives of different state organisations. I am not entirely sure that I would have every name there, but we can attempt to give you what we do have.

Senator MURPHY—Were there minutes taken at those meetings? Are there recordings of those meetings?

Ms Murphy—I went to Western Australia and I understand they took minutes. We could get a copy from them. I am not sure what happened in the other states.

Senator MURPHY—It just goes to the question Mr Hardgrave asked about whether concerns were raised and how they were dealt with. If we could have some detail of the meetings that took place and if states raised concerns—if local government, for instance, raised concerns—how they have been dealt with by the Commonwealth parties.

Ms Murphy—I only took handwritten notes of particular concerns that I was not able to address at the time.

Senator MURPHY—It seems to me a bit of an odd way to actually deal with a process that relates to a fairly significant agreement. You sit down and have a consultative approach with a state, local or territory government and it is so informal that we have got handwritten notes—maybe we have got some minutes—as to how you dealt with issues raised by them.

Ms Murphy—The focus of the last round of meetings was to obtain from the states a preliminary list of those areas where they might have policies or practices that are non-conforming with the MAI obligations.

Senator MURPHY—What is the process of identifying that?

Ms Murphy—By explaining what the MAI provisions mean, what kind of things other people have highlighted as possibly being in conflict and getting them to, if you like,

throw up and discuss possible areas within their particular agencies.

Senator MURPHY—When does that occur? Did that occur at the meeting or does it occur by way of correspondence after the meeting? Do the states and the local government bodies write to you?

Ms Murphy—That is what is happening next.

Senator MURPHY—What do you mean—happening next?

Ms Murphy—After those meetings we have given the states some time to respond.

Senator MURPHY—What time?

Ms Murphy—We asked them to respond by the end of April but at this stage we have only had two responses.

Senator MURPHY—Have they raised concerns?

Ms Murphy—There are a few concerns, but as I said the focus of those particular meetings was on trying to identify particular government policies and practices that may conflict with the MAI and for which we will need to seek exceptions.

Senator MURPHY—We would appreciate some advice on that.

CHAIRMAN—The committee wants to know this: what is Treasury going to do, as the lead department, in the six-month breathing space before the next consultative group? What are you going to do to enhance the consultative mechanisms to make sure that we overcome these perceptions—and they are very real perceptions out there—that we have some sort of secret process going on? There is no validity in that but it is understandable that some people have those views. What is Treasury going to do to press the accelerator in terms of consultative mechanisms between now and October 1998?

Ms Murphy—I think we have done a considerable amount of briefing since February this year. We have offered to speak to just about anybody who has raised particular concerns. We have spoken to numerous people on the telephone to discuss particular concerns that they might or might not have or to put to rights misinformation that has been spread by others on what this MAI agreement is all about. So we have accelerated that process quite significantly in the last few months. We will continue that process. We will have further negotiations with the states once we get their written comments on what kinds of exceptions they think they may need to develop a new Australian list of exceptions to go back to the negotiating group.

CHAIRMAN—Will that be done by Treasury unilaterally with the states or will it

be done through the SCOT process—the Standing Committee on Treaties through DFAT?

Ms Murphy—We have been doing it unilaterally.

CHAIRMAN—Maybe that is half the problem. When we get DFAT appearing before us, we will be asking to what extent the SCOT processes have taken place in terms of the MAI. But in this one it seems to me—and correct me if I am wrong—that we may have a left hand, right hand problem being perpetuated. There is machinery at the bureaucratic, official level already existing in the preparation of treaties, and that is coordinated through the treaties secretariat in DFAT using the lead departments as appropriate. I would have thought that the MAI could very reasonably use that mechanism to make quite sure that the left hand does know what the right hand is doing and nothing falls down the cracks.

Ms Murphy—When we consult with the states and territories we do that through a lead department. I am not quite sure whether that is the same lead department that the Department of Foreign Affairs and Trade uses.

CHAIRMAN—I am going to be very pointed about this. When we had an informal briefing—the only briefing that we have had—by Mr Hinton, I recall that at the time he was quite anxious when I invited DFAT officials to come along. Why did I invite DFAT officials to come along? It was because they needed to be in the picture. It seemed to me that there was an indication, perhaps, that Treasury wanted to go it alone on this one. That is not acceptable, irrespective of what the subject matter is, when you are developing a major treaty—which this is—and a treaty that is generating a lot of unnecessary emotion.

Ms Murphy—We can certainly work through that with the Department of Foreign Affairs and Trade. I guess one response is that the process of this particular treaty was started before those provisions were set in place.

CHAIRMAN—I do not think that matters. We have now got the new provisions in place. Let us observe the new provisions. If, in fact, you have gone a reasonable way down a particular line, then there is no reason why we cannot bring the whole thing back into focus, otherwise it makes a bit of a nonsense of the whole mechanism. We will cover that with DFAT when we come to their evidence. I just ask that you take it up with them. I am sure that my colleagues agree with me that we need to have the mechanism as one, rather than a left hand and a right hand being generated.

Mr HARDGRAVE—Even further on that, I would ask for ample proof of the cooperation between both sets of bureaucracies, that mechanisms that are in place and the quality control checks of those mechanisms that are there to ensure that departmental rivalry is not railroading something down the wrong gully or in itself contributing to the misinformation that is out there. I think Treasury has got its place in the international

diplomacy sun under this particular treaty. The once every six weeks trip to the OECD to negotiate it would be a much sought after frequent flier point acquisition program. If Treasury is trying to protect their place in the sun and is excluding other departments, this committee would be very concerned about that. The challenge is in Treasury's lap to assure this committee that that particular rivalry is not a factor and tell us what mechanisms are in place to make sure that that never becomes a factor.

Ms Murphy—May I respond to that? There is definitely no suggestion that there is any rivalry between Treasury and the Department of Foreign Affairs and Trade. We have been consulting with them as regularly as we have consulted with, perhaps, the Attorney-General's Department on technical issues within the MAI and with the Department of the Environment on the environmental provisions. They have been kept informed and we have relied on their advice, where necessary, all along.

Mr HARDGRAVE—But the rationale, the operating principles in both departments are so entirely different that there is always going to be rivalry. I admire the fact that you say there is not, but there will always be. DFAT, by its nature, would also dearly be wanting you not to intrude on their negotiating patch either, so there is going to be rivalry there. I would just like to think we have mechanisms in place to minimise the rivalry.

Senator O'CHEE—Since this government came in we have changed the treaty making process. This committee has a very important role in that, and we would like to ensure that any information that a department has or point of view comes to us unfiltered. It is one thing to say that you keep in touch with DFAT, but it is a quite different thing for us to have the uncensored, unexpurgated and unfiltered views of departments. The committee process will only work if that occurs. I think that is basically what my colleague Mr Hardgrave was saying. We need to be satisfied of that.

Ms Murphy—Am I getting this correct: if we get advice from a department in respect of a particular provision of the draft MAI, we should be sending a copy to the committee?

Senator O'CHEE—No. What I am saying is that, if DFAT has a particular point of view, I would be horrified to think that they have to go through you, and you choose what does or does not get passed on, or you put a particular slant on it. I have seen this happen in Canberra a lot. I am basically saying—as Mr Hardgrave has said and as Mr Taylor, the Chairman, has said—that it should be very clear that information can come here direct and does not have to go through another department.

CHAIRMAN—If it were all done through the SCOT processes you would not have that difficulty arise, it seems to me, and Treasury would be the lead department. It happens all the time with treaties: you have a lead department, but it is all handled through the SCOT process initially at the official level. That then leads to signature either

at the official level or at the ministerial level, depending on what the treaty brings. It develops a national interest analysis, which is then tabled, with the treaty, and is referred automatically to this committee prior to ratification. I would be interested, when Mr Potts comes before us, to discuss this with him as well. I might be wrong, but it seems to me that that is where the whole process might be falling down.

Mr HARDGRAVE—One other thing I just want to add to that before you respond is that the fact that we got the submission this morning—and I understand all of the mechanics behind the delays—is a sign to me that Treasury is not taking this committee's role in the process seriously. It is the same gully we have been up already with the Department of Foreign Affairs and Trade and the Attorney-General's Department. I think we have sorted them out, and I do not think they are going to submit things to us late. We sorted this out with the Australian Taxation Office in the past, and we will sort it out with each and every department as and when necessary. I am just saying that the fact that this is late is an indication that your department is not plugged into the process which is now established, and which has been established for almost two years.

CHAIRMAN—Does anybody else have anything on consultation?

Senator ABETZ—You indicated two areas—environment and labour—as being areas of concern that arose as a result of consultation. Did that arise after or before February 1998?

Ms Murphy—Before.

Senator ABETZ—By whom? You do not necessarily have to mention individuals, but was it state governments? With whom were you consulting before February 1998?

Ms Murphy—We were consulting with all Commonwealth departments and state and territory governments well before February 1998. I must stress that these are the Australian positions on these things. They are not Treasury's positions, they are positions that have been agreed across departments and ministers, where appropriate. On those things, they reflect government positions on those particular issues. So we have got that advice, perhaps in the first instance from the department that is particularly concerned, but also through ministerial direction.

Mr BARTLETT—I am interested in the source of the impetus for this treaty. What level of call has there been from Australian industry or Australian business in the past to be involved in this treaty? Has there been any evidence, for instance, of Australian businesses being denied access to investment markets overseas or of discriminatory processes impeding their investment overseas? Has there been a large level of demand by Australian business for us to be involved in this treaty?

Ms Murphy—As I said before, we have only really been talking to umbrella

organisations to date, but there is some genuine concern amongst business about the difficulty for Australians to invest, particularly in some developing countries. There are obviously a number of examples where countries, perhaps in the Asia-Pacific region, change their rules regarding foreign ownership levels and things like that which have been to the detriment of Australian investors in past years.

Mr BARTLETT—But are not most of the signatories to this treaty in fact the developed countries, rather than the developing ones?

Ms Murphy—That is true, but the aim of the negotiations is, once an agreement is settled, to open up the agreement to non-OECD countries. Indeed, at this point some eight non-OECD countries are participating in the negotiations.

Senator MURPHY—Who are the additional three?

Ms Murphy—The Baltic countries—Estonia, Lithuania and Latvia.

Senator ABETZ—Are they participating or observing?

Ms Murphy—They have only been observing. With this last ministerial council meeting, there has been an increase in the level of participation that they are able to be involved in.

Senator ABETZ—At this last meeting they were observers?

Ms Murphy—Yes.

Senator ABETZ—And now they can participate? To what extent?

Ms Murphy—I am not entirely clear exactly how far that will go. Before, as I understand it, they were allowed to speak and make a statement, but that was it. Now they are actually able to participate in the negotiation of the provisions themselves.

Senator ABETZ—Did those eight observers approach the OECD countries? Or did the OECD go out of its way and say, 'Look, we would like the involvement of countries such as your own'?

Ms Murphy—In the main, they have approached the OECD seeking to participate and some of them have, in fact, prepared their own list of exceptions. My colleague says that the only thing that the non-OECD people are not allowed to do now is to insist on square bracketed text; but they can negotiate on the wording.

CHAIRMAN—There is an article in the *Guardian Weekly* which covers this point. It says:

The annual OECD ministerial gathering in Paris this week will be told that the negotiating group is considering a proposal to include eight non-member countries as full participants in the discussions. The potential participants are Argentina, Brazil, Chile, Hong Kong and the Slovak Republic, which are already observers at the talks, and Estonia, Latvia and Lithuania, which are about to join in the same capacity.

Is that correct?

Ms Murphy—I think that is correct, yes.

Mr BARTLETT—In your introductory comment you referred to a fairly significant increase in recent years in the level of Australian investment overseas. Wouldn't that seem to indicate that the whole investment process is going along quite well without this treaty?

Ms Murphy—Australian investment overseas is still largely in OECD countries: that is reflected in the other OECD data that I presented to you. Increasingly, Australia is interested in investing in non-OECD countries and that is where there are still difficulties—I gave the example of Korea, where it was opening up its financial institutions sector. Countries are unilaterally moving to liberalise their investment regimes. We see the MAI—if it gets up and running—as being a further mechanism for encouraging that process in non-OECD countries.

Mr BARTLETT—Given that there is a steady increase in investment into the OECD countries, the main benefit of this treaty—from an Australian business point of view—is the degree of its extension to non-OECD countries?

Ms Murphy—There is that issue certainly, but the point of the MAI and the exceptions is the transparency that those exceptions will give. So that, even for OECD countries, Australian investors seeking to make a decision as to where they may invest overseas will have the benefit of knowing what the restrictions are against foreign investors in all countries that participate in the MAI.

Mr BARTLETT—What evidence do we have that the non-transparency of those provisions in the past has impeded Australian investment overseas in the OECD countries?

Ms Murphy—I cannot answer that in detail. The Department of Foreign Affairs and Trade may have more detail on that.

Mr BARTLETT—Could you take that on notice to find some information on that?

Ms Murphy—We can take that on notice, yes.

Mr BARTLETT—Can I perhaps just reverse the question for a moment and look at it from another point of view. What evidence have we had, in recent years, of

complaints from other OECD countries about lack of transparency in Australian business arrangements or government regulations? To what extent has that impeded foreign investment in Australia?

Ms Murphy—We very rarely get complaints about lack of transparency in Australia because our laws, rules and regulations are made public and our foreign investment regime is very transparent.

CHAIRMAN—We have had criticism, in a number of submissions, that doing it through the OECD machinery will generate a rich man/poor man country approach and that it should be done on a more multilateral basis. It has been suggested to us, in a submission we will be dealing with later in the day from the ACCI, that maybe a more appropriate approach would be to do it through the WTO Millennium Round. How does Treasury react to moving it from the OECD where you have got OECD countries and an increasing number of non-OECD countries wanting to join into a more multilateral forum of the WTO Millennium Round?

Ms Murphy—The reason the OECD countries began this process of negotiating the MAI was that, in the process of the Uruguay Round, there was an attempt to get investment issues up for negotiation, and it failed—so this was a fall back option, if you like. Australia's position—not just Treasury's position—is that we have no particular view on where the negotiations should be held. We are participating in this process because other countries have agreed to work through the OECD countries. If there was agreement to move it to the WTO we would continue to participate.

CHAIRMAN—So there is no policy objection to it being moved into that forum?

Ms Murphy—Yes. My colleague reminds me that we are also participating in some similar work on investment in the WTO and in the APEC context.

Mr TONY SMITH—I want to further Mr Bartlett's point about the genesis of it. It seems to be the case, does it not, that it had its genesis in May 1995? Was that when it was first spoken about?

Mr Nixon—The negotiations formally commenced in May 1995 but there has been a lot of work done previously in the OECD on the issue of what they used to call the wider investment instrument. I think that dates back at least two years, if not three years, prior to the formal commencement of negotiations. The elements of a wider investment instrument, as it was then known, were broadly moving along the same lines and eventually became known as the MAI. I think the answer to your question is that there was a lot of work already in train in the OECD on a multilateral investment instrument; and I suppose that was one of the reasons why in some ways it was felt appropriate that the work that became the MAI continued in that forum.

Mr TONY SMITH—As a member of the OECD, three years prior to May 1995, what was Australia's input into this idea?

Mr Nixon—You are testing my memory very much there now.

Mr Biggs—I am aware of some involvement. For instance, in a document referred to in the OECD information sheet on the Multilateral Agreement on Investment—which I took off the Internet—there was reference to a document called *Towards Multilateral Investment Rules* and that reports, as I recall, on papers that were prepared at a conference. Some of those papers were prepared by Australians—I think there was somebody from the Department of Foreign Affairs and Trade, and also an academic. The document I refer to reports published papers which were presented at conferences on that topic.

Mr TONY SMITH—Where and when was that?

Mr Biggs—I think that would have been in the mid-1990s. But, as I say, it is referred to there as a published document, and the OECD material reports it.

Mr TONY SMITH—When one compares the generation of the Australian involvement with the Convention on the Rights of the Child, it is said that some people took an idea that had been rejected by the US courts and went through the back door to start an idea about the notion of autonomy of children. Is this what has happened here? Effectively, has someone said, 'All right, we will never get this through in a democratic sense, but we have got ways and means of getting around that. We will go through this process which will eventually hoist itself up by its own boot straps in the international arena'?

Mr Nixon—It is fair to say the OECD has a fairly significant history of being involved in international treaties or agreements relating to the movement of capital. Back in the 1960s, when Australia became a member of the OECD, it accepted the terms and obligations of what are now known as the OECD codes on the liberalisation of capital movements and current invisibles operations. Certainly to my knowledge, we have acceded to these codes and the OECD has been in the business of trying to provide rules on the movement of capital, including direct investment—which the MAI is all about—for probably 25 years.

The genesis of the movement towards an MAI probably gained momentum towards the end of the eighties and into the early part of the nineties when there were some abortive attempts at that stage to try and strengthen some of the obligations in these codes. As for the committees that deal with these in the OECD, we are obviously a member of them and we sit on those. Treasury has carriage for providing the input to those committees. Part of that process led to further work on what was then, as I said, the wider investment instrument and from there came the work out of the MAI. So I do not think it was something that popped up out of the blue. It has certainly been a process of long

standing.

Mr TONY SMITH—Within a certain clique, yes. But would you not accept the notion that in the wider community it has popped up out of the blue?

Ms Murphy—But the negotiations on the MAI were made public. The decision to move into those negotiations was made public by the communique from the ministerial council meeting in May 1995. It has never been secret in that sense. Clearly, it is not normal to distribute widely very early drafts of any text because they can be as much misleading as they can be helpful, but it has certainly never been a secret that these negotiations have been under way.

Senator ABETZ—Say I am an Australia businessman wanting to invest overseas—what is the MAI going to do for me? Would I not be trusting the OECD countries anyway? In general terms, they have appropriate regimes and I would feel confident that their regimes would not pull the rug out from under me. I would feel relatively comfortable, wouldn't I?

Ms Murphy—That is true. The additional advantage of the MAI is that you would be able to see in one place the various restrictions that the different countries that are participating in this MAI might place on the kind of investment that you might wish to make. Without this agreement that might be much harder for you to find out in the normal course of events.

Senator ABETZ—So that would be the advantage?

Ms Murphy—Yes, if you are investing only in OECD countries.

Senator ABETZ—If I were an overseas investor—let us say based in Singapore—thinking of investing in Australia, the fact that Australia had signed up to the MAI would not be any real extra protection. Is that so? Could I trust Australia being a responsible world citizen and not pulling stunts on foreign investors?

Ms Murphy—That is true. We always regard ourselves as being an open and friendly environment for foreign investors in Australia because of our need for foreign investment but, equally, the obligations that would be imposed on us by the MAI might strengthen your relaxed view on investing in Australia. Let us put it that way.

Senator ABETZ—Right, but one of the things that I am told in the submissions is that, if Australia wanted to, it could pull out of the MAI anyway after five years.

Ms Murphy—That is the current proposal: you get five years if you do ratify and after that you can opt out if you want to. But the investments that were made—

Senator ABETZ—During that five-year period would still be subject—

Ms Murphy—During that five-year period they would and, as is currently proposed, any previous investments prior to that five-year period would be protected for a further 15 years.

Senator ABETZ—It would stand to reason that any prior investments were made on the strength of Australia's reputation and not on the strength of the signing up to the MAI.

Ms Murphy—That is right.

Senator ABETZ—I suppose the attitude I am taking to this is that you have got to convince me that it is going to be for the ultimate good for Australia to sign up to this, and I cannot really see that our signing up to it is going to increase the flow of foreign investment into this country, nor can I necessarily see it as being beneficial for Australian investors investing in OECD countries who are going to be signatories to it, because basically we trust them anyway to do the right thing. The real area I would have thought for Australian expansion and opportunity is in South-East Asia and we only have one observer, Hong Kong. I would have thought that that does not necessarily assist Australian investors in the international community because OECD is safe and all the others are non-signatories anyway, so what is the actual benefit to Australia? That is what I am trying to get a handle on.

Ms Murphy—You are quite right; we do not see that there will be very much additional investment created between OECD countries as a result of this agreement if it finally gets ratified. Where we do see advantages is if we can get non-OECD countries to sign on. Even though Australia will get foreign investment regardless probably of the MAI, the benefits to Australia go wider than that. If we can increase the level of foreign investment flows throughout the world, that brings with it greater employment opportunities and trade opportunities, and the flow-on effects to Australia through that mechanism are what we are seeking to get out of this agreement.

Senator ABETZ—I fully agree with you on that. There are some people who would disagree with that; nevertheless, I agree with that thesis. But wouldn't that make it absolutely and utterly essential that you—you, the OECD—actively invite non-OECD countries to participate in this process and get them actively involved from the ground level so that all the Asian countries, for example, would be predisposed to be saying, 'This is a good agreement and we are thinking of signing it up.' But if you have not actually been involved in the process and then it is, 'Do you want to sign up? Take it or leave it,' then, as we know with international agreements, once they are signed up they are very hard to amend or change and therefore it will be a take it or leave it approach. If our real target is the non-OECD countries, and I can understand the rationale for that, I would have thought leaving the non-OECD countries out is a major flaw in your assertion that it is for the non-OECD countries.

Ms Murphy—I would like to say that there are two issues there. One is the demonstration effect for other non-OECD countries of the eight that are participating, and they are from right around the world. We are not only interested in our Asian neighbours but also very interested in the old USSR-type countries for investment.

Senator ABETZ—Yes, but any African countries, for example?

