COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: Multilateral Agreement on Investment

CANBERRA

Friday, 14 August 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 Halverson
Senator Murphy	Mr Hardgrave
Senator O'Chee	Ms Jeanes
Senator Reynolds	Mr McClelland
	Mr McGauran

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

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Present

Mr Hardgrave (Acting Chair)

Senator Bourne
Senator Cooney
Senator Murphy

Committee met at 10.05 a.m.
Mr Hardgrave took the chair.

MUSOLINO, Ms Franca, Senior Government Lawyer, International Trade and Environment Law Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

ZANKER, Mr Mark Andrew, Assistant Secretary, International Trade and Environment Law Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

ACTING CHAIR—Welcome. I declare open this fourth public hearing into the matter known as the Multilateral Agreement on Investment. We have already taken valuable evidence on this particular subject from a variety of witnesses in Melbourne and Brisbane as well as here in Canberra and the organisations listed to appear today will, no doubt, add to our store of information on the overall topic by providing detail in a number of different areas. We have already taken a great amount of evidence on such topics as consultation and sovereignty, so these particular areas will not generally be the focus of our attention today.

I should add that, if the parliament is dissolved before the inquiry has been completed, we certainly assume that the committee will re-establish in the 39th Parliament and that the incoming committee will want to resume this inquiry. Further hearings would then be held before a report was drafted and tabled in the parliament. Would either or both of the representatives of the Attorney-General's Department like to make a brief opening statement?

Mr Zanker—I do not think so. We have a written submission that we put in some time ago which canvasses most of the points that the department wanted to make, so I thought we would just take that as read.

ACTING CHAIR—Do any committee members wish to ask questions?

Senator MURPHY—There are some questions I would like to ask on the points on page 2 of your submission. It says at section 5.2:

Australia is a party to a multilateral investor-government dispute resolution treaty: the Convention on the Settlement of Investment Disputes between States and Nationals and Nationals of Other States (ICSID).

It has been since 1991. Further on—the last dot point on that page—it states:

Many of the draft MAI's provisions draw on established precedents in bilateral investment treaties, the ICSID Convention and, so far as dispute resolution is concerned, the provisions of the WTO's Dispute Settlement Understanding.

Why is it that the MAI, in my view at least, seems to go further and is somewhat different?

Mr Zanker—I am not sure that it does precisely. Like the ICSID convention, the MAI provides for state to state dispute resolution and investor state dispute resolution. Without being drafted in precisely the same terms, when you examine the provisions side by side for quite a while you can see that there are very substantial similarities. They are not really significantly different.

Senator MURPHY—On page 3 of your submission, you say:

> Where the MAI differs in a significant way from the other investment agreements is in its requirements to afford national treatment to foreign investors. It contains measures to limit investment incentives being offered to domestic investors, and to prevent performance requirements relating to exporting of goods, use of local labour and materials and related matters being imposed on foreign investors. Also, it would enable foreign investor participation in privatisations of government enterprises on an equal footing with domestic investors.

I have some questions that relate to those areas. In so far as that is concerned, it proposes measures to limit incentives to domestic investors and prevent performance requirements. Do you think that is in the national interest of this country?

Mr Zanker—That is really not my brief. That is an issue of policy. I should say just in elaboration of that—

Senator MURPHY—I will ask you from a legal point of view. If we had this agreement, do you think that could restrict a domestic government acting in the national interest of this country?

Mr Zanker—The thing is that the overriding requirement in the MAI, as it is drafted, is to accord national treatment to foreign investors, which means that you treat them in the same way as your domestic nationals. At the present time, we do not do that. The Foreign Acquisitions and Takeovers Act provides for screening of foreign investment. If the MAI were to be accepted without exception, then it would follow that you would have to modify your domestic arrangements—for example, by repealing the Foreign Acquisitions and Takeovers Act—so that there was not discriminatory treatment against foreign investors because domestic investors are not subject to the Foreign Investment Review Board screening procedures. However, during the negotiations, the Treasury has maintained exceptions which would limit national treatment so as to ensure that the existing regime, provided for under the FATA, would remain in place.

Senator MURPHY—What about with regard to my question about preventing a government then subsequently acting in the national interest as it goes to takeovers and acquisitions? Under this MAI as it currently is proposed, what would stop overseas companies from acquiring manufacturing companies in this country and closing them down and then subsequently putting us in a position of having to import products from the major manufacturing company overseas?

Mr Zanker—Again, it is difficult to comment on that particular question without seeing exactly what sort of exceptions Australia takes in relation to the final draft of the MAI and what would remain in terms of domestic legislation. At the present time, because the Foreign Acquisitions and Takeovers Act regime is in place, if a foreign company or foreign investors sought to take over a domestic company, they would have to go through the screening and approval processes of the Foreign Investment Review Board. As I understand it, given the way the exceptions have been taken at the moment, this would make no difference. Once Australia became a party to the MAI, the existing domestic regime would stay in place.