Mr Biggs—If I may just add, as we refer on page 16 of the submission, the OECD took on itself the role, as part of the process of developing the MAI, of an outreach program. That outreach program was aimed at doing what you were asking about. That was aimed at all countries, and it has been done through conferences and seminars in Latin America; I think there was a conference in Brasilia, for example. There may have been others. There were certainly some in Asia and in Africa there was one in Egypt. The process has been one of enabling countries beyond the OECD countries to see what is happening, to inform them. The people involved in the negotiations have spoken and presented papers at those conferences. Allied with that has been this question of observers coming in. As we have seen, the number of observers have grown. That is because countries quite clearly are coming forward when they see that they have realistic possibilities of coming up to the standards of OECD countries in terms of their openness and transparency in their policies. That is the process that is in train.

Senator ABETZ—Could I invite you to give us more detail and ask you to take on notice for us the basis of those conferences in Brasilia and Egypt: who actually attended, which countries were represented, whether they represented governments or corporations. Also there was one in Indonesia, did you say?

Mr Biggs—There was one in Asia.

Senator ABETZ—That outreach program is an area that I am interested in, and if you could give us more details on that in some supplementary submission I would appreciate that.

Senator MURPHY—You might also provide us with some information about the responses that all of these outreach countries have given thus far, without just saying to us that the number of observers has grown. I would not say it has grown that greatly. Why do these countries actually need an MAI to develop transparent investment laws?

Ms Murphy—They do not need an MAI to develop transparent investment laws. Obviously, Australia has developed them fairly well unilaterally. The benefit of the MAI, as I see it, would be that it is a demonstration effect. If a developing country can see how few restrictions OECD countries place on foreign investment, it is perhaps a target level or a high standard level that they could seek to attain over time.

Senator MURPHY—I am just reading the submission from DFAT where they talk

about the various processes over time. If you go right back to the 1940s, I think, there was an effort to try and get in place an agreement on investment as part of the GATT. It was as early as 1948. That failed simply because developing countries wanted to maintain control over their own economies in that respect. It would appear that there is no difference today to some degree. Yet there have been other agreements that have developed on a bilateral basis, with which I would have thought from Australia's point of view and in Australia's interest we might be better off, given that we are often seen as a springboard to Asia for European investors. That has generally been accepted. Europe is a long way away for a lot of Asian countries and Australia is to some degree accepted as part of the Asian community. Why wouldn't it be more of an advantage to us to develop a multilateral agreement along the lines which I think is in the APEC investment principles, though are they not binding, as I understand it, according to the brief that we have been given. Why would it not be in the interests of this country to do that, rather than become part of a European agreement?

Ms Murphy—Can I answer the first part of your question, which was why developing countries would not have the same view today about protecting their domestic economies. Obviously since the 1940s there has been an awful amount of empirical and theoretical work done by the OECD, the WTO, IMF and World Bank that shows fairly well conclusively that protectionist measures are not the way to go if a country is seeking to get economic growth, higher living standards, increased employment et cetera. Increasingly, these developing countries are recognising that and recognising that where they compare themselves with other developing countries, those developing countries that are moving ahead fastest are those that are liberalising their trade and investment regimes the quickest.

Senator MURPHY—I will just go to a point you made earlier in response to another question, where there have been problems for Australian investors overseas, and generally they have been in Asian countries where they change the rules. I have not seen anywhere in any of the briefing information that an MAI necessarily is going to stop countries from doing that, particularly countries, say, that are like Indonesia where you have basically got a dictatorship. The only exception is that I think in the dispute settlement procedures it says something like, 'Well, you may get your name taken off the list.' Big deal.

Ms Murphy—The important thing about the MAI is the transparency of any rules or laws in those countries that might enable a particular country to reverse a decision that it made regarding a foreign investment proposal.

Senator MURPHY—But how does the MAI stop a government from changing the rules?

Ms Murphy—It will not, but it would mean that a foreign investor looking at where it might make an investment—say, an Australian business seeking to make an

investment in the Asia-Pacific area—would perhaps be more loath to invest in a country where there was scope to reverse decisions regarding that foreign investment proposal than in another country where there was no scope to do that.

Senator MURPHY—But how does the MAI all of a sudden develop a situation that will stop a country from changing its rules?

Ms Murphy—It will not.

Senator MURPHY—I have some difficulty in understanding what you just said—that an investor says, 'Look, the MAI exists in countries X, Y and Z. I'm all for that. I can go and invest there knowing I'm fully and totally secure.'

Ms Murphy—The benefit of the MAI is, in a sense, that it is setting a standard. It is setting an ideal that other countries can seek to achieve.

Senator MURPHY—So what?

Ms Murphy—By doing that it is like a peer review. It is the way—

Senator MURPHY—I understand completely about the peer review aspect of it all but, at the end of the day, what about somebody who sits down with hard currency and says, 'Where will I put my money?' on the basis of someone saying, 'This is being promoted as the security which will underpin your investment in a country.' I do not see how it can do that. Certainly in the description of the dispute settlement procedures it says quite the contrary, I think—that there will be no capacity to inflict punitive measures upon a country, a government, a company or people in a country. There may be a capacity to do so, but I have not been able to ascertain how that works.

Ms Murphy—There is an obligation in the MAI regarding investment protection. That is part of the principle of the MAI.

Senator MURPHY—Perhaps you might like to elaborate on how that might work.

Mr Nixon—The MAI took on as part of its core obligations provisions which are fairly common in bilateral agreements. They deal with issues of principle which are often of concern to businesses, such as the sort of general treatment they can expect: standards, fair and equitable treatment and constant protection and security. Then there are specific matters like expropriation, compensation for losses and protection from strife. They are all in the agreement there. Also, there is the transfer of moneys associated with your investment, including of course the repatriation of the investment should you choose to do so.

That is a central part of the MAI which of course we assume, because OECD

countries when they invest within OECD countries are fairly confident that they will get that standard of treatment because of the domestic legal and tax systems. Of course, in some other countries they are not quite as explicit as that. The investment protection provisions would work in making investors feel more secure if the MAI has a demonstration effect to countries outside the OECD in particular. So I suppose there would be a benefit there.

Senator MURPHY—It refers to a lot of bilateral agreements. I go back to the question I asked before: why wouldn't it be more in the interests of this country and its place in the world—given that, as Ms Murphy said, we do not necessarily have any real problems with European investment, et cetera; where we have had problems is closer to home—for us to seek to achieve agreements of this nature within our own region of the world?

Mr Nixon—It is true there are a lot of bilateral agreements. We currently have 15 and some countries have a lot more than that. The provisions of each of those agreements vary considerably as to what each country seeks to pursue as a central element of their bilateral treaties. Of course, one of the benefits to the MAI is that it will get a standardisation of the sorts of matters that are brought within the purview of protection. Some bilateral treaties certainly may not come to this.

Senator MURPHY—Mr Nixon, why can't Australia do that? Why do we need the OECD to be involved in that process in our region of the world? I suppose while I am completely cynical, I might be totally wrong too. Some countries in the OECD, because they see Australia as an important country in this region of the world, may well say, 'Look, if we get Australia into this ball game, it would provide us with an opportunity in a country that has developed some trust with Asian countries to give us a road in, as a bit of a stalking horse to get us in the door. Let's have a standard set of rules and then companies from our different countries can go over there and it will be a level playing field.'

Ms Murphy—The additional benefit of us pursuing this through a multilateral agreement is that we could get not only the direct benefits of improving the rules between Australia and a particular other country; we could also get the indirect benefits of those rules being improved between that country and any other country and the additional capital and trade that might flow back to Australia from that.

Mr BARTLETT—But they could be fairly insignificant indirect benefits compared to the potential losses and direct obligations imposed, along the lines of what Senator Murphy is suggesting.

Ms Murphy—Australia is negotiating on the basis that overall the benefits are in our favour.

CHAIRMAN—Let us not get bogged down on this issue. It is pretty clear that there is a big question mark as to the benefits. There is a lot of education and a lot more consultation that has to take place to convince, I suggest, this committee and, more importantly, the people out there that there is a benefit in this. We could argue round and round in circles.

Mr BARTLETT—Has Treasury done any modelling in terms of the potential impact on the balance of payments resulting from increased flows of foreign investment, both in and out of the country, particularly the impact on dividend flows?

Ms Murphy—Treasury has not done any modelling on that.

Mr BARTLETT—Does it intend to?

Ms Murphy—As I said in my opening statement, the Treasury position would be that foreign investment flows reflect the shortfall of domestic savings over domestic investment in Australia.

Mr BARTLETT—If that is the case, then that really undermines the whole need to be trying to enhance investment flows through the MIA anyway. Surely, if we are saying there are benefits resulting from enhanced investment flows as a result of ratification of this treaty, there ought to be some attempt to quantify benefits from potential flow of dividend into the country and netted from dividend flows out of the country.

Mr HARDGRAVE—It is one of those classics: an economist is someone who tells you tomorrow why what they told you yesterday did not happen today.

Ms Murphy—All I can refer you to, Mr Bartlett, is the OECD work, including the recent study that was put out by the OECD on the benefits of liberalisation of trade and investment. Australia participated in that study and fully endorsed it.

Mr BARTLETT—So Treasury has made no attempt to quantify the potential benefits or cost to Australia?

Ms Murphy—As economists, Treasury would argue that trade and investment liberalisation is good for economic growth, both domestically and worldwide.

Mr BARTLETT—In ethereal terms, but no attempt to quantify it?

Ms Murphy—I am not sure how you would actually go about quantifying it.

Mr HARDGRAVE—Multilateral treaties or treaties involving a multitude of nations really are the art of compromise, are they not?

Ms Murphy—Generally, yes.

Mr HARDGRAVE—So one would suspect the more countries involved in a treaty the more compromise, the more exemptions that would have to be sought, if you like, to that treaty.

Ms Murphy—In the specific case of the MAI, the benefit of having a high level treaty with exceptions allows countries where they cannot quite meet the high level obligations of the MAI to deal with that by taking out an exception. So, in that sense, I do not think, in this particular treaty, the more countries would necessarily weaken the standard of those obligations.

Mr HARDGRAVE—I have been able to read some of your written submission. Page 6 begins this thing about exemptions general and countries specific, and it lists a number of exemptions. What changes in the overall scheme of things will there be as far as international investment between OECD countries or those who may sign this proposal as a result of these general exemptions? Then, also, there is the fact that countries are able to make specific exemptions based on their ability to meet the obligation.

Ms Murphy—At the end of the day, if this agreement is reached, you will have a set of country exceptions. Now, they will differ between countries, and one of the issues that Australia will have to consider before it signs on or ratifies the agreement is whether the balance of commitments of countries reflected by their sets of exceptions is adequate from Australia's point of view.

Now, typical of all agreements or processes in the OECD is that peer review process that then follows. Say that we all agree and then the agreement moves on: there would be a process whereby, through peer review, countries look at how policies, practices, are changing over time in their peers, and that can influence government decisions into the future, and that is how things can move. You would have to say that the WTO and trade liberalisation is a perfect previous example of that. Countries make unilateral decisions to make trade liberalisations, but they are also reflected in peer review and further negotiations on the treaty.

Mr HARDGRAVE—I find the concept of peer review somewhat threatening. If you apply it in a corporate sense, it would be like McDonald's and Hungry Jack's reviewing Pizza Hut. There is no benefit, surely, in that process in a country sense. I do not quote Rand very often, but I really find this whole process an unnecessary intervention in basic market forces. If a country is worthwhile investing in, one would suspect that people would invest in it. If a country is stable and going to provide stable obligations to those who invest in it, it will attract investment. I do not want to re-run Senator Murphy's fine cross-examination of you this morning because I also, like Senator Murphy, remain totally unconvinced because this morning on one hand you said that the MAI will provide stability, but in the next sentence you said, to paraphrase you, 'but countries of course can

change the conditions'.

So, there is a great deal of uncertainty that exists in markets on an everyday basis. The MAI is either going to lock all of that uncertainty away—in other words, take away Australia's sovereignty to make rules about investment in its own country—or it is not. It is going to do one or the other; is it not?

Ms Murphy—Under the MAI they cannot change their practices. If they were in annex B, as we are proposing at the moment, they would have some restrictions on what they could do in those exceptions that were listed in annex B. The whole point is this transparency issue, that all countries have particular areas of sensitivity and that therefore they want to make restrictions in those areas, but what it enables is for the investors to see where those restrictions are and what they entail.

Mr HARDGRAVE—Do you know if all countries have a constitution which allows their high courts to consider an application by an investor, citing this particular agreement, to override domestic law?

Ms Murphy—I cannot answer that.

Mr HARDGRAVE—I think it is a major factor and a major fault in just about every treaty that is ever negotiated by this country, that our constitution does provide that opportunity. I will give you an example. The High Court has recently ruled on a matter of our cultural integrity whereby New Zealand television productions can be regarded as Australian content, all because we have this thing called closer economic relations, a bilateral treaty. Those sorts of matters, we were assured—I am told, and privately I must admit; it is not evidence before the committee—were considered and dealt with years ago, by perhaps predecessors in Treasury, and would not come into play. Yet here we have a situation where New Zealand television is regarded as Australian television because the matter has been challenged in the High Court and interpreted that way.

So what assurances can you give me that any exemptions we give in cultural matters—and I see in your submission on page 7 that Canada and France have some concerns about cultural matters—as in this particular example I have given you, will not come into play in years to come?

Ms Murphy—Australia's position with regard to dispute settlement is that we will not open to dispute the question of whether a particular measure is or is not covered by an exception.

Mr HARDGRAVE—Forgetting about negotiations between signatory states, I am talking about the High Court. I am talking about somebody who wanted to invest in a particular industry in Australia, who was told by Australian domestic law that it is not in our national interest and who said, 'I'm aggrieved, I'm going to take the matter further.

I'm going to hire a string of QCs or whatever and I am going to the High Court.' The High Court convenes; the High Court considers the matter and looks at this particular document—if we sign it—and says, 'Look, under our international obligations, no, we will have to allow that investment.' Can you assure me that will not occur?

Senator ABETZ—Nobody can assure anybody as to what the High Court is going to do.

Mr HARDGRAVE—I think that is an important point, Senator. But I would like to think that these officials before us today, defending as they are this particular matter, should be able to assure me and the committee and the entire Australian nation that that will not occur.

Mr Biggs—Perhaps I might respond. The question that you raise is one which would be, to my understanding, for the process to come through this committee. It is the process when an assessment is made of what is prepared in the treaty, including the text in this case and the exceptions. When they are clear and no longer uncertain in their format, then the process is possible to assess what that would mean, and then the treaty-making process of Australia could be conducted in a way to answer that question.

CHAIRMAN—With due respect, it comes way before this committee.

Mr HARDGRAVE—Absolutely.

CHAIRMAN—Mr Hardgrave has raised a very fundamental, very important point in relation to the New Zealand case. I am sure some ministers are giving that some attention at the moment. It raises a basic question which I think the committee would have of you: to what extent has the Attorney-General's Department been requested, in the light of High Court decisions like that and in the light of the MAI, that domestic legislation is compatible with the MAI provisions?

What Gary is saying is quite right; CER has opened up a Pandora's box in relation to this. It is a very basic question which you may not be able to answer today but, at the very least, if you would take it on notice, to what extent has Treasury, as the lead department in MAI, requested Attorney-General's to look at the compatibility provisions of the MAI in relation to our domestic legislation? It is a very wide subject, but it is a very fundamental and very important subject. Perhaps the best way of handling that this morning is to ask you to take it on notice.

Mr HARDGRAVE—Mr Chairman, there is one other point. Negotiating these sorts of agreements and entering into these discussions is all very well and fine, but we are going to have to have departments, not just this department, understanding the fundamentals of challenges in the High Court of anything that we sign. Since the Franklin Dam case of 1982, or whenever it was, there has been ample example in this nation where

international treaties have caused direct changes in our domestic legislation, and that is really at the heart of why this committee was created in the first place.

It is on the public record that those debates and discussions have taken place both in a general sense and in this place. It has been discussed in a general sense in every report of this committee as well. I just find it extraordinary that time and time again we have departments keeping negotiating processes alive in total isolation of the reality that, as a consequence of what we sign, we will end up with something we did not want in this country. We have just seen it again with the CER being imposed to create this business of New Zealand television being regarded as Australian television. It is just unbelievable!

CHAIRMAN—To come back to Mr Biggs's response, it happens way before it gets to this committee. It is all done as a consequence of preparing the national interest analysis. It comes back to the SCOT, which will involve you as the lead department in this particular agreement, and with other departments as lead departments in lots of other treaties, protocols, et cetera.

It goes way back before this committee. All these things have to be explored at the official level through that SCOT process in consultation with states and territories, with all government departments and with non-government organisations prior to the preparation of an NIA, which then comes to this committee, otherwise we are having to do the work all over again, as we have had to do in a number of cases, without being too explicit.

Mr HARDGRAVE—Unfortunately we are not the High Court.

Ms Murphy—Can I just respond to that? As I said very early on in our presentation, we have been consulting very closely with the Department of Foreign Affairs and Trade, the Attorney-General's Department and the states. Clearly we do seek their advice on the sorts of issues that have just been raised in the past few minutes.

Senator MURPHY—Perhaps when you take on notice Mr Hardgrave's question you can also provide us with some further information with regard to section 30 on page 6 of your submission where you say:

. . . it is also proposed that the MAI would contain provisions for establishing binding arbitration procedures.

Ms Murphy—Do you want more information on what that means, Senator Murphy?

Senator MURPHY—I certainly would.

Senator ABETZ—That is still being negotiated, isn't it?

Ms Murphy—That is part of the problem.

Senator MURPHY—Yes, but I would like to know what advice Attorney-General's is providing you with regard to that, given the questions that were raised about CER and the High Court decision.

Senator ABETZ—To a certain extent, ultimately, the ministers are going to make that decision.

Senator MURPHY—They might, but I would like some information.

Senator ABETZ—I understand that, but I think the advice ministers get from their departments may not necessarily be available to this committee, because the buck stops with the minister. I think we have to be careful.

Senator MURPHY—We will see about that at some point in time.

CHAIRMAN—We will leave that to the judgment of the officials.

Mr HARDGRAVE—There is one last, very quick aspect which is the same argument but looking at it in a different way. Perhaps Treasury should offer to this committee an assessment of the domestic law changes that would have to take place as a result of meeting our obligations under this treaty. In other words, do our foreign investment laws have to change and what are those changes? In other words, how do we avoid somebody, an aggrieved party, taking it to the High Court?

Ms Murphy—At this stage we are operating on the basis that there would be no need to change any domestic laws, policies or practices and that we would take out all necessary exceptions to protect current policies.

Senator ABETZ—Can I just follow up on that. We as a country have already had an experience in relation to New Zealand films and our cultural identity or integrity. But there is also the experience with the Convention on the Rights of the Child where the federal minister got up in the parliament and said that there was no need to change anything, that all of Australia's laws were in tune with the Convention on the Rights of the Child. That is now pursuant to the High Court in Teoh and also with a lot of the commentary made in international circles, allegedly not so, and UN committee commentaries.

Part of the problem with the consultation process with CROC was that the federal departments went to the states advising them that there would not be any need for the states to change their laws. As a result, the states did not bother investigating to any great degree because they accepted on face value the sort of assurance that you have just given us. The problem is—and I suppose this is what we need—who is ultimately going to take

responsibility for that sort of advice that was proffered but was wrong in relation to the Convention on the Rights of the Child and was wrong in relation to closer economic relations?

You go public and say, 'There is no need to change anything.' Then, 10 years later, sure enough, things do have to change, and we are left with a big mess. I support Mr Hardgrave inasmuch as I would like to be able to point to something and say, 'I was advised by the highest officials that no changes were necessary or, if changes are necessary, it is within these discrete areas.'

CHAIRMAN—If you would take on notice what I asked you a moment ago—that is, to what extent there is compatibility between domestic legislation and the provisions of the MAI, and to what extent Attorney-General's has been consulted either unilaterally by Treasury in relation to the MAI or through the SCOT processes. That picks up the points that everybody is making. It is a very fundamental question. Unless that fundamental question is answered satisfactorily, we are going to continue to have High Court challenges.

Senator REYNOLDS—I would just like to make the comment that your submission—which, of course, I have only just received—seems rather slim pickings, if I could describe it that way. Is this all the detail we were given from Treasury?

Ms Murphy—We did not want to go into all the details of the agreement—

Senator REYNOLDS—Why not?

Ms Murphy—Because the agreement is still very much in a draft stage. We have got some square brackets—

Senator REYNOLDS—But how can this committee form an opinion on the basis of this sort of summary of a submission?

CHAIRMAN—Margaret, I do not want to interrupt you, but you were not here for my opening comments. We did discuss it in private before we had the hearing. I think that point has been made very forcibly; we will leave it at that.

Senator REYNOLDS—Okay.

CHAIRMAN—Have you got anything else?

Senator REYNOLDS—I have. Have you done anything much on the consultative process?

CHAIRMAN—Yes. We have finished the consultative process, but you can ask a

question on that.

Senator REYNOLDS—Thank you. You say on page 10 that you have undertaken a very wide-ranging and extensive consultative process. What do you mean by consultative process? What is your definition in Treasury of how you consult?

Ms Murphy—We have provided copies of information that has been available to us to—

Senator REYNOLDS—But is that consultation—providing information? I provide information—

Ms Murphy—Would you let me finish?

Senator REYNOLDS—to constituents all the time, but I do not call that consultation.

Ms Murphy—No. But once we have done that, we have been able to respond to any questions arising from that information. We have provided written briefings to a number of people. We have had face-to-face briefings with a number of people, particularly other Commonwealth government departments, and state and territory government departments.

Senator REYNOLDS—With every respect, I suggest that you look at the definition of consultation. Consultation is face-to-face negotiation and discussion about issues and getting information from people. Obviously, that is not your definition of consultation.

Ms Murphy—That would be exactly our definition, Senator; that is exactly what we have been doing.

Senator REYNOLDS—In that case, why do you say that you have consulted all relevant Commonwealth departments? Surely all Commonwealth departments have some interest in this matter. Which Commonwealth departments do you consider relevant?

Ms Murphy—We have consulted with an awful lot of departments, Senator. I am not sure that we can tell you who we have not consulted with.

Senator REYNOLDS—Could you provide us with a list of all Commonwealth departments that you have consulted with and what the outcome of those consultations have been. In other words, what input has there been from other Commonwealth government departments? It is the input, I think, we are interested in.

Ms Murphy—That might be very difficult. We have received an awful amount of information from these departments and it is a very iterative process.

Senator REYNOLDS—We have an awful amount of information to digest from submissions we are receiving, and we have an awful amount of information to digest and analyse for the public. Treasury seem to have a strange idea of consultation and a strange idea of the role of this committee. You cannot give us that much of the information and expect us to form an opinion about our terms of reference.

Ms Murphy—We can attempt to give you—

Senator REYNOLDS—Even if it is a summary of the key points. But at least we need to know what other Commonwealth departments are saying to Treasury in this consultation process that you have said you have conducted.

Secondly, you have said you have briefed and consulted—it is interesting that you put briefing and consultation in the same breath—but you have been through the same process with state and territory governments. Could we also have the detail of the key points that state and territory governments are making in relation to the MAI?

Ms Murphy—Senator, before you arrived we were discussing that and what I was saying was that at this stage the focus of those discussions has been on trying to identify those state and territory laws that may not be compatible with the so-called draft provisions of the MAI. We are in that process of identifying those now. At this stage, only two states have formally responded to that. We have been around with face-to-face discussions with the states and helped them to try and identify the sorts of areas where they may have concerns, but we are now leaving that to them to come back to us in writing.

CHAIRMAN—Can I just ask you to add to that list—just while I think of it—the Treasury submission to Mortimer, because it is perhaps relevant to MAI. Is that possible? Could you take that on notice to add that to the list? If in fact you cannot give us access to the Treasury submission to Mortimer, then perhaps you could tell us why.

Senator REYNOLDS—Finally, you say that you have provided to and comments have been sought from non-government organisations. So you have not tried to have consultations with non-government organisations?

Ms Murphy—When we have briefed them, we have, of course, taken on board any concerns they have had and have tried to address them in that consultative process.

Senator REYNOLDS—Where is that detailed? Could we also have a list of the concerns that have been raised by the non-government organisations that you have listed here? Has the same process occurred with parliamentarians?

Ms Murphy—In the briefing sessions we have had with the parliamentarians, I think largely we have been able to answer all their concerns. Similarly, with the consultations we have had with most non-government organisations, in those consultations we have been able to answer the concerns they had, which in large part stemmed from misinformation that they had obtained elsewhere, and perhaps from a need to flesh out what was actually meant by particular provisions of the MAI.

Senator REYNOLDS—Why have I just received about 150 letters from various sources expressing grave concerns about the MAI, if you have explained away everyone's concerns?

Ms Murphy—As we were saying before, we have only had the opportunity to have these briefings and consultations with what we would call umbrella organisations, and so it could be that they are not disseminating that information. Also, as you would probably be very well aware, on the Internet and in other media there has been a lot of misinformation spread about the MAI, and we believe that has generated a lot of the letters that we have been receiving and you obviously have been receiving.

Senator REYNOLDS—Just in conclusion, I really would like to see some information that demonstrates that Treasury is really consulting, and is taking the comments of all those groups that you have mentioned seriously—seriously enough to include in a submission of this kind.

Senator MURPHY—On page 9 of your submission, the issue of territoriality is raised in relation to the US Helms-Burton legislation and its Iran Libya Sanctions Act and how that might be proceeding, given that you acknowledge the issue needs to be resolved before there is an agreement on MAI.

Ms Murphy—This is something that is very much an issue between the United States of America and the European countries. When it gets raised in the MAI negotiating group, both those parties put their hands up and say, 'We are still discussing this outside of this forum and we will get back to you.' So at this point there is not much I can say about where those negotiations are heading. We are largely relying on those two parties to reach some sort of agreement between themselves and bring that to the MAI negotiating group for consideration.

Senator MURPHY—But does not that then lend itself to other countries that we may be seeking to be participating members of an MAI, which may well also have a view about the Helms-Burton Act and also the Iran Libya Sanctions Act, particularly some Asian countries—

Ms Murphy—That is quite right, Senator.

CHAIRMAN—It is probably more appropriate to DFAT. Can we leave those

questions for DFAT.

Senator MURPHY—With regard to the MAI and the WTO agreement, you say there are concerns with regard to existing commitments on investment and commercial presence obligations, that countries have expressed concerns that country specific exceptions under the MAI do not involve a backtrack on existing obligations under GATT.

Ms Murphy—Sorry, I am not quite sure what the question is.

Senator MURPHY—I am just asking for further explanation of that, and how that is proceeding. I mean, you have just got a statement there, that, yes, the concerns have been expressed do not involve a backtrack on existing obligations under the GATTs.

Ms Murphy—That is part of the process of making sure, as we negotiate the provisions of the MAI, that there is nothing in the MAI that would enable a country who has signed up to another agreement which may have tighter requirements on them to use the MAI in some way to resile from its obligations under that other agreement. But again, Senator, that is probably where you should talk more with the Department of Foreign Affairs and Trade.

Senator MURPHY—Could I also ask you on section 42, I think it is page 9, where you go to the question that there is broad acceptance of the proposal to refer in the preamble of the treaty to existing commitments on environment et cetera, and say that, however, there is still a strong divergence of views on the MAI containing binding provisions on the environment. Is there a particular group of countries that are pursuing that?

Ms Murphy—I think there is a range of views on how to deal with the environment in the MAI. Because environment is also being negotiated in a number of other fora, it becomes particularly difficult to see how we might cover it off in the MAI, particularly if there was pressure to put binding provisions in the MAI.

Senator MURPHY—But are there particular countries that are pursuing that as a must-have?

Ms Murphy—Some negotiators were pursuing that as a must-have. I think perhaps that the outcome of the ministerial council meeting in April reflects the fact that there is now some second thinking about some of those things.

Senator MURPHY—What is our position in that respect?

Ms Murphy—Australia's position is that we would not want to see binding commitments on environment in the MAI. We are negotiating on environment through other legitimate fora. We would be happy to have some exhortatory statement at the

beginning of the MAI document on preserving the environment, but we do not want—

Senator REYNOLDS—You do not want it to mean anything?

Ms Murphy—Not in the context of the MAI.

Senator REYNOLDS—Not in the context of the MAI. But, if the MAI is going to be as influential as we assume, it would simply mean that there would be no way that we could enforce our own environmental laws in this country.

Ms Murphy—Quite the contrary, Senator. The whole purpose is that Australia reserves the sovereign right to set the environmental standards that we think are appropriate for Australia. We do not want it to be over-written by an MAI.

Senator MURPHY—What I am thinking about is whether or not the European Union might be pursuing it with regard to greenhouse gases, et cetera.

Ms Murphy—I am not quite sure what the question is.

Senator MURPHY—If the MAI set some standards or has binding provisions, we could well be confronted with a blockage to investment by some countries that might say, 'Your greenhouse gas emissions are not sufficiently low enough. Therefore, we oppose some form of an investment.' What is the purpose of environment provisions otherwise?

Ms Murphy—That is exactly Australia's point: we do not see it as appropriate to have binding environment provisions in an agreement that is discussing investment.

Senator MURPHY—What I am trying to understand is: if some countries are seeking binding provisions, what are they and how do they apply? I probably should have asked that in the first place.

Ms Murphy—We do not have enough detail to know what they actually mean yet. This is one of the areas where there is considerable vagueness as to what countries actually do imply when they have been arguing for these things.

Senator MURPHY—You give an example there of an investor seeking to make an investment in a country, in a particular industry. Take forestry, for instance. You say that unintended consequences in disputes would 'frustrate the purposes of the MAI, eg, through competitors to an investor seeking to use the provisions in an anti-competitive way'.

Ms Murphy—That is right.

Senator MURPHY—If you had given an example—

Ms Murphy—We can give you an example.

Senator MURPHY—If there is a possibility that there are going to be provisions in there, I would like some more information about what that actually means and not just have some sort of shallow explanation.

Ms Murphy—I can give you an example from Australia's point of view. For example, we have a system of foreign investment approvals and we approve most proposals very quickly, within 30 days. If we had to abide by binding provisions on the environment and that was therefore subject to some sort of dispute settlement, it could be possible, perhaps, under the MAI as it was negotiated, that after we had agreed to allow a foreign investment proposal to go ahead, for a third party to challenge that sovereign decision on the basis that the particular investment might have created some pollution or that the particular proposal was going to create more pollution than some competing company would—that kind of thing. We regard that as being contrary to our right to make a sovereign decision whether or not to allow a foreign investment proposal to go ahead.

Senator ABETZ—Also the reverse would be true, would it not? A company could say, 'The environmental conditions being imposed on us are two strict and therefore are having a negative impact,' or not?

Ms Murphy—No, because a foreign investor coming into this country would have to know what the environmental standards were. In fact, as we currently operate, we often attach environmental standards as conditions to foreign investment proposals.

Senator ABETZ—Yes, but if our Australian conditions are not fully in tune with the proposed standards in the MAI, could then not the Australian standards be subject to challenge?

Ms Murphy—That is, if that got into the MAI. That is another reason why we are arguing that they should not be in the MAI. Australia is negotiating what world standards should be in other forums.

Senator ABETZ—Exactly, and that was the lifeline I was trying to throw you to suggest, if a certain regime of environmental standards was in the MAI, if Australia was more rigorous in its environmental standards, then somebody could complain that Australia's rigorous environmental standards were contrary to the MAI standards and therefore the Australian standards ought be relaxed. That is what I was trying to put to you.

CHAIRMAN—It all comes back to the compatibility argument. Therefore, the Attorney-General's role in this is very important, whether it be the environment, indigenous peoples, whatever it might be. That is a very important one that we have invited you to take on notice. We are running out of time. Colleagues may ask a few more

quick questions. We must move on to DFAT as soon as can.

Mr HARDGRAVE—Can you assure me, and would you be willing to sign off on advice to your minister, that the MAI would not affect the government's stated intentions regarding the level of foreign ownership and the imposition of community service obligations with regard to the completed sale, and for that matter the so far completed partial sale, of a public utility like Telstra?

Ms Murphy—At this stage, Mr Hardgrave—and it gets back to that same issue about the compatibility of the MAI with Australia's legal processes—we are operating on the fact that, firstly, with regard to privatisation, there may be some specific provisions in the MAI dealing with that. Secondly, if that does not fully satisfy our particular arrangements regarding privatisation, we will take out the necessary exceptions to allow us to do what the government intends with regard to Telstra and any other privatisation matters with regard to the Commonwealth, state and territory governments.

Mr TONY SMITH—This may not be an appropriate question for Treasury, but I will ask it anyway. Under the MAI, would it be possible for a transnational corporation to produce goods by conscripted child labour knowing or reasonably believing that it was immune from prosecution in the host state and immune from trade barriers in the importing state?

Ms Murphy—I do not think I am able to answer that question. I will take that on notice.

CHAIRMAN—It is an important one. Could you take that on notice. Could you raise that with DFAT as well, Mr Smith.

Senator ABETZ—I do not know whether Treasury has undertaken an analysis of this—it may be more appropriate to put to Attorney-General's—but is a general assessment being done on the impact on the extra federal powers that the federal government might get by virtue of this treaty?

Ms Murphy—That would be for Attorney-General's.

Senator ABETZ—Also, has any investigation been undertaken—that is undoubtedly for DFAT—on our existing bilateral agreements? How many would be obviated if we signed up to the MAI?

Ms Murphy—They will not be obviated by signing up to the MAI.

Senator ABETZ—Are you saying that they would coexist?

Ms Murphy—That is right. There may be less need for further—

Senator ABETZ—Have you checked them all to ensure that there is no inconsistency between bilateral agreements and this multilateral agreement? If I may race through your submission, in paragraph 3 you tell us that Australia's reservations are likely to be significantly revised and refined. Do you see at this stage that the list will either increase or decrease?

Ms Murphy—The list most certainly will increase because at this stage we do not have references to state and territory measures that we would need to take exceptions for.

Senator ABETZ—I noticed that just above paragraph 9 you have a heading 'Benefits of the Multilateral Agreement on Investment.' I note that there isn't a similar heading talking about the drawbacks or the negatives of the Multilateral Agreement on Investment. I am just wondering why that is. Whenever we deal with international treaties, at this committee, we are nearly always told about all the positives, but we are never given an assessment of the negatives. Has that been undertaken?

Ms Murphy—I expect that we have not got negatives because the Australian government is participating in these negotiations on the understanding that the outcome will be of benefit to Australia; that there will not be any negatives of any significant consequence. That comes down to all the issues that—

Senator ABETZ—So you are saying we are going into this with rose coloured glasses. I would like to be given an analysis of, say, 10 benefits and possibly only two or three negatives, and then say, 'On balance, this is a good treaty. We'll sign up.' I have to say to you that I quite frankly cannot believe that there are no negatives of signing up to such an agreement. It is like any piece of legislation—usually there are overwhelming reasons in favour of it. But you also accept that there are some negative consequences that are distasteful. This is the case even with the gun laws, for example: most of us supported that, but I could grieve with those who had been responsible gun users for generations, who had their former liberties restricted somewhat as a negative. I would have thought any proper analysis of any treaty or legislation would have a positive checklist and a negative checklist. Could we be provided with such a negative checklist? If you tell us it is all perfect then that is fine.

Ms Murphy—The problem with that is that it is very much too soon to be able to make that assessment with the fact that the agreement itself is in such a draft form.

Senator ABETZ—If it is too soon, how can you tell us about the benefits?

Ms Murphy—We are taking the benefits from the very broad implications of what the MAI objectives are, and the overall benefits of foreign investment.

Senator ABETZ—I can understand that, but I would have thought that overall generalist approach could also be adopted to possible negatives.

Ms Murphy—We will attempt to.

Senator ABETZ—Australia has presented a draft list of reservations to the negotiations and we have got a copy of that. Is Australia's list publicly known to all the other countries negotiating?

Ms Murphy—It has been available to other negotiating countries. Until we made ours public within Australia they kept that confidential.

Senator ABETZ—Have all the other countries also lodged theirs because quite frankly, in my assessment of Australia's reservations, I would like to know the reservations that are being contemplated by all the other countries, to see if we have missed anything or whether we ought to be saying, 'We do not sign up if you have such a reservation in there.' I would like to know about the other countries' reservations. If you could take that on notice, please.

Ms Murphy—We have copies of most countries' reservations.

CHAIRMAN—Our reservations are on the web site, aren't they?

Ms Murphy—Yes.

CHAIRMAN—We really need to know whether other countries' reservations are on the appropriate website as well.

Ms Murphy—We understand those of the United States and Canada are publicly available, and perhaps New Zealand. We were trying to seek a more definitive answer on that. We have not got yet from the OECD how many have—

CHAIRMAN—It is a very fundamental one because you need to have a two-way street. We cannot give everything and expect to get nothing in return.

Ms Murphy—Exactly.

Senator ABETZ—Exactly my point.

Ms Murphy—That is where the balance of commitments decision comes down at the end of the day. Again, all of these lists of exceptions by any country are still very much in draft form because of the need to tailor those exceptions to the provisions of the MAI itself as they are developed.

CHAIRMAN—Could you take that one on notice please.

Senator ABETZ—Paragraph 45, which deals with extraterritoriality—I am not

sure if that was asked whilst I was out of the room—says that the provisions seek to ensure that there is no scope for countries to impose measures that impact on the policies of other countries. Is that solely related to investment type policies or could we, for example, unilaterally boycott, say, the old USSR or South Africa with apartheid? Would we be allowed to do those things under the MAI regime as it presently stands?

Ms Murphy—The MAI is only related to investment related issues, so that would be one issue.

Senator ABETZ—Yes. But therefore could Australia say, 'We are not going to accept any investment from South Africa because South Africa has a regime of apartheid' or—not that it would have happened—'We will not accept foreign investment in the USSR because of their persecution of minority groups'?

Ms Murphy—My understanding, and you should probably ask the Department of Foreign Affairs and Trade, is that Australia has usually done that as part of a United Nations decision. It would be very difficult to do it unilaterally.

Senator ABETZ—One day we might decide that the principle is so great that we should do that and show an example to the rest of the world. I must say that I would be in two minds if investment were to be seen as a more important priority than some of these fundamental issues such as the persecution of minority groups or apartheid or persecution of a majority group, so I would like to have some greater clarification on those aspects. I would like to think, albeit that Treasury has the carriage of this, that Treasury takes a more whole of government approach to these negotiations and not only considers economics pure and simple but also considers some of the other important issues in which a government should appropriately be involved.

Senator REYNOLDS—This is really a question on notice. Could you expand on your statement that Australia does not need to include labour matters in the MAI? It seems extraordinary that Treasury's view in its submission is that labour is not worthy of any further comment than that one statement. I would like a reason for it or perhaps an expansion.

Ms Murphy—We can expand on that. This is not the Treasury position, of course; this is the government position. So you may wish to take that up with the minister.

Senator REYNOLDS—Thank you.

Mr BARTLETT—I have some quick questions that you might like to take on notice. What is the rate of return measured in terms of dividend flow on Australian investment overseas? How does that compare with the rate of return on foreign investment in Australia? What are the relative tax receipts and payments?

Ms Murphy—I am sorry, was that the rate of return on Australian investment overseas?

Mr BARTLETT—Overseas in terms of dividend flow. How does that compare with the rate of return on dividend outflows on foreign investment in Australia? What are the relative tax receipts to the Australian economy or the Australian government from foreign investment in Australia? How does that compare with the tax payments of Australian investors overseas?

Ms Murphy—We will do our best. I am not sure whether we will be able to answer all that.

Mr BARTLETT—I would be surprised if Treasury could not.

Ms Murphy—It would not be our area.

CHAIRMAN—We have had an interesting 2½ hours. I want to add to the long list of questions for you to take on notice. Firstly, will industry development initiatives by the Commonwealth, states or territories be prohibited under the MAI? I think there are some reservations that you have included already, but we would like to have that one answered. Secondly, will state and territory initiatives to promote regional investment activity be restricted? Thirdly, will local government be affected? Could we have those answered? I think Senator Reynolds has raised the question of labour standards, so we have picked that one up. I think we have covered just about everything, albeit in abbreviated form at this stage.

I have to say to say, and I hope my colleagues agree with me, that this morning has been helpful, but it probably has raised more questions than it has answered. We have opened up a real Pandora's box with this issue. Without pre-empting what we may or may not say to the minister and to the Senate, it seems to me that we are just not prepared in any way, shape or form to sign anything in the reasonable future. That is a personal reaction, and perhaps that will not come as any surprise after this morning. We need to put our views together on that.

Senator MURPHY—I have one point I would like to add to that in terms of the provisions of the MAI which provide for dispute settling processes and maybe even legal processes for companies or multinational companies: there does not seem to be the same reference back the other way.

Ms Murphy—I can answer that one now. Any foreign investor in Australia has to abide by Australia's domestic laws in the same way as a domestic company would. We have all the same legal processes against a foreign investor in Australia as we do against a domestic company.

CHAIRMAN—I want to cover one or two points that Senator Reynolds raised, seeing she was not here for the start. What I should reinforce—and it has come out over and over again in the questioning and responses this morning—is that this potential MAI, if that is the right terminology, has generated a lot of emotive comments and misinformation in some quarters, but at the same time there is a lot of genuine concern. All of my colleagues on the committee here this morning have reflected a lot of those genuine concerns. We do need a lot more information. It seems to me that we are a long way away from any resolution of this. It would be inappropriate for this committee, even at this stage, to be suggesting that we recommend to ministers any sort of signature. That would be inappropriate and is reflected in the six-month pause that has been given.

I go back to one or two questions that you were given on notice. What is important and what we would be very keen to know is what Treasury, as the lead department, is doing unilaterally and in conjunction with DFAT and the SCOT processes in that six months leading up to October 1998—and maybe the second increment of that is to the next ministerial meeting on or about April-May 1999—to make sure that the consultative machinery is enhanced. Again I make a general comment, that is, I think it is unsatisfactory. Now, that is not anybody's fault; it has come from all directions. A lot of people have these misconceptions because they perceive that the information is just not there. Do you have any final comments?

Ms Murphy—I would like to say thank you very much for having us here, Chairman, and to make the point that we are always available to answer questions. We have made ourselves available to any number of people by telephone and through meetings and correspondence to answer questions and provide further information on the MAI. The Assistant Treasurer has asked me to let you know that he is also willing to meet with you to discuss any issues concerning government policy.

CHAIRMAN—Finally, we would like to wish Tony Hinton the best in his new capacity as the Ambassador to the OECD. We look forward to his replacement in that area in Treasury and to a continuing dialogue on these very technical and difficult issues. Thank you very much.

Ms Murphy—Thank you.

[12.30 p.m.]

GOODE, Dr Walter, Director, New Trade Issues Unit, Department of Foreign Affairs and Trade, R.G. Casey Building, Canberra, Australian Capital Territory

HART, Mr Jeff, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade, R.G. Casey Building, Canberra, Australian Capital Territory

POTTS, Mr Michael, Assistant Secretary, Trade Policies Issues and Industries Branch, Department of Foreign Affairs and Trade, R.G. Casey Building, Canberra, Australian Capital Territory

McCAWLEY, Dr Peter, Deputy Director General, Quality Group, AusAID, Department of Foreign Affairs and Trade, AusAID House, 62 Northbourne Avenue, Canberra City, Australian Capital Territory 2601

MUNROE, Ms Helen, Senior Adviser, Government and Policy Branch, Austrade, R.G. Casey Building, Canberra, Australian Capital Territory 0221

CHAIRMAN—Welcome. The committee has received your submission dated 30 April. Mr Potts, I found this an excellent historical summary of where we are coming from in terms of this potential MAI. I congratulate the department on a very good submission, albeit that you are not the lead department. Do you have any amendments to the written submission?

Mr Potts—No, Mr Chairman.

CHAIRMAN—Would you like to make an opening statement?

Mr Potts—I would, a short one. The portfolio welcomes this focus on the MAI by the committee and sees it as useful airing of the issues which surround the treaty. We note that the trigger for the committee's work comes, first of all, from a reference by Mr Downer. I notice you mentioned that we have officers from AusAID and Austrade with us, a whole of portfolio approach.

DFAT has no line responsibility for the MAI, but we do have responsibility for international trade negotiations. In that context, we have a strong interest in the development of rules for investment treatment, particularly as these integrate with other elements of the rules based international trading system.

As you alluded to, Mr Chairman, our submission has a wider focus than that of Treasury as it looks at the growth of efforts over the past few decades to develop some basic investment rules, both on a bilateral basis and, more recently, in the multilateral field. It is obviously in this context that the MAI has been developed. Given this historical

context, the push for an MAI of some sort is unsurprising. The question—and you have been grappling with that already in your discussions with Treasury—is whether the current structure of the MAI is the right one. I think it is fair to say that there is no clear answer to that as yet.

Treasury will have outlined the current position in the OECD, especially after the decisions of the Ministerial Council: in short, a period for assessment and consultations, with negotiations to resume in October. We believe it is too early to look at other alternatives to the MAI. Clearly, there is a job of work for the negotiators in Paris. I think it is fair to say that the future of the MAI is in the balance. Very significant difficulties remain—you canvassed some of them in your discussions with Treasury—and these will need to be narrowed if there is to be some real progress.

I want to conclude these remarks by emphasising three points which are basic to the government's approach on the MAI. The government supports international efforts to develop and codify proper investment treatment rules. The second point is that the MAI offers the potential—and I emphasise 'the potential'—to be an effective instrument for setting investment rules, but the detail is going to be all important. Finally, the government has made no decision on the MAI; it is an evolving text. When it does so in respect of the final text, it will not sign the treaty unless it is demonstrably in Australia's interest to do so. The government would be consulting parliament through your committee before taking such binding action.

CHAIRMAN—Thank you very much. I will start with you, exactly as I did with Treasury, on the subject of consultation. You heard me and a number of my colleagues raise the issue of the Joint Standing Committee on Treaties at the official level, the degree to which Treasury has or has not been involved in some sort of coordinated approach through the SCOT processes. Is DFAT happy that there has been a coordinated consultative approach, and has that been centred through the SCOT processes? Would you like to make a general comment about consultation?

Mr Potts—I think DFAT would see the consultative approach between Treasury and ourselves—certainly I do not think I can speak from a wider perspective—from that level, as being very satisfactory. We have regular consultations as departments here in Canberra. We have the opportunity to contribute from the DFAT perspective to the briefing instructions that are sent to negotiators in Paris. We also have, if you like, a whole of government approach in our mission to the OECD in Paris, and there are regular consultations there between Treasury officers and the DFAT officers. Clearly, we share in the product that comes out of the negotiations—the reporting process from the OECD.

There is always, I think, an element of imperfection in any consultative process. It is in the nature of things. Departments in Canberra are thin on resources, and it is clear that the sorts of resources we can devote to the MAI are pretty finite. The same probably applies to Treasury. I think we would all aspire to a higher level of consultation. I say this

not just in the MAI context, but more broadly. Within that general framework, I think it is fair to say that we have been very satisfied with the level of consultation.

CHAIRMAN—What I am specifically asking is where is the emphasis of coordination in the consultative processes. Is it the unilateral approach by Treasury with appropriate authorities—government or non-government—or is it through the SCOT? It seems to me that the SCOT is a central focus for the whole development of treaty-making processes and that one has to be dovetailed in with the other. Correct me if I am wrong, but it seems to me at this point in time that perhaps the unilateral approach—without being too unkind of Treasury—has been too concentrated on the unilateral approach, or am I wrong?

Mr Potts—I think it is fair to say that you have to look at both levels. There has already been, as I understand it, an informal briefing by at least Treasury and DFAT of the committee. We are certainly very anxious to stay in touch with the committee. We are very willing participants in this hearing. Clearly, from here on especially, there is going to be the need to keep in regular touch with you as the MAI evolves further.

CHAIRMAN—In relation to the external machinery, again, you would have heard me raise the question of the WTO Millennium Round approach vis-a-vis the OECD with additions approach. Does DFAT have a particular preference? You mentioned it in your submission, albeit rather obliquely. Does DFAT have a preference for a more multilateral approach in terms of this one through the WTO mechanisms, or are you happy that it be retained within OECD plus?

Mr Potts—We would see the OECD approach very much as a multilateral endeavour in any case. As I said in my opening remarks, I think it is too early to conclude that the OECD process has exhausted itself. In fact, I think the de facto pause period might offer the opportunity of recharging batteries in trying to refocus the process and narrow the differences. I think our preference would be to let the matter remain with the OECD and in fact give it a new fillip.

Senator REYNOLDS—First of all, I would like to reinforce the remarks of the Chairman and congratulate you on your submission. I would be prepared to go further and say it seems to be a submission that is more appropriate to the lead department than the one we received from the lead department. I think that you should be highly commended for the amount of detail in it.

I would like to come back to the consultation process. I know that not being the lead department you would say that you are not in a position to undertake direct consultations because that is not your role, but, within the international community, are you able to comment on the level of debate in other countries about the MAI? Are other countries undergoing the same disquiet in the community, or have some countries been able to keep their citizens better informed and perhaps better attuned to the so-called

benefits of the MAI?

Mr Potts—I think it is fair to say that there is an ongoing debate in most OECD member countries. The level of public comment, I think, varies from country to country. It is certainly high in Canada and New Zealand. In some other countries it is probably a lower level. It is also probably the case that public anxieties vary, in terms of sectors, from country to country as well. The environment will loom large in some but, say, cultural protection will loom as more important in others. Beyond that, I think it is evident as a global phenomenon that it is not easy to come to grips with an organism like the MAI. It is a moving vehicle, for a start. It is a complex text.

I know the OECD has made real efforts in recent months, especially, to improve public information. The negotiating text is on the web site and so is a commentary, but you would have to say to a lay person that these texts are not user friendly. I think, against that background, it is not surprising that there is a fair degree of public interest and also a fair degree of imprecision as to what is the MAI. The MAI is, in a sense, a collection of words, many of which are square bracketed and so on. You cannot form a coherent view of the balance of benefit at the moment. I think that is one of the reasons why the public debate is, I would not say incoherent, but very inconclusive.

Senator REYNOLDS—Are you aware of what efforts the governments of other countries, particularly New Zealand and Canada, have made to ensure that those communities feel more part of the consultation process?

Mr Potts—I cannot say that we are aware of the detail. What I can say is that it is evident that governments, in the broad, are more conscious now—maybe over the last year—of the need for further public information programs than perhaps they were earlier in the process. I think that is a general feeling from the OECD countries. The emphasis you see in recent OECD discussions on questions of transparency, I think, reflects that recognition.

Senator REYNOLDS—How much information are individual countries prepared to give to their citizens in relation to their current positions, albeit that, as you say, the negotiations are very much a movable feast?

Mr Potts—I am not able to answer that question in any detail. Obviously the approach is going to vary from country to country. We in Australia have certainly been very anxious to get our negotiation position very much in the public domain. I think that has been helpful in focusing comment in Australia. But I think we as a department do not have very much information on what other governments are doing, if you like, to sell the message of the MAI. In a sense, it is more just to raise the level of public consciousness at this stage because there is not an MAI, as such, to sell.

Senator REYNOLDS—Where would this committee get that kind of information?

I am reluctant to ask DFAT to do more with fewer resources. Where would this committee get that kind of comparative analysis of how individual OECD countries are conducting their consultation process?

Mr Potts—It occurs to us that we might be able to get an impression of that certainly from the OECD secretariat.

Senator MURPHY—Your submission provides some very good background information. On the question of what is happening in the process, Australia has been involved from the outset and there are some other countries that are involved in the negotiations that have come into the game. As I understand it from an explanation from Treasury, there has been a consultative process whereby there have been forums, conferences or whatever you like conducted in various other parts of the world. Can you tell me, having read your submission about how it all started off, why they never started off on the basis of inviting countries from the areas where they think there are still problems, that is, the developing nations of the world, at the outset to be part of the game.

Mr Potts—There are several answers to that question. Firstly, there had been some vague efforts earlier on in the then GATT and those bore little fruit. Secondly, the precursor to the work on the MAI was in fact in the OECD context. The OECD naturally enough started off with looking at its own membership first, and it was only a little later in the piece that they then looked to broaden the circle. I suppose it is natural in any negotiation to look to your own membership first and to take stock of where you membership is at before then seeking to widen the circle.

Senator MURPHY—On that basis, then, can you tell me, in so far as Australia is concerned and our involvement in the negotiations on the MAI, what we have been doing with regard to ASEAN, APEC et cetera. Have we been continuing to conduct consultation or seeking to have discussions with countries in our own region of the world on the basis of the development of an MAI? If so, on what basis have they taken place and how are they proceeding?

Mr Potts—There are a couple of points that need to be made in response. The first is that we as a government would find it difficult to, if you like, go on an outreach mission of our own to the South-East Asian countries talking up an MAI on which we have no formal position ourselves. You as a government are in somewhat an invidious position trying to associate other governments with the embrace of an agreement that is still evolving. I speak only from DFAT's perspective. I do not think we would have seen it as appropriate to seek to bring some of the South-East Asians in it at this stage. Certainly it is in our long-term interest—there is no doubt about it—to bring developing countries into the thrust of the MAI or into any broad based global investment regime. That is, in a sense, where the big gains are for Australia.

Senator ABETZ—I wonder if we could ask them about the general concept and, if

we were to develop an MAI, what they would want from their perspective in such a document, without committing ourselves to it.

Mr Potts—There in fact have been some discussions in various capitals about that. The MAI obviously is an issue of fairly general interest.

Senator ABETZ—Have discussions taken place? You were saying it was very difficult and I understood you to say there had not been, for the reasons you outlined. I am now asking you why couldn't you have had those discussions on a general level: if we were to have an MAI, what would they want in it, what would serve their purposes, what would be their concerns, and now you saying that there have been discussions. Can you tease that out a bit further for me?

Mr Potts—The reference to discussions has been on comments that have come up in the context of wider conversations, say, on the development of international trade rules. If you are talking, for instance, about new trade rules, countries will often say, 'Well, where does investment fit into this?' That will tend to lead to an unprompted discussion of the MAI, for instance.

Senator MURPHY—I just want to go back to the benefits that are being put to this committee, and to Australia generally, of having an MAI. When we asked questions earlier about that, we were told that the benefits are that we have a more stable, more secure investment environment throughout the world, but that in essence Australia does not have any real problems with regards to investment in European countries, because generally they are transparent and similar to our laws et cetera. Where the problems have arisen, they have arisen in South-East Asia and with other developing countries, some of which, I suppose, may be found in Eastern Europe, for Telstra at least.

CHAIRMAN—Kazakhstan.

Senator MURPHY—That being the case, if we are endeavouring to get more stable and secure investment laws and transparent investment environments in South-East Asia, I would have thought it was pretty important for some sort of discussion to be going on with them. I would have thought that in our own interests, the national interests of this country, we ought to have been initiating discussions with the countries in our region of the world, which I agree are very important from an investment point of view for people in this country that have got enough money to invest overseas. I do not understand why, given that in your submission there is an outline which I think really is very good, and we talk about the ASEAN arrangements, we talk APEC arrangements—yet it seems almost that we are keeping them like mushrooms in the dark until after we get some agreement with the Europeans, with whom we have no problems in the first place. Then we are going to go down and try and flog it off to them. I do not quite follow the logic of that.

Mr Potts—I think there are two points that need to be made in response. I think,

first of all, you should not underestimate the difficulty in a sense of trying to interest other countries in the negotiation and then being confronted by them saying, 'Well, are you going to sign up to the MAI?' Then we say, 'Well, it is an evolving process,' and so on. It is very easy for them to come back to say, 'Well, if you guys are not going to sign up, or if it is not clear whether you guys are going to sign up, why are you pushing us to something which you cannot really sell to us because you do not know what it is?'

Senator MURPHY—Why hasn't Australia, in its national interest, sought to develop or build on some form of existing bilateral or multilateral agreements that we currently have in so far as investment in our region of the world is concerned? Why aren't we doing that?

Mr Potts—We certainly are doing that, probably in two different fields. One would be in the WTO, where there is a committee on trade and investment which is in fact looking at the exchange of information on the investment regimes and treatment and so on. The work in that committee is going to be reviewed and then at some stage there will have to be a decision taken in the WTO on where they take investment. The second forum is under APEC. All of our South-East Asian neighbours are members of APEC, and there is a specific focus in APEC on investment questions. There are these frameworks and there are exchanges on them.

Senator MURPHY—So we have a few more strings to our bow in so far as we are seeking, aside from the MAI, to continue to develop more secure investment arrangements with the nations within our immediate proximity?

Mr Potts—Certainly that, but I think also on a global basis. There is still the possibility at some stage that the WTO will focus squarely on a global regime for investor treatment. That is very much a consideration in the minds of the negotiators in the OECD process as well.

Senator MURPHY—I think I will just leave it at that at the moment.

Mr BARTLETT—There would be no doubt that there have been significant benefits to living standards in the world through trade liberalisation and investment liberalisation. I guess the dispute, though, would be about the distribution of those benefits. I would be interested in AusAID's views as to the impact of the MAI on living standards in developing countries.

Dr McCawley—Firstly, the most obvious point to make is that since the MAI is still such an uncertain animal, it is a bit hard to make any clear estimates. Secondly, however, I think it is generally agreed that the facilitation of capital movements across the world in broad terms is important for developing countries. It is glaringly obvious that developing countries are short of capital. This is one of the striking facts of our planet. The processes of development, particularly in Asia, are likely to be badly held back by

lack of access to international capital.

I think the point that you are making is that, apart from the straight amount of quantitative flows of capital, there are important debates about the quality of the capital. This rapidly gets into debates about precisely who in developing countries benefits. A whole Pandora's box of arguments opens up here. The Pandora's box is so complex and so complicated and so greatly influenced, in effect, by the regulatory regime that surrounds these things—and this varies from country to country—that it is hard to move away from the first generalisation, which is that in general capital f45
lows are likely on the whole to be very beneficial to developing countries. But, in the process of that movement of capital, there are likely to be winners and losers in developing countries. In any process of change there are winners and losers. There are likely to be winners and losers.

There are a couple of other points I would make. The first is unfortunately that, in assessing this business of winners and losers, even if one sets up regulatory environments in developing countries, if the developing countries themselves attempt to set up regulatory regimes which arguably, depending upon your views of regulations, are meant to protect weaker groups within those developing countries, the regulatory regimes are extremely weak. As a generalisation, the legal environment in most developing countries is extremely weak. At least half the time, depending on how you measure these things, the letter of the law is irrelevant to the way life is conducted in developing countries.

I think those are the main points I would want to make about the MAI. The final one I should make is that, so far, for the sorts of reasons that my colleague from DFAT has touched upon, there has not been much interest from the developing world in the MAI. A small number of developing countries—five, I think—have taken some interest (indeed, have been attending hearings of the OECD) but it is true that, by and large, the developing world does not see the OECD as, if I may put it this way, their club.

The world is composed of clubs. Obviously the UN is a club, the World Bank is a club and the International Monetary Fund is a club. All these are meeting places, as is the WTO. The Asian Development Bank is a club for countries in this region. We belong to it; developing countries belong to it. But, by and large, developing countries do not see the OECD as a club to which they belong. They tend, therefore, not to attend the club. I think it would be overdoing it to say that they see the OECD club as hostile, but they do not see it as a sympathetic environment. It is basically a club which they do not attend much. Therefore, they are under-represented and there is not a good flow of material. It is something that, by and large, is going on outside the areas that they operate in.

Mr BARTLETT—Do you see, then, a possibility that, if they stay out of that club, there will be increased capital flows between the OECD countries and less capital flows to developing countries and that, as a result, they will become increasingly starved of capital? Is that a possible scenario?

Dr McCawley—It is a possible scenario. There are quite a few other possible scenarios. Why I am hedging my bets a bit on this is that it is very clear from many studies that international capital flows are affected by many factors indeed. One of the most obvious is domestic peace—law and order. The turmoil and uncertainty in Asia at present is, I would guess, likely to do far more damage to the likelihood of capital flows. There is likely to be a much greater barrier to capital flows than the existence or the non-existence of the MAI. We can expect this year that international capital flows to Asia will absolutely plummet. They have been very high in the last year or so. A lot of them have gone to China. The point has frequently been made that the great jump in capital flows over the past couple of years, and which we have heard a lot about, has in fact really only gone to a relatively small number of developing countries, and China has been one main beneficiary. But you can bet your life that this year those flows are going to plummet.

Mr BARTLETT—I take it, then, it would be equally hard to estimate the impact of the MAI on the effectiveness of Australian aid programs or in fact the aid programs of other countries as well?

Dr McCawley—Yes, I think so. The aid programs are, of course, public flows. They are sometimes called public non-market flows. The OECD and a range of other institutions do provide some very useful data that compares these public non-market flows with private capital flows. One of the features of the private capital flows over the years is that they have been much more volatile than the public flows.

The public flows have in some years been greater than the private flows. In some years the private flows have plummeted to almost nothing. In other years—in the last couple of years—private flows to developing countries appear on the face of it to have risen very rapidly. We tend to see them as operating in rather different environments. One group, the A donor environment, is driven by government policies, and is arguably a form of government intervention in markets. If you take an extremely free market approach, and there are some international economists who do—a very well-known one is Professor Peter Bower; he would argue that this largely should be left to private capital flows—there are advantages and disadvantages.

As I have said, the private capital flows sometimes can be quite high; at other times they drop. So volatility is a major problem from the point of view of developing countries with capital flows. You can see this over Asia in the past decade or so. In the early eighties private flows were quite high. In the mid- and late eighties in the midst of the debt crisis private flows to developing countries absolutely plummeted. In the early 1990s they tended to rise again, and in 1995, 1996 and 1997 they were very high. Now they are likely to plummet again, especially to Asia. So they have got pluses and minuses, but certainly one negative aspect of private capital flows is their volatility.

Mr BARTLETT—One last question: is AusAID satisfied with the degree of consultation with Treasury?

Dr McCawley—Yes, we have very largely relied on our relations with our DFAT colleagues—as I say, principally it is DFAT. This will sound like public servants giving you explanations, but we do have excellent relations with DFAT. There would be 100 or 200 phone calls every day, not just on this issue. There is a very close relationship, so the answer is yes.

CHAIRMAN—I want to take Mr Bartlett's question on ODA policy a little further, specifically the government decision in terms of tying of aid in relation to the recent review of the whole ODA program. Do you see tying, particularly in the procurement area for ODA programs, as being consistent with the MAI or the other way around? Is there a consistency there or do you see a basic inconsistency in policy terms?

Dr McCawley—I must admit I have not considered it. I would have to closely check the MAI again. If you want a considered answer, I would have to take it on notice. Off the top of my head—please do not hold me to this—my answer is that they are pretty separate issues. I do not see a close connection with the MAI, but I would need to read through the details again.

CHAIRMAN—It is fine if you take that on notice.

Mr Potts—I think there is one thing to add to Dr McCawley's response on this point. To the extent that there is any overlap as I understand it in the schedule of preliminary reservations, there is a carve-out identified for ODA.

CHAIRMAN—Yes, there is.

Mr HARDGRAVE—I am interested in pursuing with you, Mr Potts, the question of the focus of this agreement. We talked before about world trade organisations and, I guess, we could talk about GATT and things like that. Is it too narrow a focus to include just the OECD nations? Should we be broadening it? It really rests perhaps more with WTO or GATT. Is there a conflict between what those organisations—and you mentioned APEC as well—are currently doing and what the OECD is currently doing?

Mr Potts—I might make a couple of comments and Dr Goode might also want to comment on the question. The basic answer is a question of political will. At the moment the only body which has broad based work on investor treatment rules is the OECD, so you have to ask, first of all, whether the OECD work is going anywhere—the answer is that it is too early to say that it is not—and, secondly, whether the political will is there in other alternative bodies. The short answer is that, at least for the moment, it is not. There was in Paris at the OECD ministerial council some brief discussion of the OECD versus the WTO as the appropriate vehicle. The preference of ministers at that meeting was clear: to keep things in the OECD for the moment and to see where those negotiations went.

Mr HARDGRAVE—Dr McCawley—I thought very honestly and accurately—

described its club atmosphere. At least one benefit that can come out of that club is that it provides what Treasury describes as a demonstration effect to other nations. Is that really why it is currently with the OECD—because they can actually provide the example for others to follow?

Mr Potts—Yes, the hope is that with the OECD countries at least there will be, first of all, a critical mass and that, secondly, that will generate a momentum effect, hopefully, of accessions to the MAI itself. It is a stand-alone agreement—or it will be when it is completed—and it will be open to accession by non-OECD members. If the MAI is concluded and it is open for signature to non-members and if that process does not attract much in the way of accessions, there would need to be a fundamental rethink, but that is some years away.

Mr HARDGRAVE—My concern is that there is more to it than just the OECD club. A concern that I would have is that, if there are other bodies that are similarly looking at investment matters, a conflict could develop and Australia may end up being left a proverbial shag on its rock in a regional sense when it is really all about us signing up an agreement with, if you like, the old nations of the world whilst the new and emerging nations to our immediate north are not inside the loop. We could find ourselves not working in our best long-term interests.

Mr Potts—I would be surprised if it panned out that way because we are in each of the various loops or each of the various fora that you would have to look at for development of investment treatment rules.

Mr HARDGRAVE—Thank you for that. The other thing I want to explore very quickly with you is the general principle in regard to High Court challenges. From your viewing of the document in its current form, where does it leave us? Does it leave us in a position where, as Ralph Nader—and I rarely quote him—has suggested, it is a slow motion coup d'etat against democratic governments, to paraphrase one of the submissions we have received? The sovereignty issue and the potential High Court challenge matters: are you satisfied that the MAI is being negotiated knowing that we have this thing called our constitution, which leaves us open to these sorts of challenges?

Mr Potts—It is certainly something which our negotiators have in mind.

Mr HARDGRAVE—But what about the Treasury? Are you talking 'our' as in the Department of Foreign Affairs and Trade or 'our' as in the government?

Mr Potts—The whole of government. What you would have to say at the end of the day is that, especially in the common law system, whether you are talking about domestic legislation or whether you are talking about international obligations that we have taken on, the way is always open for an aggrieved party to take a case to our domestic courts.

In terms of the drafting of the list of Australian reservations, it has been the government's policy to claim a very generous carve out, especially on the treatment of inwards foreign investment to Australia. This is a matter on which Attorney-General's is better placed than my department, but our expectation would be that that should exclude as far as possible the sort of legal action that you speak of. But that is something I would need to have more detailed advice from lawyers on.

Mr HARDGRAVE—We all would hope that the lawyers, be it A-G's or whatever, get it right, I suspect.

CHAIRMAN—Michael, could you make sure that DFAT follows up what we asked Treasury to take on notice—that is, the Attorney-General's advisings in relation to the compatibility provisions? If you could do that—ideally through the SCOT processes, through Jeff Hart's organisation with your legal adviser—we could get some sort of cross-pollination and that would be helpful.

Mr HARDGRAVE—In the view of your department, will this MAI affect existing trade and investment relationships?

Mr Potts—That is difficult to say in the sense that we do not know what we are really talking about at the end of the day. I do not know what a final MAI is going to look at. We are aiming for an MAI which would have a beneficial impact on Australia's trading and investment relations with other countries. We go back to the question of our focus being essentially on the beneficial impact of Australian investment overseas. I think all of us have very much in mind the point that our target countries really lie outside the OECD. DFAT would say that there is need to take a long-term view on this, hopefully to get the MAI up within the OECD context and for that then to be adopted more widely. But if that process does not go very far, clearly, there are other options that we have to look at. But, to look at those options, there needs to be developed some political will.

Mr HARDGRAVE—You were here before in the gallery when I gave Treasury a fair old rev-up about the way the CER is impacting on matters such as New Zealand television production now counting as Australian content. Surely your department would learn from some of those sorts of mistakes in the past and be looking at what this draft is. It is a dynamic document in the sense that it is constantly changing, but you would have your set of conditions and what you want tightened up fairly clear in your mind, surely?

Mr Potts—I think that is right. I cannot really comment on the CER angle, but I would like to think—and I am personally convinced of this—is that DFAT is a learning organisation and we are responsive to the experience that has gone before us.

Senator ABETZ—Has DFAT done any analysis of the impact of the MAI on the federal balance at all? Would the federal government be able to claim certain extra heads of power under which it can legislate?

Mr Potts—The answer to that question is no. We do not see that as within our portfolio responsibilities.

Senator ABETZ—In whose portfolio do you see it as falling?

Mr Potts—I think that would lie with the Attorney-General's Department as it affects the balance of federal-state.

Senator ABETZ—Are you saying to us that, when Australia negotiates these federal treaties, how it might impact on the federal balance is not a consideration that DFAT takes into account?

Mr Potts—It is certainly a factor that needs to be fed into the whole of government negotiating position, but whether it should be fed through DFAT or whether it should be fed through the lead department I think is a different matter. In this case, it is not DFAT which is the lead department.

Senator ABETZ—Treasury passed on it; I am now asking you. When DFAT is the lead department, do you take the federal balance into account?

Mr Hart—The answer to that is that it would be taken into account. I have to speak in general terms. It would be taken into account, would it not, in the way in which the states and the Commonwealth consulted about the question. It would be taken into account in the sense that one would expect that when a treaty was being considered and the states were commenting on it, you would expect them to make any judgments and express views about how that would affect their interests. That presumably would then be fed into the process. But I cannot give you a specific example because I have not been involved in one.

Senator ABETZ—Also, the unfortunate thing is I understand, for example, with the Convention on the Rights of the Child, all the state governments were advised, 'You have got nothing to worry about. All Australian law is compatible with CROC and you've got no worries there.' Of course, now all sorts of manner of people are trying to tell the states and the federal government that they have got to change their laws. That is, I suppose, something that I am concerned about, that we get it right from the very beginning.

Mr Hart—Yes. I would hope that under the new arrangements—which, of course, you are more a part of really than we are, even though my office has a role—those sorts of situations will not be repeated.

Senator ABETZ—Good.

Mr Potts—I would like to make a comment as well which might add a little

illumination on this point. We are conscious, specifically in the case of the MAI, of the federal-state question, and that is why, for instance, while the primary negotiations and consultations obviously are going to be done between Treasury and the states, particularly on the question of state matters that need to be carved out of the ambit of the MAI, we as a department have included the MAI in our regular consultations with the states. We have a national trade strategy which involves six-monthly meetings with the states and the MAI is now embedded in the agenda. Tony Hinton participated in our last national trade strategy with us, and there was a discussion with state representatives and peak industry bodies on the MAI.

Senator ABETZ—Time is short and I would like to move on. How many of our current bilateral agreements might be superseded by the MAI?

Mr Potts—I think the answer to that is none of them. The bilateral investment agreements are of a slightly different order in the sense that they lay down, if you like, a framework of endeavours. The receiving country will do their best endeavours and so on. But at the end of the day, the enforcement provisions under the bilateral agreements typically are not very strong. They normally refer to either resolving disputes through consultation or in some cases through already established rules of international arbitration.

Dr Goode also reminds me that in the MAI context it is going to depend on whether the aggrieved partner, if you like, or the other country, is a member of the MAI or not.

Senator ABETZ—Of course; otherwise the MAI would not come into play. My next question is, let us say we have a bilateral agreement with Germany and both Germany and Australia sign the MAI, and it were to be shown somewhere in one of those agreements that there is an inconsistency. Which one would be said to prevail in international law?

Mr Potts—That is a matter that would need to be resolved according to the rules laid down in the Vienna Convention on the Law of Treaties.

Senator ABETZ—Which is? That is what I am trying to find out. Can you take it on notice if you do not have an answer. I do not expect you to carry those sorts of answers in your back pocket.

Mr Potts—No. I think an answer from lawyers would be better than an answer from us.

Senator ABETZ—Yes, so take that on notice.

Mr Potts—Dr Goode—

Senator ABETZ—Does carry it in his back pocket? Good.

Mr Potts—Dr Goode has a very quick answer, and it is the later one.

Senator ABETZ—It is a bit like legislation; the later legislation would be seen as prevailing.

Mr Potts—Yes. That is more of a reflection of the thought of the day.

Senator ABETZ—So the suggestion that the basic idea of the MAI was to simply link together into a single catch-all agreement with common standards a network of some 16 bilateral agreements would be an incorrect summary?

Mr Potts—In my view, yes.

Senator ABETZ—They are the words of one Gareth Evans on Tuesday, 24 March 1998. Thank you for that. Let us move on. In your submission you deal with a number of the benefits of the MAI, and I asked this of Treasury as well. It is good to see the benefits: is there a negative check list as well? I must say you have dealt very well with the criticisms and debunked them, but I would like to think also that to a certain extent you may have exercised your mind as to how the current MAI could be improved with drafting or suggestions or further reservations and would have dealt with some negative aspects to draw to our attention so that, when we weigh up the whole thing, we are able to determine whether it is a good or bad thing. All we seem to be being fed is the positives. Are there any negatives, potential negatives, any concerns?

Mr Potts—Let me just say on the positive front first that what we have sought to do in the submission is simply to emphasise the positive advantages of a good multilateral rules based regime for investment treatment rather than this MAI, the MAI where it stands. We have also tried, as you have mentioned, to set out some of the flavour of the public debate on pluses and minuses. We have not sought to come to any significant conclusions in our commentary on it. We do not see that as our role in a sense. I am very conscious also that we are not the lead department on this and that we are not investment specialists. If we are specialists, it is more on the wider area of international trade rules.

Senator ABETZ—Yes, but from an international trade point of view and foreign affairs and international agreement, are there any concerns whatsoever? I suppose I take the view that most documents have their positives and negatives. As a lawyer I used to go through agreements with clients. I would say, ‘Look, these are the good things for you, but these are the responsibilities that you have to abide by. Are you willing to accept the bad along with the good things in this agreement?’ Usually they said, ‘Yes,’ and they signed up. All I am being told at the moment as a committee member are all the good things without having put to me some of our obligations, responsibilities or potential negatives if we do go down this path. For example, on page 15 of your document you tell

us that Britain's Department for International Development has recently published a report titled *The Development Implications of the Multilateral Agreement on Investment*. They in fact made a suggestion in relation to developing countries—food for thought. Do you people have any food for thought. I am not asking you to make conclusions or draw conclusions but just to offer up discrete areas that may be potential for concern.

Mr Potts—Let me start with the caveat that I do not think we have a department wide view on this because these are not issues that we have had come to a departmental view on. But I think at working level there are a number of areas which would give observers some pause for thought. One would be, for instance, how are the country exemptions going to be handled, what will be the final outcomes on roll-back and standstill. These are going to be very important. A second one is going to be the question of culture, how is it handled. That is important to a number of countries. Finally, everyone is anxious to a see a greater degree of specificity on the dispute settlement procedures. There are big question marks on the text as it stands.

Senator ABETZ—The ACCI as a private institution went through the general provisions and then gave us a running commentary saying, agree, strongly opposed, noted, clarification required. I have got to say to you, not from any of the departments so far has there been that sort of analysis clause by clause or bracket by bracket as to whether that particular aspect of the agreement is good bad or indifferent or further clarification ought be included in the agreement. I have got to say to you that that is something that I was hoping to get from the various departmental submissions as to what the considered view was, and then for us to either agree or disagree with your suggestion that it be supported, opposed or noted.

Mr Potts—From DFAT's perspective, and I am talking just from that perspective, that would be difficult for us, because there would be a lot of areas which are outside our portfolio responsibility. It is not a question of shirking those responsibilities, but we also do not want to stray into other people's legitimate turf.

Senator ABETZ—Who is ultimately responsible for the whole of government approach to this?

Mr Potts—It is the Treasury.

Senator ABETZ—It will be the Treasury. Right.

Mr Potts—When the government finally looks at it, it would be the Treasurer who would take the matter to cabinet.

Senator ABETZ—Yes, of course.

CHAIRMAN—Again, I come back to the SCOT processes. Surely, in this one we

have the Treasury leading, but we have DFAT leading in terms of SCOT. It does not seem to be an unreasonable request that Senator Abetz has raised for perhaps SCOT to take a similar look at some of these things, as the ACCI has, and come up with at least a sort of first go at some of these comments that the ACCI has been prepared to chance its hand at. Is it possible for DFAT to take on board, in consultation with the lead department—the Treasury—a look along similar lines as the ACCI has attempted?

Mr Potts—All I can say is that this is a question we are happy to pose to the Treasury.

CHAIRMAN—It is a reasonable one, and Eric has raised an important point there.

Senator ABETZ—What views does Austrade have on the need for an international investment agreement, based on the needs of its clients?

Ms Munroe—We have had very little comment from clients. We do not take a particular position on the MAI. We accept that it is beneficial to companies to have an established framework and one which is suitable for Australian companies, but beyond that we would not really be taking a strong position. We would be following DFAT's policy position.

Senator ABETZ—Has Austrade been lobbied by companies saying, 'Look, this MAI is absolutely essential for investment purposes?'

Ms Munroe—No. Bearing in mind that the dealings Austrade has with potential foreign investors coming into Australia and with Australian companies looking to invest overseas, relate primarily to particular business propositions or consideration of business dealings so that they are at an operational and fairly focused level, on a quick check around the Austrade network there has been nothing coming forth from clients. That is not to say there have not been comments here or there, but there certainly has been no appreciable wave of opinion or even noticeable wave. There has been no significant feedback from companies.

Senator ABETZ—If companies were genuinely interested in MAI and you have not got input on it, are there other government departments or bodies that you might be able to point to where that sort of input may have been provided to government and that we might be able to talk to?

Ms Munroe—Yes. I would expect the Department of Industry, Science and Tourism would be taking and attracting those sorts of comments. I understand that they have had some discussions with companies and industry.

CHAIRMAN—We are running out of time and I want to have at least a 25-minute break before we come back for the afternoon session. Unless my colleagues have any

other questions, I have a final question. It is in relation to the major reservations of the United States and France in relation to the MAI. If we believe what the media have written on it, their basic reservations are associated with the cultural implications of the MAI. Is DFAT aware of more fundamental opposition? The United States historically is not a good signer of any treaties. Is there any more fundamental opposition over and above cultural implications of which you are aware? Canada is another one, but the United States and France are the ones that have been given most media comment.

Mr Potts—From the beginning the United States has been one of the countries that has been most in favour of an MAI type of regime. That said, their major problem at the moment is the cultural problem. On the other hand, one of their policies, namely extraterritoriality, is having a huge impact on the whole future of the negotiations. That was brought out in earlier discussions that you had with Treasury.

I would not underestimate the difficulty of resolving that question. There are very strongly held positions of principle on both sides in relation to Helms-Burton and to ILSA and that dynamic is going to be one of the key aspects which will either resolve the way ahead or continue negotiations at an impasse.

CHAIRMAN—The political mix on the hill in Washington at the moment does not really lend itself to an open-ended signature of a major document like this, it seems to me. On this cultural front that is being used, do you have anything you can add in terms of a wider agenda by the United States in terms of this particular one? They might be supporting it in principle and they might be using the cultural opposition as a strategy, but is there something more political in terms of this?

Mr Potts—Not that I am aware of. The administration, of course, is keenly sensitive to a degree of anxiety and public opinion in America parallel with that in other countries, particularly on questions of the environment and so on. That is going to be one aspect of the baggage that their negotiators will be bringing. The other comment I would make is in relation to your comment about opinion on the hill. That is clearly relevant in one sense, but also no-one expects that the MAI will come to the existing congress. It is going to be a matter for a future congress.

CHAIRMAN—Yes. There is the difference between the administration and the hill anyhow; that is the basic difficulty in Washington. We have seen it with CTBT and we have seen it with other nuclear issues. They will continue to use the cultural thing as a bit of a front for some of these things. Are there any other final questions?

Mr Hart—I did want to make one or two comments from the treaties perspective, just to put on the record what has so far been done from the point of view of the SCOT process and, indeed, its antecedents. In fact, in the first list of treaties matters under consideration, which was tabled in both houses in 1994, the MAI was on that list. It was, I think, the first list that was produced. I was not in this country at that time so I am not

aware of all of the background, but that list was the precursor of what are now the twice-yearly lists of consolidated action under consideration which are now available to the SCOT and are also tabled in both houses.

CHAIRMAN—If I could interrupt you, my reaction to that would be, how many members and/or senators took much notice of what was tabled in 1994? I would suggest to you very few, because the information was just being tabled, and that was it.

Mr Hart—No, but that was where it did start from, and subsequently it was therefore available; once the SCOT process began, it was then on the list. It was considered at the last meeting of the SCOT, which was in October 1997. There was discussion of the MAI. There was a briefing provided by the chairman, so there was not a direct briefing provided by Treasury officials. There was also a note made at that meeting—I did not attend it—that there was going to be this further correspondence—

CHAIRMAN—The Chairman of SCOT is DFAT's legal adviser?

Mr Hart—No, the chairman is the First Assistant Secretary, International Division in the Department of Prime Minister and Cabinet. So the next SCOT meeting is on 22 May. The items for consideration at that are to be finalised, in theory, today. It is the last day for states to indicate their interest, so I would hope and expect that there will be an intensification and, noting your points about it, one would hope that there will be a more intensive process this time. It will be my recommendation that it involve a briefing by Treasury.

CHAIRMAN—It was not raised at the last COAG, at Treaties Council?

Mr Hart—It is a good question. I cannot say whether it was on the attached list. It may have been in the list of documents, but I was not able to clarify that this morning. It was not discussed. There was a list of 10 or 12 items.

CHAIRMAN—As far as this committee is concerned, in the light of what we have heard today, it is an item that should be listed on the agenda for possible consideration at the next Treaties Council. Thank you very much indeed.

Proceedings suspended from 1.37 p.m. to 2.07 p.m.

RANALD, Ms Patricia Marie, Senior Research Fellow, Public Sector Research Centre, Morven Brown Building, University of New South Wales, New South Wales 2052

CHAIRMAN—Welcome. Do you have any comments to make on the capacity in which you appear?

Ms Ranald—I am appearing as an independent researcher who does work on international trading agreements—not only the MAI, but other agreements.

CHAIRMAN—Thank you very much. The committee has received into the evidence a copy of the paper that you wrote entitled *Disciplining governments,* about what the Multilateral Agreement on Investment would mean for Australia. I am not sure if it has got a date on it.

Ms Ranald—March 1998.

CHAIRMAN—Do you want to table any other documents this afternoon or do you just want to make an opening statement?

Ms Ranald—I would like to make a brief opening statement.

CHAIRMAN—Please go ahead.

Ms Ranald—My remarks are based on the publication *Disciplining Governments,* which you just mentioned. This analysis was based on the February draft of the MAI, but I have also read the April draft and I have concluded that there are a few significant differences which would affect my analysis in the April draft. I will mentioned them as they come up, but I think the overall thrust of my analysis still applies to the April draft.

This document addresses many of the terms of reference, particularly (a) to (e) and (f), (h) and (i). It outlines major concerns with the structure of the MAI as an agreement, its scope and its possible impact on key areas of policy in Australia.

The MAI is a legally binding treaty and is more far-reaching than most agreements reached in the World Trade Organisation framework, except perhaps for the NAFTA, which is a regional agreement. There are three major structural reasons for this. First of all, it is a top-down agreement. It applies to all legislation and government measures unless they are listed as an exception. This is the opposite to the usual structure of WTO agreements, where it is usually by inclusion that things are specifically included in the agreement.

If you add to these the principles which are common to WTO but in this context become more powerful, that is, the principles of standstill or no new measures that are

inconsistent with the agreement and the principle of roll-back, which is that those exceptions which are inconsistent with the agreement have to be time-limited and eventually rolled back, then I think it makes the agreement very comprehensive and powerful in its impact on current legislation, potential legislation and other measures of government.

Secondly, what is unique about this agreement is that it has a dispute settling mechanism which gives standing to corporations, or transnational investors, to sue governments for damages if governments take measures which are detrimental to investors. I will go into the definition of that a bit more thoroughly if the committee wishes, but this is unusual in the context of these agreements. It is usually only governments which can take action against other governments. This ability for corporations to sue, for very large amounts in many cases, if we look at the NAFTA precedents, also exercises potentially a very big limiting discipline, if you like, on governments. In fact, the reason that my publication is called *Disciplining Governments* is that that is the term that the MAI uses. It uses the term 'applying the MAI disciplines to governments.' Thirdly, it is effectively a 20-year commitment, if you add the five years before withdrawal and the 15 years of application.

I think those three structural aspects of the agreement make it a very powerful disciplining force on governments, and I believe that they are not really necessary for such an agreement. They potentially restrain the rights of both governments and citizens.

The fourth point I would like to make is that, while extending the powers of investors or corporations, the agreement places no corresponding legally binding obligations on those corporations in areas like environment protection, labour rights et cetera. Although these things are mentioned in the agreement, they are mentioned as desirable or voluntary aspects of the agreement, in contrast with the disciplines which are exercised on governments, which are legally binding. Together, all of these features have a huge impact on government policy and legislation. I believe they do elevate the rights of corporations or investors above those of governments and citizens. In its own language, as I said, it seeks to implement discipline over governments.

The response that is usually made to these criticisms is that governments can have a list of exceptions which preserve their rights to legislate in certain areas. It is true that you can have exceptions, but I believe that in the long run the exceptions do not negate the effect of this structure, because the objective of the structure—and this is quite clearly expressed in the agreement—is to have a ratchet effect on these exceptions, to roll them back and to have grandfathering clauses eventually, although the precise mechanism for this has not yet been determined.

There is a concept of having a list of temporary objections and a list of permanent objections. That has not yet been agreed. If you read the notes to the agreement, it is perfectly clear that there is a large number of the parties who believe that having

permanent exceptions is in fact contrary to the whole spirit of the agreement. Those objecting to that idea of permanent exceptions I think correctly point out that they are against the spirit of the agreement. That makes me ask the question why have a structure of the agreement which makes exceptions of things which are seen as essential to preserving the ability of governments to legislate? Why make them into exceptions? Why is the agreement framed in that way so that they become non-conforming measures to the spirit of the whole agreement?

I want to briefly run through some examples of possible impacts on Australian policy. I make the point that most of these have been included in exceptions but at this stage it is still not clear whether those exceptions would be permanent and whether they would have to be rolled back eventually. The following things are non-conforming measures in terms of the agreement and are current government policy: limits on foreign ownership in areas like media, Qantas and Telstra; local industry development measures, such as requiring transnational investors to do research and development, train local people and achieve certain levels of exports. We do have current policies which require this in the telecommunications equipment industry and in government procurement policy.

Even the exclusive provision of government services by independent public bodies such as hospitals, schools and universities may have to be opened up to competition by transnational investors under the terms of the agreement. This clause in the agreement is ambiguous, but I note that Treasury has included those areas in its list of exceptions. So it clearly believes that they potentially do come under the scope of the agreement. Culture and media has already been mentioned, Australian content rules. Indigenous peoples—the concepts of land rights and cultural rights for indigenous people, particularly land rights, are inconsistent with the idea of national treatment.

In the area of environment, there are no legally enforceable minimum commitments that are required of companies. There is a very broad provision under the investment protection part of the agreement which says that investors must not be impaired from operation, management, use, enjoyment or disposal of investments by unreasonable or discriminatory measures. Leaving aside the discriminatory thing, which deals with national treatment, ‘unreasonable’ in the case of the environment is a very ambiguous area of definition. It is true that in the latest draft there is provision made for companies not to be able to take action in the case of normal regulation, but what constitutes unusual regulation? Does this mean, for example, that precautionary environmental legislation could be endangered?

Finally, on labour rights I note that again there are no legally enforceable labour rights in the agreement. There is a commitment not to lower existing domestic standards, but I believe that in an agreement of this kind, which actually significantly extends the right of transnational investors in a number of areas, it would not be unreasonable to require them to make a binding commitment to commit themselves to certain basic labour rights.

These structural problems and potential areas of conflict with domestic policy of the MAI are illustrated by the strength of global criticism and the impact that this global criticism has had on the negotiations. What has happened is that there has been an impact on negotiations both at the level of the OECD and at the level of governments like ours. Governments have had to list more and more exceptions as people have become more aware of possible impacts. In fact, the potential to reach agreement has been postponed twice. It was originally intended that agreement be reached last April, then it was to be this April. Now it has been postponed again till October. This is unprecedented in terms of this type of international agreement.

I conclude by saying that I believe we do need international regulation of investment, but we do not need an expansion of corporate rights at the expense of government and citizens' rights. Any regulation framework for investment must safeguard both the rights of governments to govern and the rights of citizens.

CHAIRMAN—Thank you very much. On behalf of the committee, I congratulate you on your paper. That said, I do not agree with some of the assertions you have made. Perhaps I come from a different philosophical base. Nevertheless, it is a good expose of the issues and we thank you for that. Where I would perhaps take issue with you—and I ask you to make some further comment on this—is your comment about the extension of the legal rights of corporations at the expense of everybody else. What is the substantive evidence to support that assertion?

Ms Ranald—The substantive evidence is that this agreement gives corporations or investors the right to appear in an international forum and take action against governments. That is unusual in the context of this type of agreement. I think NAFTA is the only other agreement which permits this. In the WTO context, all of the dispute settling mechanisms are government to government. They do not involve investors taking action against governments. That is one point.

The other point is that there is such a broad definition of 'investment protection', that is, that investors must not be impaired from operation, management, use, enjoyment or disposal of investments by any unreasonable or discriminatory measure. That is a very broad definition and the definition of 'investment' itself is very broad. As I said, if you look at the area of the environment, for example, you could argue that some environmental legislation was unusual if Australia happened to pass some legislation, which it felt necessary to protect its environment, before other countries did. I think that does have a kind of discouragement effect on the legislative ambit of governments. I do not think you need such a broad definition as that.

CHAIRMAN—This morning, both with DFAT and Treasury, you heard me ask the question about the more multilateral approach. There were some views given on that. You argue in this paper that the OECD approach gives strength to the argument of the rich and the poor differential. That is what you are saying in that paper, obliquely anyhow.

Ms Ranald—Yes.

CHAIRMAN—How do you respond to the suggestion that, in due course, this would be more appropriately dealt with under the WTO mechanisms?

Ms Ranald—I think the WTO environment, in the sense that it includes developing as well as industrialised countries, would be more appropriate for this kind of agreement. That environment in itself also has limitations. I think the reason that it came out of the WTO environment is precisely because most developing countries would not agree to these sorts of conditions being placed on them, for the very good reason that, because they are developing countries, they want to have the scope to develop their own capacity for local industry and service industries, and so on.

CHAIRMAN—Yet we have a number of developing countries wanting to be party to the OECD.

Ms Ranald—Yes. It is a fairly small number.

CHAIRMAN—Yes, it is small.

Ms Ranald—If you look, for instance, at APEC, you will see APEC has a non-binding voluntary investment agreement which has nothing like these provisions in it. The reason that it is non-binding and voluntary is also that most of the members of APEC who are our near trading neighbours would not agree to these conditions.

Mr BARTLETT—One of the concerns you expressed was the fact that it would give a multinational corporation the ability to take action against another government. Would your concerns be somewhat alleviated if that power were transferred to the government of that parent company instead? Could the treaty be reworked so that that was not an issue?

Ms Ranald—In most treaties only governments can take action against other governments. Certainly, that would be a preferable situation for this agreement also.

Mr BARTLETT—So that could happen?

Ms Ranald—In terms of this agreement some of the definitions are so broad, as I have indicated, that those would also have to be addressed, and I think the top-down structure has to be addressed. We are now getting into absurd situations where we have a top-down structure where everything is included except the exceptions, and the exceptions are just getting longer and longer as people realise what the implications are. It seems to me that a top-down structure is simply too limiting on government's ability to legislate and regulate.

Mr BARTLETT—On a different tack, how effective do you see the role of the Foreign Investment Review Board being under the current arrangements in protecting Australia's sovereignty and interests in terms of international investment flows?

Ms Ranald—I am not an expert on the Foreign Investment Review Board but my understanding of it is that it is a fairly weak review power and it is not exercised very often. It is still there though and it is important to have it there. Some of its powers would be inconsistent if they were not exempted, and that is why they are being excepted by our government. We do not have a really stringent regime at the moment. Most of the limits on foreign investment are in fact in specific legislation like that for Telstra, Qantas or whatever.

Mr HARDGRAVE—Would it be your view that any exemptions that might be signed up in a very long and perhaps ever-lengthening list of exemptions might in fact end up being tested in the High Court and might not even being worth the paper they are written on?

Ms Ranald—I would not put it that strongly but I would say that, because of the very broad definitions in the agreement, there is scope for a lot of legal contestation. By that I mean: what is an unreasonable piece of legislation in terms of the investment protection clause that I read out before? What is an unreasonable impairment to investment? There is a lot of scope for legal contestation about these matters. The other thing about the corporations we are talking about is that they do have very large resources: a lot of them have as many resources as governments and they are prepared to take these actions, as they have under NAFTA.

Mr HARDGRAVE—I turn to the government's provisional list of exemptions. I mentioned 'media' this morning and it is an easy one to point at because of a recent High Court decision based on, as I understand it, the closer economic relations bilateral treaty with New Zealand, whereby now a New Zealand television program is counted as an Australian television program. That, in itself, could be a door, a precedent, for a High Court matter down the track. I do not expect you to have QC qualifications because I certainly do not—that is why I have a clear-eyed look about me: I am not a legal person—but it just seemed to me, based on many years of previous action, that the High Court could view a matter such as the MAI, regardless of exemptions, as having an intention which could see every one of those exemptions tested in the High Court.

Ms Ranald—I would agree with your general point that the definitions are too broad and lend themselves to legal challenges.

Senator ABETZ—You pose the question of disciplining governments. Is that a concern that the Evatt Foundation has had in relation to all the other treaties that Australia is a member of?

Ms Ranald—I am actually not from the Evatt Foundation. The publication is a joint publication of the University of New South Wales and the foundation.

Senator ABETZ—So you are here in a private capacity?

Ms Ranald—Yes.

Senator ABETZ—My apologies. I was reading from UNSW and Evatt Foundation and I assumed. But, in a private capacity, can I ask you that same question.

Ms Ranald—I do not disagree with the concept of international regulation or the concept of international treaties, but I think they should be balanced. I do not think this particular treaty is balanced because it gives extraordinary rights to corporations in particular. It has very broad definitions of areas in which legal action can potentially be taken against governments but it does not have corresponding obligations on those corporations. So, in that sense, I do think that it is a legal minefield.

Senator ABETZ—Do you consider yourself to be a broad internationalist?

Ms Ranald—Yes, I do.

Senator ABETZ—It says under the heading 'Critics of the MAI':

But the broad internationalists want stronger national and international regulation to control the activities of corporations . . .

I can understand that. But if you have balance, if you want to insist on control, shouldn't you also in fairness give some rights? Why do you only talk about controlling these multinationals or transnationals and not talk about, as you just did then, a balanced approach and say that you agree with all these companies being given the rights but it should also be balanced with some control?

Ms Ranald—You have taken one sentence out of my publication. I think the whole context of the publication does argue for balance. You have to look at the context of transnational corporations themselves. There has been a tremendous growth not only in the numbers of transnational corporations but also in their size and influence.

In the beginning of my publication, I refer to the fact that, if you look at the 200-odd economies in the world, there are corporations which are larger than about 190 of these economies. We are talking here about very large organisations which have equivalent resources to a large number of the world's economies. We are talking about balance in that context; we are talking about the relationships between corporations on the one hand and elected governments on the other. I think that my publication as a whole does refer to that balance, but it has to be seen in the context of a situation in which there is already

considerable power and influence exercised by such corporations. It is not just me saying this; there are United Nations studies, OECD studies and other studies that have noted this.

Senator ABETZ—But what would you say to a transnational that let us say would argue that it was seduced to invest in a particular country by promises or understanding of what the law would be and made a considerable investment in that country. However, that transnational finds two years later that all the rules by which they were to play have been changed and altered, to its devastation; then ultimately to the devastation of its shareholders, which might be to the ultimate devastation of superannuation companies; and then ultimately to the superannuants in retirement sitting in their homes in Australian suburbia without any income coming in any more. This is just because a national government, for cheap political reasons, changed the rules.

Ms Ranald—If national governments behaved in the very erratic fashion as you have described, then investors could just stay away. They would not be there—

Senator ABETZ—But what happens if there is a change?

Ms Ranald—If I can just finish: I think that governments do have the right to make laws which do contain some policy changes. Governments are elected to do that. It is a matter of balance. Most governments will not pass laws that will be of huge detriment to large numbers of investors precisely because most governments do want foreign investment. I have made the point in my paper that investment does bring benefits. But I do think that governments and citizens have the right to have some requirements of those investors not only to abide by national law but also to have due regard to what I would call, I suppose, their duties as corporate citizens. So it is a question of balance.

Senator ABETZ—Would you take that sort of view with all other international treaties as well—that most governments would act responsibly?

Ms Ranald—I do not want to comment on all other international treaties. I am not quite sure what you are getting at.

Senator ABETZ—Would you take the same approach to the conduct of governments in the way families are supposed to be run, or children are supposed to be run, or human rights? Are there some fundamental principles of fair play in relation to human rights that should transcend the capacity of a national government to legislate? And, if so, why wouldn't that apply to the investment environment as well—there ought be some fundamental rules that governments ought to bide by if they are going to allow foreign investment?

Ms Ranald—That is precisely what I am arguing. I think you have misunderstood my argument somewhere. I actually refer in the paper to the UN Treaty on Human Rights,

so I have no problems with that. I also refer to the need for international regulation of investment, which means regulation for investors as well as for governments and citizens. I think you have misunderstood the thrust of what I am saying.

Senator ABETZ—I do not think I have, but we will not discuss that. The public scrutiny that the MAIs come under, you undoubtedly welcome that?

Ms Ranald—Yes, I do. I think most people do.

Senator ABETZ—Do you think it would have been a good idea if other treaties that Australia has signed in the past come under the same degree of scrutiny?

Ms Ranald—I think that a process of public scrutiny and discussion is desirable for all these agreements, yes.

CHAIRMAN—Thank you very much, we are most appreciative of that paper and the discussion.

[2.38 p.m.]

SANDERS, Mr Richard David, National Coordinator, Stop MAI Coalition, c/- Workers Medical Centre, 223 Logan Road, Buranda, Queensland

CHAIRMAN—The committee has received your faxed three- page summary dated 28 April, 1998 which has been received into evidence. Do you have any amendments to that written submission?

Mr Sanders—Not at this point.

CHAIRMAN—Would you like to make a short opening statement?

Mr Sanders—Yes, please. The first thing I would like to say is that our coalition is not against foreign investment as such. However, we are emphatic that it has to be in the interests of the community and to the net benefit of the community.

Senator ABETZ—Could I ask you tell us who the coalition is?

CHAIRMAN—Let us do that in questioning.

Senator ABETZ—When he says 'we in the coalition', I would just like to get a bit of the flavour before I consider the comment.

CHAIRMAN—Are you going to cover that in your opening statement or—

Mr Sanders—No, I was not, but I am happy to just briefly cover that now, if you like.

CHAIRMAN—All right. If you can do that now it might save time later on. What is the Stop MAI Coalition? How many people are there? Is it you and one other, or is it you and 500 others or you and 5,000 others? Could you just quickly—

Mr Sanders—We do not have a formal membership list or anything like that so I cannot be definitive in terms of specific numbers. We are part of a global coalition of over 600 non-government organisations. In Australia we have six coordinators in different state capitals, and the members of our coalition come from the churches, including the major churches, the environment movement, small business associations, indigenous groups, environmental groups, pensioners and superannuants. Probably about 40 or 50 different kinds of groupings like that have aligned themselves with us. The sort of mix that you get varies from state to state, but generally that is what we represent.

Essentially, what we represent is the concern that a lot of Australians are feeling these days—a sense of insecurity about where the country is going. Unfortunately, Hanson

seems to reflect this sentiment as well, but we come from what we would call a moderate position and do not really want anything to do with that other mob.

We are opposed to an MAI as this one appears to be drafted at the moment, which confers extraordinary rights on foreign investors and at the same time severely limits the options of governments. In our view, governments must have greater powers to control investments. Investments seem to be flowing around willy-nilly these days. We have just seen what has happened in Asia as a result of insufficient controls on investment—the meltdown there. So we believe that governments must have greater powers and must be free to discriminate against any investment that is not demonstrably for the benefit of the community.

I think the logic for that is that it is a privilege for an investor to invest in a country because investors, when they invest, they invest on the basis they are going to take out a hell of a lot more than they are putting in, so it is a privilege that a country confers on an investor to actually allow them to invest and to make money out of that. So we figure that governments have the right and the duty and responsibility to in fact ensure that those investors behave in a way that is to the benefit of the host community.

In terms of Australia signing up to an MAI, as far as we are concerned it should fully protect our culture; the environment, including the resource base; labour standards; health; education; social services and other public sector activities at all levels of government. In particular, it must protect us against any ex-appropriatory or other coercive measures that foreign investors can put on us because our concern is that the right to sue governments actually gives a foreign investor a coercive power over a government.

You might have, for example, a government that is not particularly keen on maybe an environmental regulation. It might be of a persuasion that is not too keen on environmental regulations and the public might be wanting something like that, and the government could say, 'Well, we have signed up to this MAI; we could get sued or whatever for going down this road.' Now I do not know if this can actually happen under the MAI or not, as it has been drafted, but it seems that the definitions are so broad, with the use of terms such as 'reasonable' and 'unreasonable', that they are totally open to interpretation. Also, we have to remember that big corporate investors have much greater assets than many countries and therefore have the legal muscle, if you like, to possibly win cases.

I question whether we need an MAI. As has already been made clear by yourselves this morning in questioning the Treasury, Australia already has one of the highest levels of foreign investment in the world. Foreign investors have no qualms about coming here at all. Equally, we do not have a problem in investing in other OECD countries, so it does not seem there is a case for such an agreement within the OECD.

Quoting the *Economist* on 14 March this year, page 85, they stated that:

Most of the OECD countries have functioning legal systems and little discrimination against foreign investors, which makes an investment treaty among them relatively unimportant.

This is the important part:

The more significant barriers to foreign investment lie in developing countries.

I think, as some of you may have been suggesting this morning, the real agenda here is to deregulate, regulate, however you see it, investment in developing countries.

What we have to remember with developing countries—and I think we should have a concern for their welfare as a nation—is that because the nature of investment is that investors tend to take out more than they put in, governments put performance requirements on investors to ensure that some of the benefits actually stay in that country. One of the key aspects of this agreement is that it will be illegal for governments to put such performance requirements over investors, and that will have a very negative impact on developing countries, in my view. They will not be able to retain the benefits of the investment because, ultimately, the benefits of any investment flow to the owner. Ownership is really what counts here.

This is the problem Australia is in at the moment with our high levels of foreign indebtedness and ownership, that we generate the wealth, but where does it go? Straight out there. This is a problem as well that we need to be thinking very seriously about.

Something that has not been mentioned, but should have been, particularly by our DFAT people in regard to one of the questions, was that in December 1996 in Singapore the WTO met regarding a multilateral investment agreement, and it was quite clear there that most of the developing countries did not want to know about that kind of an agreement. I think it is important to understand that, that the MAI is a rich boys' club, if you like, that is intent on creating an MAI that obviously has little to offer to the OECD countries amongst themselves.

The real gains come from forcing, I would suggest, developing countries to sign up: 'If you do not sign up to this thing, you are a pretty risky sort of a proposition; we cannot really invest here', kind of line. I think it is clear that is really what the intent is.

The advantages for Australia—I cannot see many, really. As I have said, we already get, I think, the full benefits from investment, so I cannot really see any. In terms of getting more jobs, or exports, or so on and so forth, again, I do not think we are going to see much more investment coming out of this, so I do not really see benefits at all. In terms of the disadvantages, I see them, and I think they are easy to see.

The general idea of this agreement is increasing economic liberalisation. In Australia, we have been a victim of this for the past 15 years. What we are finding is

that—and there is plenty of empirical evidence of this—that the gap between the rich and the poor in this country is continuing to grow, despite economic growth. I think we call it the trickle up effect.

There is a lot of job insecurity. I myself now work on a contract basis. I do not know whether I will get another job or not. I tell you, it is not a pleasant feeling, and there is a lot of social unease—

Mr HARDGRAVE—We know very well that feeling.

CHAIRMAN—It happens to us every three years.

Mr Sanders—But you choose to do that; I have little choice. There is a lot of social unease that accompanies this direction that we are heading in. Also, we are seeing small businesses suffering. There are lots of strategies used by big business to displace small business: setting up the CD store next to the local operator, undercutting them in price and basically pushing them out, and I am sure Gary would know all about that.

I think some kind of cost-benefit analysis needs to be done on whether or not we should go ahead with an MAI. I suggest that this should be done before any initial signature is made because, if you read the text of the MAI—and it is referred to in Patricia's paper—basically, once the initial signature goes in there, you are bound to keep pursuing the intent of the agreement. There is no backing down from that point. The decision not to sign up to this agreement, which I hope you are going to recommend—

CHAIRMAN—That is, of course, not right, but nevertheless—

Mr Sanders—I will hope.

CHAIRMAN—The first signature is a moral intent, but the important signature is the ratifying signature, which does not happen until after it comes through this committee. To suggest that it is a fait accompli at the first signature is wrong.

Mr Sanders—My interpretation of section 18 of the Vienna Convention on the Law of Treaties—and I do not call myself an expert in that regard by any stretch of the imagination—is that under that agreement, and also in the wording of the MAI, that is the intent once you have made the initial signature. But I am happy to stand corrected.

CHAIRMAN—There is a moral intent and a legal intent in terms of international law. There is a fine line between them but, certainly, until such time as the ratification takes place in international law it has no place.

Mr Sanders—Thank you. However, I do think there is a need for a cost-benefit analysis. It has been suggested to me, and I have not yet been able to track down hard

data, that when Canada signed up to NAFTA there was a great flood of foreign investment into Canada. Between 90 and 97 per cent of that investment, depending on whose figures you read, went into the acquisition of existing investments—in other words, between 2½ and 10 per cent new investment arose out of that.

Furthermore, a lot of the borrowings to finance that investment were denominated in Canadian dollars and therefore added to the Canadian foreign debt. So not only did they have the ownership of their own assets taken away from them but, to add insult to injury, they also incurred additional foreign debt. I would suggest that if there was an influx of additional investment into Australia as a result of the MAI, we might find the same thing.

CHAIRMAN—How about we draw stumps at this stage and ask you a few questions?

Mr Sanders—That is fine.

CHAIRMAN—To take up one point you made in terms of Ms Hanson's approach, it is a strange amalgam of the sort of Hanson nationalistic approach and the 'internationalist' approach, to use Patricia Ranald's word. It is happening in the United States at the moment in relation to contributions to the UN. It is a strange amalgam. People are coming at it from different directions, but it is a fact of life and we have to deal with that in terms of this committee.

You were here for the whole of the morning sessions with both Treasury and DFAT. We did not raise with them—and it is something that you have raised in your submission and which we should get on the *Hansard* record—the issue of standstill, rollback and ratchet provisions. Would you like to outline what they are and what your objections are in those areas?

Mr Sanders—Standstill basically means that, at any point in time, existing legislation cannot be moved in the opposite direction to liberalisation—so it cannot be tightened up. Rollback means progressive liberalisation. In the words of the commentary to the MAI text, the rollback and standstill provisions work in concert to create a ratchet effect towards ever increasing liberalisation.

CHAIRMAN—I can see Mr Davis nodding. No doubt, when he gives evidence, he might disagree with some of that. But nevertheless, that is an interpretation of that.

Mr BARTLETT—You made the fairly strong claim that the real intent of this treaty seems to be to deregulate investment in developing countries. How then do you respond to evidence this morning that there did not seem to be a very strong push from the OECD to incorporate developing countries in this—that it is essentially largely confined to the OECD membership?

Mr Sanders—If you have a large number of negotiators sitting around the table, you are going to get a pretty watered-down agreement. If you have 29 sitting around the table who are already highly liberalised, this to some extent is nothing new for OECD countries. Most OECD countries are already this far down the liberalisation path. Just to add another point, I think what really concerns us and a lot of Australians is that the MAI has made us realise how far down that slippery slope we have gone, and we do not like it.

Mr BARTLETT—What evidence do you have for the claim that that is the real intent of the treaty?

Mr Sanders—There has been quite a bit of commentary about it. In the article I mentioned before in the *Economist*, from memory—

Mr BARTLETT—That does not actually mention that as an aim of the treaty, does it?

Mr Sanders—You could read it in—let's put it that way. It is very clear from what came out of the Singapore WTO ministerial meeting in 1996 that the majority of developing countries were not in favour of that multilateral investment agreement.

Mr BARTLETT—Even if that is the case, that still does not imply, and it certainly does not prove, that this is a basic intent of the treaty itself.

Mr Sanders—How can you prove an intention?

Mr BARTLETT—But don't you make the assertion that it is a basic intent?

Mr Sanders—Going on what I understand to be the interests involved here—we are talking about raw and naked power, essentially—you have very powerful organisations which basically want to have a free run around the world, irrespective of whether it is in developed or developing countries. They are out there to do one thing and that is to make a profit. They are not interested in the welfare of the society within which they operate because they can source and sell anywhere on the planet. So if you are offside with people where you are sourcing your inputs or maybe even with your labour—and it might be a cheap labour country—it does not matter if you are offside with those people because you are going to be selling the products in somewhere like Australia or Europe where they have got plenty of money to buy them. There is no real—

Mr BARTLETT—With respect, though, it is still drawing a fairly long bow from there to saying that it is a basic intent of the treaty to deregulate investment by multinationals into developing countries.

Mr Sanders—It is my opinion that that is their intention. That is all I can say.

CHAIRMAN—Do you subscribe, therefore, to some sort of conspiracy theory? Are you saying that there is some sort of conspiracy theory in relation to this?

Mr Sanders—I am not saying that there is a conspiracy theory, although I must say that one of the journalists in the *Business Review Weekly* suggested that there was. It depends what you mean by a conspiracy. There is no doubt that when you have your world economic forum meeting in Davos every year that they sit around and decide on the sorts of actions and outcomes that they would like to see. Obviously, something like this liberalisation in investment has been discussed in those sorts of forums. Whether they actually sit down and plot and plan to bring less developed countries unstuck or not is difficult to say. Let's put it this way: if they wanted to leave the benefits of their investment in those countries, then they would not be calling for performance requirements.

CHAIRMAN—Wait a minute. Davos is not a decision making machine.

Mr Sanders—No, it is a get-together. It is where you chat and—

CHAIRMAN—It is a think-tank—that is all it is really and that is healthy, surely?

Mr Sanders—I am not saying it is unhealthy and I am not saying it is a conspiracy. Please do not try and put those kinds of words into my mouth, because I am not a conspiracy theorist.

CHAIRMAN—That is what I wanted to find out.

Mr BARTLETT—You said that the MAI will lead to a blow-out in foreign debt. If it leads to an increase in investment, it will lead to an increase in foreign debt. Isn't, in fact, the reverse true, that if Australia runs a current account deficit and actually decreases foreign investment, then the current account deficit has to be financed by an increase in foreign debt and by the interest servicing costs on that foreign debt?

Mr Sanders—I find it a bit hard to follow your logic there. Basically, 99.9 per cent or 99.5 per cent of the current account deficit that has accumulated since July 1990 to the present time has been due to wealth flowing out of this country in the form of interests and dividends.

Mr BARTLETT—Interest on foreign debt is a very significant part of it, and in fact at least as significant as dividend payments on investment. If you are going to say that an increase in foreign investment is harmful in terms of future current account deficits, then what do you do about a blow-out in foreign debt that would result if you had a decrease in foreign investment? If you are not going to finance a current account deficit through investment, then it needs to be financed through debt.

Mr Sanders—I would suggest that what we need to be doing—and I do not want to go into an economics discourse—to my way of thinking, we should be lessening foreign investment. All of our superannuation should be going into Australian investment, it should not be going into offshore investment. We should be investing in the infrastructure of Australia. What you have to remember is that, in a globalising world, if you are an investor it does not matter where your investments are located on the planet, you get a flow of income from that.

Senator O'CHEE—It does make a difference where you put the investment because it determines a whole heap of things, like what your risk is.

Senator ABETZ—Why do they go overseas to attract a higher rate of return so that superannuants in Australia can enjoy a higher standard of living?

Mr BARTLETT—We benefit from the higher rate of return on our investment funds that are invested offshore, where, as Senator Abetz says, they are earning higher rates of return.

Senator ABETZ—Why else would you go overseas?

Mr Sanders—The point that I want to make is that, if you are an investor—and when I say an investor I mean somebody who is earning the majority, if not all, of their income from investments, as opposed to the ordinary Australian who has maybe one or two per cent of their total income over their life coming out of their investments through super or wherever—you do not care where your investments are located in the world. If you are an ordinary Australian citizen, like we are, we depend on the wealth that stays in this country for our welfare and our wellbeing.

If we are syphoning wealth out of this country at an ever-increasing rate—and the more foreign investment you get in here the more you are going to be syphoning out—then we are going to go down the gurgler. I would suggest the evidence of the last 15 years is that we are heading in that direction. We have had a blow-out from $23 billion to about $230 or $250 billion. We are obviously not going forwards.

Senator O'CHEE—I do not want to be difficult, but I have a conceptual difficulty with what you are saying because you said that foreign investment syphons wealth out of Australia. Can I put a proposition to you that that equity investment—because I assume we are talking about equity investment by foreigners in Australia—actually generates wealth. For example, the Bowen Basin in Queensland: without foreign equity investment we would not have created mines, we would not have created jobs. The return on the coalmining industry is a marginal return. The greatest percentage of the revenues that are generated by the coalmining interest stay in Australia because they are consumed in the wages of workers who work in the industry.

I think the problem with what you are saying is that you assume that the wealth of the country is a pie of a fixed size. Surely, doesn't that foreign equity investment, or in fact any equity investment, have the potential to grow the size of the pie and therefore create wealth here as well as for people overseas?

Mr Sanders—It is a bit like a hydraulic ram pump: you get 2,000 litres going through the thing to push one litre of water 40 feet up the hill. There are small benefits: we employ a few people, we get a few wages and so on. There is no doubt there are some small benefits. What I am suggesting is that, if we want more benefits then the superannuation moneys that you and I are putting aside every week, it would be better invested in this country—not to earn a dividend through an investment somewhere else but, in the sense of creating the physical infrastructure in this country that generates wealth in this country, that is owned in this country, so that the wealth stays in this country rather than going elsewhere.

Mr HARDGRAVE—Would you have the same view about our natural resources that are sold off short term?

Mr Sanders—In what sense, Gary?

Mr HARDGRAVE—What you have to be careful of with this analogy is that, in the overall scheme of things, you run the risk of a foreign country retaliating and saying, 'We are not going to buy Australian products any more.' Currently, our investment regime, despite the fact that the Foreign Investment Review Board delegate from Treasury said to us this morning that they approve almost anything, is still based on what is in it for Australia, as I understand it.

As Senator O'Chee has outlined, there is social good that comes from jobs and infrastructure and all the things that physically are not removed from the country and the benefits that are generated from foreign investment. Likewise, there are benefits that are generated as a result of others buying our coal and others buying our iron ore. There are others who push the point of investing solely in Australia, who then advance their argument to say, 'And our products like iron ore should not be sold offshore; we should make all the steel here and we should make all the cars here.' I just wanted to see whether or not you fell into that particular camp as well.

Mr Sanders—No, not particularly. What I am saying is that, rather than borrowing money offshore to set up an iron ore mine, for example, we use our own superannuation funds to do that and we invest in our iron ore mine. We then export that iron ore and we get all of the benefits out of that staying in Australia. I would suggest an investor is not going to invest unless, ultimately, they are going to get more out of it than they put into it. I am not an expert on investment—I do not really know anything about it—but my understanding is that you are not going to invest in something unless you are going to get a bigger return than you ultimately put in.

Mr BARTLETT—Doesn't that then apply to Australian companies investing overseas and thereby yielding a greater return for their shareholders, or for the superannuants who are dependent on high rates of returns from them?

Mr Sanders—Yes. In terms of Australian companies investing offshore, again there is the question of where does this wealth actually flow to. Who are the owners? How many of them live in Australia? How many of them live offshore? The way things are structured these days with lots of companies—for example, BHP—is that they have a proportion of foreign ownership in them.

Mr HARDGRAVE—The classic example is Mount Isa Mines. The majority of the operation of Mount Isa Mines—I do not think I am misrepresenting the position—is offshore. They are actually investing in South America, amongst other places, and are generating money back to shareholders, predominantly Australians, as a result of their deliberate investments offshore. It is a two-way street. I understand the argument you are putting and admire the nationalist sentiment but, at the end of the day, you have to be very careful that the two-way street is not re-routed and you are re-routed, if you like, as a result.

Mr Sanders—I do not want to be portrayed as a nationalist, not in the Hansonite sense anyway.

Mr HARDGRAVE—No. I certainly would not want you to think I was trying to put you in that box.

CHAIRMAN—We are getting off MAI in many ways.

Mr Sanders—Yes, I think we are.

CHAIRMAN—If you take this approach, perhaps a logical extension of what you are saying is that we should increase tariffs. Do you think we should prop up the whole system by increasing tariffs?

Mr Sanders—I have no difficulty at all with increasing tariffs. My area of research is into agricultural sustainability. I am doing a lot of research down in north-west Tasmania and down there is a bit of a basket case. They have some of the best land in the country but they are locked in to contract arrangements with processing companies which are owned offshore. The global pressures on those farmers—the price pressures and trying to compete globally—is destroying that resource base. It is an absolute tragedy. Not only is it destroying the resource base; it is destroying the community, and you have a bunch of very unhappy people in that part of the world.

Our research has shown that, if we are going to sustain that resource to ensure that our children and their children are able to grow agricultural products down there, we have

to somehow protect or insulate that activity from raw market forces which are concerned about the here and now—they do not care about tomorrow. Also, market forces are blind; they have no direction to them. They are just about the pursuit of profit; there is no objective other than that. This is why we have governments and regulation. If we want to move into the future with some direction, if we want to steer rather than just put on a blindfold and hope for the best, then we have to have some control, and it includes investments. We might decide that there are some areas of the Australian economy where we should be encouraging investment; maybe there are others where we should not. For example, gambling might be one where we might ask, 'Do we really want foreigners investing in gambling operations in Australia and syphoning the pay packets of ordinary Australians out of the country?'

Under MAI, as I read it, if there were no national law to prevent it, a gambling outfit could come in and set up such an operation. So we need governments to be able to determine what investments are in the national interest. There is a lot of speculative investment, for example, which is in nobody's interest, other than that of the speculator, if they happen to make the right judgment.

Mr HARDGRAVE—What you are really saying, as the Foreign Investment Review Board said this morning, is that we approve most everything, and that is just not good enough from your point of view.

Mr Sanders—It is absolutely not good enough.

Mr HARDGRAVE—One question which came out of this morning's evidence from Treasury is about the so-called demonstration effect. Does this sort of OECD club approach and the way that it might or might not be relevant for OECD countries to have this arrangement have a sort of colonial arrogance feel about it, saying to developing countries, 'Look, we're doing it. Therefore, it must be good for you too'?

Mr Sanders—You could put that interpretation on it, yes.

Mr HARDGRAVE—Do you think it sends a good or a bad signal to developing countries about having a cooperative arrangement between them and others with regard to investment?

Mr Sanders—I think it is a worrying signal. Most developing countries clearly want performance requirements on their investments in their countries. So, clearly, they are not really interested in an MAI. However, if the wealthy countries sign it up, given that a lot of multinationals are headquartered in those countries—although some these days are not headquartered anywhere—basically, they could hold a gun at the head of developing countries. They could say, 'Look, you're a pretty tin-pot operation, your laws are pretty shonky. If you want us to invest here, we need protection for our investments. Sign up to the MAI and everything will be sweet.' I do not like the smell of it at all.

Senator REYNOLDS—How do you see the agreement impacting on the normal processes of government decision making which we take for granted? You have hinted at some of these and I wonder whether you could expand on that theme.

Mr Sanders—Going on what is happening overseas, in Canada quite a number of the provinces have passed motions to indicate that they do not want to know about the MAI because federal government decisions are basically going to impose upon their legislation and result in a lot of changes to non-conforming legislation, it would appear. The governors in the western states of the United States are making the same complaint.

I am not quite sure if this is the point you are wanting me to make or to address, but it would appear that at all levels of government there will be a need to change a lot of legislation to make it conforming, although the Treasury people—who I do not trust one iota—seem to suggest that every part of our legislation that could be impacted upon will be excluded through the exceptions.

There are those kinds of implications, but the more significant implication is that if, for example, a government is thinking of making a decision which might have some negative impact upon a foreign investor—it might even be something simple like an anti-smoking campaign—under MAI, as I read it, our government or a local or state government possibly could be sued for running an anti-smoking campaign. Whether or not that is the case, it is very hard to tell, with lawyers being the kind of people that they are, with lots of money thrown at them by interested investors—

Senator ABETZ—For once, you are under parliamentary privilege!

CHAIRMAN—You've got about five of them up here!

Mr Sanders—And consider the wording of the text to date, with words like 'unreasonable', 'investor'—which is so broadly defined that it could mean anything—and 'expropriation', which is defined so broadly as to mean any measure having equivalent effect. Again, this may or may not be a long bow, but if a government runs an anti-smoking campaign, the tobacco company could say, 'Well, look: our profits have dropped by $20 million, and also we've got a worse reputation now. We're going to sue you for damages.' With the Ethyl case they sued for damages both to reputation and to profits.

Senator REYNOLDS—Which case was that?

Mr Sanders—The Ethyl Corporation in the United States sued the Canadian government for $250US million.

Senator REYNOLDS—You referred to Canada in particular. What about other countries? Are similar reactions developing in a number of other countries?

Mr Sanders—There are high levels of concern in New Zealand and not quite such high levels in Europe or the States. But I think that, as the public becomes aware of this issue, there is generally a growing concern. In fact, the OECD stated that the reason for putting this whole thing on hold is that the public have not been aware of what is happening, have not been adequately consulted and now are concerned with what this really means. They are asking why there has been this secrecy; they are suspicious. For that reason, they have suspended things for a while—or slowed them down anyway.

CHAIRMAN—Are there any other questions before we move onto the ACCI?

Senator ABETZ—Possibly, you could take this on notice. I would like some further clarification as to the membership of Stop MAI. You mentioned a whole range of groups, but it would be interesting to see which churches, small business groups, environment groups and indigenous groups necessarily share some of your views. If you could provide that, I would be thankful.

CHAIRMAN—As I indicated this morning, it would be fair to say that, of the 700-plus submissions that we have received, a fairly large proportion are form letters. The origins of those form letters are debatable. Some of us would blame the League of Rights for some of it.

Mr Sanders—Or the National Civic Council.

CHAIRMAN—Perhaps.

Senator ABETZ—Or the ACTU.

CHAIRMAN—What I think Senator Abetz is getting at is that we would like a much better feel for your organisation—whether it is small, what it involves and what the network is.

Mr Sanders—I am extremely concerned at the inadequacy of Treasury's approach. As a citizen, I think it is abominable; it is disgusting. They have absolutely no idea of the national interest at all. The woman who was speaking has admitted basically that they are not working on the basis of any research; it is purely an article of faith that freeing up foreign investment and trade will improve the welfare of our country or world. In my view, that is completely erroneous.

Part of the argument against that would be—and I am speaking about trade here rather than investment—that the whole principle behind free trade is something called the law of comparative advantage. It is something that a guy called David Ricardo came up with in 1840 or thereabouts. This law of comparative advantage is premised on the assumption that capital is not mobile across national borders. Ricardo said himself that this is why you cannot have comparative advantage within a country—you can only have it across national borders. When capital becomes mobile across national borders, even

physical capital becomes mobile. The threat they put over the farmers in Ulverstone down in north-west Tasmania was that they would unbolt the factory that they had made portable and ship it off to China. So it is not only the financial capital.

I am an economist myself. I have studied economics. I am an ecological economist, which is a new area of economics. These people from Treasury are economic rationalists and they have a theory which is like a religion to them. A lot of it is not empirically based. It is the same thing with using interest rates to control inflation. When you increase interest rates you increase the price of money, which increases the price of everything, which is inflationary.

If you look at the inflationary period of the late 1980s, you will see that every time they jacked up the interest rates inflation went up. What killed inflation was killing the economy by getting interest rates up around 20 per cent or 30 per cent when everybody started to bail out and you had a massive contraction in the money supply. These people have theories but they are not based on empirical evidence. I am a scientist primarily—that is my original training.

CHAIRMAN—I am not going to indulge this afternoon in criticism of any government department. The committee, I think, has already formed a view and we note your comments. I am not going to get into an argument about economic rationalists or anything else. Your points are noted, and I am sure the committee has noted the performance of the Treasury officials here this morning. You can rest assured that the appropriate response will come from the committee in due course.

Mr Sanders—The reason I was making that point is that I really feel that it is important that there be some kind of independent assessment of what the costs and benefits of foreign investment actually are.

CHAIRMAN—You heard some of the questions this morning. Senator Abetz, in particular, asked for disadvantages as well as advantages. We have some of those and we will get more. That is what this committee's task is: to sort out the wheat from the chaff. We thank you very much for your submission and for appearing before us.

Mr Sanders—Thank you.

[3.22 p.m.]

DAVIS, Mr Brent, Director, Trade and Policy Research, Australian Chamber of Commerce and Industry, Commerce House, 24 Brisbane Avenue, Barton, Australian Capital Territory

PATERSON, Mr Mark Ian, Chief Executive, Australian Chamber of Commerce and Industry, Commerce House, 24 Brisbane Avenue, Barton, Australian Capital Territory

CHAIRMAN—Welcome. We apologise that we are behind schedule. Unfortunately, we have to finish right on 4 o'clock because a number of us have to catch aeroplanes. I apologise for that in advance. We have received your written submission dated 1 May. It has been received into evidence. Do you have any amendments to make to that written submission at this point in time?

Mr Paterson—There are no amendments.

CHAIRMAN—Firstly, as neither of you were here this morning and would not have heard my comment, let me say that, in fact, the ACCI was the only organisation in many ways that prepared a comparative line-by-line comment on some of the provisions in the MAI. We have tasked both Treasury and DFAT to see if they can do the same sort of thing because, in our view, what you have done is very helpful, even though some of those comments are strongly opposed, or are a proposal, or a clarification, et cetera. That has been very helpful. There are one or two paragraphs that we will come back to quickly in questioning. We are very appreciative of what you have had to say on this one. Would you like to make a short opening statement?

Mr Paterson—It is not my intention to go through that line-by-line document, but we are more than happy to respond to any questions the committee may have. I think it is important to emphasise that what the committee is dealing with is a potential treaty, and an important potential treaty, but not a treaty in its own right at this stage. We are dealing with draft text and text of a document that will require, and will undoubtedly be confronted by significant further discussion at an international level and, undoubtedly, further amendment.

The observations we make are based on the draft in its current form, but I will conclude my observations by indicating that it is our view that this committee should continue to hold its current hearings, but adjourn prior to reaching any conclusions to enable it to further consider the text as it is further developed in international negotiations. I make that point up-front. We are commenting on a draft treaty, not the normal position that we might be confronted by in appearing before this committee of commenting on something that is finalised.

I think you can describe the submission that we have made to you as one of support in relation to the MAI. Our support is not uncritical nor is it unequivocal. We have a strong interest in the MAI and have been an active participant in the development of the MAI over a number of years. It is clear that the former Keating-led government provided support for Australia being a participant in the negotiations, and the current Howard-led government has given commitment to a continuation of that process of negotiation, but no Australian government has committed itself to a final draft text. In the same way, we are not committed to the current text.

There are a number of concerns that we raise. It is important to indicate that a potential international treaty on investment does fill a gap within the current suite of international treaties that deal with many of the other areas of commercial and economic activity that we undertake. Clearly, there are international treaties designed to liberalise global trade, to liberalise global commerce and investment. Much has been said in people's public commentaries in relation to this agreement suggesting that it would, in some way, challenge either Australia's sovereignty or any other nation's sovereignty.

I think it is important to recognise—and I think this is borne out in our submission—that something like 1,600 bilateral investment treaties exist around the world at the present time. They cover 190 or so countries, so this is not something new in terms of international discussions in relation to investment. Australia is a party already to 15 international agreements with respect to investment. We are not looking at this in isolation nor without some prior experience in relation to the issues before us.

Senator ABETZ—Do any of those agreements deal with investors' rights to potentially sue governments?

Mr Davis—Not in any of the bilaterals, not in any of the regionals, nor the multilaterals.

Senator ABETZ—In that respect, it is breaking new ground though?

Mr Paterson—Clearly, it is going further than the existing regime of treaties.

CHAIRMAN—Other than the government to government—is what you are saying?

Mr Paterson—Yes, but I think it is important to recognise that there are international instruments, admittedly on a bilateral basis, that deal with investment at the present time, so it is not wholly new territory. In our view, it is an important part of the broader suite.

I think it is also important, when considering this treaty, to keep in our minds the fact that Australia at the present time is a relatively open economy so that being an active

participant, both in the development and potential signatory to this treaty, does not mean to say that we are necessarily giving up a substantial amount from where we are at the present time. For those who assert some additional steps in this process that might threaten Australia's sovereignty you have to question why our sovereignty has not been threatened by the international treaties that have been entered into at the present time and the international investment regime which exists at the present time.

I heard you, Mr Chairman, making some observations to the previous witness about what you heard from Treasury and the Foreign Investment Review Board this morning. Clearly, this country retains some reservations with respect to international investment in particular sectors, and those reservations are outlined and expressed in our government submission to the OECD on the list of reservations and country specific exemptions. They exist at the present time, and the vast majority of those that we have submitted on an international basis for discussion reflect existing policy and practice, and that existing policy and practice is broadly supported by commerce and industry on whose behalf you know we speak.

We give emphasis to the fact that it is a process of negotiation within the OECD. Our submission to you clearly indicates that we have a preference that the further enhancement of the negotiations in relation to the agreement ought to be pursued under the WTO and as part of the much anticipated Millennium Round of discussions.

Clearly, a lot can be done within the OECD in trying to minimise the areas of difference or at least reach some broad areas of agreement on what such an agreement might look like. But our preference would be to see it resolved in a broader international instrument and an instrument similar to those which affect our trade in goods and trade in services under the WTO, and we have expressed that point of view on a number of occasions, both in our responses to various drafts and in our submission to the committee and in our public observations on the MAI.

There are a number of very positive features that need to be emphasised under the MAI. There are the wide definitions of what constitutes investment. I think it is important that we have wide, not narrow, definitions if we are dealing with an international instrument of this nature. There is a proposal with respect to much greater transparency in relation to investment laws and regulations. We are strong advocates of transparency in relation to the impact of all laws, be they laws associated with investment or taxation treatment or otherwise, so I think it is an important part of the proposed instrument.

Easier movement of key personnel to underpin clear investments is part of the draft multilateral agreement on investment. It is an area we support. It does not undermine national sovereignty in terms of determining who does not enter a country and, clearly, the MAI would not facilitate people who are otherwise persona non gratis in relation to a particular nation being allowed to enter. But there ought to be some facilitation for key personnel to be able to support a particular investment in a particular motion.

There are a number of other areas, and I will not go through each of them, but I am happy to go to them in detail should you wish it, Mr Chairman. We have identified a number of areas that remain outstanding in terms of the negotiations and a number of areas where we have particular concerns about the draft text, and they have been outlined in our submission. I am happy to go through those if you wish, but I am conscious that I flew in for this and I have got to fly out following it, so—

CHAIRMAN—The committee thanks you very much, as I said before, for the submission and the detail specificity in terms of some of what the MAI says, but I just want to take the opportunity, to reinforce what you said in that opening comment, to read into the *Hansard* record four paragraphs from your submission because I think they encapsulate some important points. I quote:

The Chamber would draw to the attention of the Committee the draft status of the current text of the Agreement.

That is a point that has been made over and over again today. It goes on:

In effect, the Committee is examining a working-draft of an international instrument still under negotiation. As such, the text is likely to evolve over time, with matters added and deleted, with the text on some provisions subject to change.

Clearly, while there may be merit in the Committee informing itself of various aspects of the MAI negotiations, especially the more important provisions, the ACCI would consider it premature for the Committee to make any final recommendations on Australian accession to the Agreement.

Commerce and industry would prefer to see the Committee complete its current round of hearings in which it informs itself of the MAI's objectives and processes, before adjourning to reconvene at such time as a full and final text is available for more detailed examination, after which a final recommendation on accession can productively be made.

And the final quote:

Such a process could best be undertaken after the next meeting of the OECD's governing Ministerial Council Meeting, scheduled for May 1999, or some later time should the MAI negotiations move across to the WTO as part of the latter's expected Millennium Round of liberalisation negotiations.

I have read that into the *Hansard* record verbatim because it has come up this morning over and over again in various ways. We did raise the question of the wider multilateral forum, that is, the Millenium Round of the WTO. It would be fair to say that the reaction to that was, 'Maybe it is a bit early to do that yet; let us see what happens in terms of the six-month pause with the OECD.' Maybe that will come a little bit later.

There was fairly general agreement, I think from both Treasury and DFAT—certainly from DFAT—that the WTO round might be appropriate but it might be a little bit early. We would welcome your comments on that particular point, whether you would

be happy, in the light of what you have said here in writing, for a slight amendment to that in that let us see what happens during the six-month pause and the lead-up to the May 1999 ministerial council meeting before we move over, perhaps, into the WTO arena.

Mr Paterson—I think our clearly conveyed point of view at this time is a preference for the WTO. That has not prevented us from being an active participant in commentary on the OECD draft, both in our role domestically and in our participation within BIAC, which is the Business and Industry Advisory Council to the OECD. We have been participants in both of those processes and will continue to be so. So whilst it remains within the OECD forum for discussion, and we support those negotiations continuing in that realm, we still have a preference for it eventually going to the WTO.

I think it is also worth noting—I do not know whether this has been brought to the committee's attention or not—that in the outcome of the most recent ministerial meeting, the record that I have, the final paragraph reads, if I can read this into the transcript—

CHAIRMAN—Is this from a communique?

Mr Paterson—It is. It says:

Ministers welcome the full participation as Observers of Argentina; Brazil; Chile; Estonia; Hong Kong; China; Latvia; Lithuania and the Slovak Republic with a view to their becoming founding members of the MAI.

That is part of the last paragraph of the communique. I do that to note that it is not just formal members of the OECD that have been active participants in this process. Indeed, at the ministerial council meeting, there are fully participating observers outside the OECD from that range of countries that I identified that are expected to be full signatories to the MAI and founding members of the MAI should the terms of the MAI be agreed.

CHAIRMAN—That has been mentioned and discussed quite extensively this morning. In the context of whether in fact it should become a more multilateral forum or not, the point was also made both by Treasury and DFAT that the very large proportion of foreign investment both ways is in relation to the OECD anyhow. Whilst they have these observer countries and, as you say, the Baltic states being added, that is the preferred approach at this point in time.

Mr Paterson—Can I make just a couple of other observations that flow from some of the elements that you have raised? One is that we would not be providing support for the further development of a treaty of this nature if we did not believe it was in Australia's national interests. We certainly would not be submitting to this committee, or to the government, that it should accede to the treaty unless it is in our national interest. Clearly, from what we have put before the committee, it is our view that there is much more to be gained than lost by acceding to this treaty, even if it remains in its current

terms.

Clearly, some of the country specific reservations and exemptions that are advocated by some we have major problems with. The inclusion of environmental measures, the proposed inclusion of labour standards and the proposed inclusion of extra territorial application of laws, particularly by the US, are areas where we have very particular concerns. They are areas where some very particular attention will need to be given.

In a world where Australia is a relatively free and open economy which facilitates and encourages, in many cases, international investment within its borders, there are many within Australia who look to invest overseas or who are not confronted by the same open and reasonable facilitation to invest in other nations. I think, in any consideration by this committee of the proposed treaty, we need to keep in mind that there are many countries in which Australian businesses would wish to invest, and they are currently prevented from doing so by unbalanced laws.

It is also a feature of the proposed treaty that it be about reciprocal rights and responsibilities, that is, that you offer these rights and responsibilities to countries from other nations which are also signatories to the same thing. This is not us opening up everything to all and sundry whether or not they commit themselves to the same terms; this is about us providing an opportunity to countries which are signatories to that treaty to the entitlements under that treaty.

There is also a lot of, in my view, misinformation about the MAI. Many assertions are made about its practical effect. I heard one example earlier—and I do not take advantage of following another witness by using examples—asserting that an anti-smoking campaign may be caught up by this. That is an example of some of the misinformation that is around. It is about not imposing on international investors in Australia a different set of rules. You can have rules in relation to an anti-smoking campaign and, as long as they are applied equitably to domestic investors and international investors, then there is no challenge to the sovereignty of Australia introducing a campaign of that nature or any other campaign. I think that that needs to be given very strong attention.

CHAIRMAN—I think I speak for all my colleagues in agreeing with that. Going back to your four paragraphs which I read onto the record, it is a bit unusual for this committee to get involved at this draft stage, as you know. We recognise the special circumstances of this. It is, therefore, unusual for a committee to show its hand in advance of formally advising ministers and the Senate. It is pretty obvious to everybody who was here this morning—and, in fact, the Assistant Treasurer made the point coming out of the ministerial council meeting in Paris—that we are nowhere near the stage where anybody could consider putting a signature on anything because there are too many imponderables.

In the opening comments and later discussion this morning, it is pretty clear that

we have a mixture of form letters in opposition with no basis in fact—the very point that you make. On the other hand, we do have a proportion of those who have some valid criticisms and some valid reservations about entering into this with our eyes wide open. It would be very inappropriate for this committee—even at this point and without giving away any secrets or in any way being in contempt of the parliament—to recommend any sort of signature in the short to medium term before a lot of water has flowed under the bridge. Basically, you agree with that in your statement.

Mr Paterson—Absolutely. As I said in my introductory remarks, we are not uncritical observers. There are elements of the proposed agreement that we have problems with as well, and we have identified those.

Senator REYNOLDS—Could you comment on consultations you have had with Treasury. Were you involved early in the process?

Mr Paterson—We have been involved in the process over a significant period of time. I will hold my answer and consult with Mr Davis before I formally respond because, to some degree, some of the negotiations that we have been involved in have been based on the provision of confidential. I make that observation openly. I will just check any further observation I would want to make on those consultations.

Mr Davis confirms that we have been involved in those negotiations for about two years, but not exclusively with the Treasury. As I mentioned, our involvement with BIAC on the OECD and our active involvement on the International Chamber of Commerce has meant that we have been consulted from both spectrums in relation to the treaty as it is being developed.

CHAIRMAN—We explored that this morning, even before Senator Reynolds arrived. It is important because of the historical basis going back beyond 1995 and the extent to which consultation has taken place, particularly with non-government organisations and important peak bodies like yours. That reinforces a point that was made earlier.

Senator REYNOLDS—It is interesting that it seems that there has been some differential in terms of which organisations are provided with which information. Not every organisation has had the benefit of this confidential information.

Mr Paterson—Clearly, that is always the case in any consultation process, irrespective of government. We have been an organisation which has a consistent and long-term interest in matters associated with international trade. As you know, many of those are often in the process of confidential negotiation prior to a public draft being prepared. We respect confidences where they are requested of us, be it this government or any former government. As an organisation with a strong and active interest, and probably one of the few organisations at a peak level with an enduring and active interest in

international trade and international treaties, it is not surprising that we would be consulted.

Senator REYNOLDS—Can you understand that there are critics in the community who believe that a lot of the negotiations have gone on behind the scenes and who feel excluded? They feel that information has been withheld from them. For example, the Treasury document is a very flimsy one and gives this committee very little information to go on. There seems to be a considerable double standard in that your organisation had access to confidential information a couple of years ago, and yet this committee is still waiting for a basic description of what the Treasury has been negotiating on our behalf.

Mr Paterson—I have two observations. The first is that I will not and cannot speak on behalf of Treasury and what they have provided to you. I have not seen what they have provided to you.

Senator REYNOLDS—You will be shocked.

Mr Paterson—I took an affirmation before I appeared before this committee and therefore you asked a direct question in relation to the nature of our consultations and I have answered that question honestly. Therefore, if we have been involved in confidential consultation, I will clearly declare that to this committee and not hide it from this committee. I would expect that the fact that we can honour those confidences over a significant period of time means that any government has the capacity to have confidence in being able to share that confidence with us and get constructive input, but not uncritical input.

Many of those who have criticised the process have had the full text of the current draft readily available to them for some time. It has been readily available on the Internet and downloadable from the Internet. It has been widely advertised by the OECD that it is there, available and downloaded. All of those who have appeared before this committee could have availed themselves of that draft text.

Senator REYNOLDS—But they could not have had access to this mystery confidential information that you have had access to.

Mr Paterson—It is not mystery confidential information, Senator, with respect.

Senator REYNOLDS—It is a mystery to me because I have not seen it.

Mr Paterson—And it has been provided to us on a confidential basis. I have indicated to you clearly, openly and honestly that we have been involved in those discussions for two years. We have not hidden that fact.

Senator ABETZ—You have seen it since February, surely, Senator.

Senator REYNOLDS—I do not know if I have seen what the witness is referring to.

CHAIRMAN—I think the only point Mr Paterson is making is that, in dealing with treaties, you are always going to have a confidential element to it. All that the government—and perhaps the previous government—has done is to provide some information to them on a confidential basis for critical comment. That is what you are saying, isn't it?

Mr Paterson—Yes. That is clearly the case. Senator, so that this is not taken out of context, I would like to say that the same situation occurred during the Uruguay Round in relation to the WTO trade in goods and services. So it is not something that is unusual or exclusive.

Senator REYNOLDS—I simply make the point that some organisations have had this right or privilege and other organisations have not. On the basis of the Treasury presentation this morning, it is difficult to have very much faith in the consultation mechanism that has been put in place because they have not been prepared to give us the detail of what was so confidential that they could not make it more publicly available, even to this committee. That is my point.

Senator MURPHY—At the end of the day, if we end up with an MAI that exists and the signatories to it are the 29 plus the eight, with the inclusion of us, you might just give an opinion about how that might advance and to what degree you think it might advance the investment opportunities for Australian businesses in the world.

Mr Paterson—I do not want to take isolated examples, but one that springs immediately to mind is that of France. France has a highly restrictive economy, in many respects a highly nationalistic economy, that focuses on itself. If it were a signatory to this treaty and Australia were a signatory to this treaty, then you could expect investment opportunities to open up within that country for Australian firms wishing to invest there in a way that they cannot at the present time. It would not necessarily change in any significant way the opportunities for investment within Australia of French companies, but it would provide opportunities for Australian companies currently restricted from investing because of existing legal restrictions on investment within that nation. The same can apply to a number of nations. So I see an opportunity within developed nations—

Senator MURPHY—I am sorry, when you say a number of other, are they nations that are currently on the list, if you like, within the OECD and additional or potential member countries?

Mr Paterson—South Korea is a good example. So they are not isolated examples; there would be opportunities for us.

Senator MURPHY—No, I am just trying to get some handle on where some opportunities may arise, if the agreement ended up being signed by the current list, and what improvements would be made from investment opportunities.

Mr Paterson—Closer to our region, I have used the example of South Korea, but in terms of the list that I read out into the *Hansard* earlier of the full participating observers, Hong Kong-China—and particularly China- opening up opportunities for investment on the same terms as are envisaged by the agreement would provide substantial opportunities for Australian businesses.

Senator MURPHY—I note that you are opposed to the inclusion of environmental or labour issues. In that context, if the agreement did contain such proposals in its final draft text, would you be opposed to Australia signing it?

Mr Paterson—Clearly I would prefer not to be in a position to have to. I know it is comment on speculation, but it would depend on the nature of those standards. Our opposition to them is not to say that they should not be agreed on. International forums like Kyoto dealt with matters associated with the environment. The International Labour Organisation which we are the Australian representatives on, are active participants in the development of international standards with respect to labour. We do not say that they should not occur per se; we say they should not occur inside an agreement on investment and that they would introduce in many cases—or have the potential to introduce—areas of subjectivity which we do not believe are appropriate in an agreement of this nature.

So it would depend on the nature. We do not oppose international standards. We say that the ILO is the appropriate body in relation to labour standards and there are appropriate other forums for pursuing the objectives that are sought to be achieved in terms of the environmental standards.

Mr BARTLETT—Is it your view that the benefits of increased investment, both inward and outward, could be achieved—or at least a significant amount of them be achieved—just through better bilateral agreements or greater access to bilateral agreements rather than through the MAI?

Mr Paterson—We have indicated that there are something like 1,600 existing bilateral agreements with respect to investment. There are inconsistencies between those. The pattern of those agreements is not something that makes it easy for people within industry and commerce to have a real sense of what the nature of the obligations are. I think that, on something like international investment, in the same way as there is a strong case for doing it in relation to the trade in goods and the trade in services, there is a strong case for a consistent set of rules in relation to investment; that having a lack of understanding about what the bilateral arrangements might be on investment across a range of countries makes the compliance regime for businesses much more challenging.

Mr BARTLETT—Do you think it is possible that the MAI, if it did go ahead, could have so many exemptions and reservations listed by the signatories that it would be almost as complex as trying to negotiate individual treaties on a bilateral basis?

Mr Paterson—Clearly, if it got to that situation, the negotiations would have been brought to nought. Australia put forward, as I understand it, about 38 pages of exemptions and reservations, and they are consistent with our current position. The combined text of the currently identified reservations and exemptions is something like 600 pages. If that is the final position, I do not think there would be too many governments around the world signing onto it.

Senator ABETZ—Is the bottom line with the MAI to try to ensure that if a government changes the rules after an investment is made there is some recourse for the investor?

Mr Paterson—Investments are made and every investment is a risk, and that risk is based on the information that is available at the time and the potential for that change to occur. We want a much more stable environment in relation to investment, and you generate much greater investment, the greater the degree of certainty associated with it. Clearly, if you change the rules after people have made a substantial commitment, then it is reasonable that they have a degree of recourse. That is the normal process of commerce.

Senator ABETZ—So the MAI, in your mind, would apply only in a situation where an investor had actually made an investment in a country and would not need to apply prior to and seeking access to a market to make an investment?

Mr Paterson—Our view is that it applies pre- and post-investment. It is not about actual investment because it is the terms under which a company may consider investment. It is the issue of offering different terms which may exist at the present time. I should not say 'offer different terms'; I should say 'impose different restrictions'. In the main, it is imposing different sets of restrictions in relation to that investment.

Senator ABETZ—If you had a South African company going back to the pre-Mandela days wanting to invest in Australia, would Australia have the capacity to say to that South African company, 'We will not allow this investment in Australia for the simple reason of the apartheid regime in South Africa, and we do not want to do business with companies that are based in South Africa'?

Mr Davis—Chairman, Senator Abetz is dealing with a number of questions of time. The MAI deals with pre- and post-establishment of an asset. What Senator Abetz is dealing with is 'enter into force'. The MAI have agreed it would not have effect on investments made before an entry into force of the agreement. However, it would cover assets which existed before and after the 'entry into force' of an MAI. The main purpose of that of course is to cover the transfer of an asset from one party to another to not allow

that pre-establishment. It would create all sorts of anomalies and would lock in capital for firms who may want to sell or in the case of privatisation.

CHAIRMAN—Thank you. Mark, did you want to make a final comment before we wrap up?

Mr Paterson—The glib response to your question about South Africa is that they are not a member of the OECD.

Senator ABETZ—I understand that but, if they were, that is what I was asking.

Mr Paterson—Can we take that particular question on notice, because I know Brent did not answer it and neither did I.

Senator ABETZ—Can I quickly finish my little window of opportunity here in relation to the question of consultation. You have supposedly been given some favourable treatment, so it is interesting to note that in the estimates committee *Hansard* of 18 March 1994 at page 164 there was this exchange:

Senator Kemp— . . . I take it from what you have said that the final proposal the business groups put up was to provide for a parliamentary vote to ratify a treaty?

Senator GARETH EVANS—No way, Jose.

Senator Kemp—That is what we thought. We could not have people involved at all in this?

Senator GARETH EVANS—Dead right.

It can be seen that the answer on both occasions was from Senator Gareth Evans who did not even want this sort of a structure to look at international treaties. I think we were talking ILO conventions at that stage. Whilst the system might not be perfect at the moment, I think it is a lot better than what it used to be under the previous government.

CHAIRMAN—We would be disappointed, Senator Abetz, if you had not made that point at this segment. Thank you very much, gentlemen.

Resolved (on motion by **Senator Murphy**):

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

Committee adjourned at 4.00 p.m.