Senator MURPHY—It does not really, does it, because you even say that in your submission. In so far as the current circumstances with the government contracting out information technology services is concerned and, if I can go so far as to say also with respect to the sale of Telstra and the telecommunications industry in this country, you say in your submission it is to prevent performance requirements relating to export goods and the use of local labour and materials.

Why would it not be the case, say, for IBM or EDS, which are international companies, where we currently have, as I understand it, a requirement in the contracting out process for there to be a measure of local input, both in terms of materials and services? We are currently contracting out government services and we have, I think, a 15 per cent local component. I think that is about what it is. That means that what we are doing there would not be in accord with the MAI, as it currently stands.

Mr Zanker—That is right.

Senator MURPHY—Would it also not be the case that, with regard to Telstra and the capacity for up to 35 per cent of it to be owned by overseas companies, they could also choose to not source any of their materials that are for telecommunications from within this country?

Mr Zanker—Yes, that is right, if the MAI were signed on to without exception being taken in relation to performance requirements.

Senator MURPHY—You say ‘with regard to an exception’. What is the intent of the MAI? The intent, as you say, is to do these things and, if you do these things, you do not get exceptions, do you, in that respect?

Mr Zanker—No, the way the negotiations have proceeded at the moment is that the countries have been able to lodge exceptions to particular clauses. Precisely that has been done by Treasury in relation to issues like limits on foreign ownership to preserve the existing policy position. So the point about it is that, when and if the MAI comes into operation, with all those exceptions having been taken out of its operation, it should not be necessary to change the domestic law because the exceptions would have been taken out

precisely because the policy is to retain control over foreign investment and also to continue to have the capacity to impose performance requirements in so far as local inputs are concerned.

Senator MURPHY—With regard to the national interest, as you say, we do have a number of multilateral and bilateral agreements that have dispute mechanisms and agreements with regard to content, local input, et cetera. Why would we as a country want to have another multilateral agreement that for all intents and purposes seems to put us in a position where we are less able to determine our own future?

Mr Zanker—That is really a question for the government to determine, Senator.

Senator MURPHY—In the Attorney-General's view, legally, would that not be the case, or is that not possibly the case?

Mr Zanker—It is not really a legal question.

Senator MURPHY—It is.

Mr Zanker—In what sense?

Senator MURPHY—It is because, if you sign an agreement, it obviously has legal ramifications.

Mr Zanker—Quite so.

Senator MURPHY—I am asking: in the view of the Attorney-General's Department, if the MAI, in its current form, were signed tomorrow without all the ifs, buts and maybes, would it make it more difficult for us to determine our own future?

Mr Zanker—I can only reiterate the point: if Australia signed on to the agreement without having taken out the exceptions that it has currently taken out, and if it accepted national treatment, most favoured nation treatment and restrictions on performance requirements and so forth, there would need to be fairly extensive changes to domestic legislation. However, the negotiations have been pursued on the basis that that will not occur. National treatment will not be fully accepted, and the requirement of the MAI that a government cannot impose performance requirements on investors is not proposed to be accepted.

Senator MURPHY—At the bottom of page 4 of your submission, it says:

The MAI aims to ensure a high minimum standard of treatment for investors and their investments, including national treatment and MFN Treatment. Standstill would result—

and this is where you are actually referring to standstill and rollback—

from the prohibition of new or more restrictive exceptions to the minimum standard of treatment.

It seems to me that that could have the effect of being stronger than what is currently the case with GATT. It is a greater requirement than what is currently required under GATT. Have you looked at that?

Mr Zanker—Yes, I have. But the GATT is a little different in the sense that it involves countries making progressive commitments to liberalise their trade in goods and services, so it is a gradual move-forward process. This is more or less the reverse of that.

Senator MURPHY—Yes. But doesn't the GATT allow for you—if you decide that, as part of your trade liberalisation, it is having an adverse impact on an industry—to actually do something about it? You can take certain steps. This appears to me to provide no steps. Once you are in, you are in. You cannot say, 'I want to test the water and, if I've made a stuff-up, I want to step back a little before I proceed forward again.'

Mr Zanker—Certainly the effect of the agreement is that, having made particular commitments to extend, for example, national treatment to a particular sector, the idea is that you will not roll back or renege on that commitment and impose restrictions where a degree of liberalisation has been provided for. There are safeguard provisions in the MAI dealing with balance of payments and things like that. In fact, they mirror provisions in the GATT agreement; they are drawn substantially on them.

Senator MURPHY—But, under the GATT, you can actually take steps. They do not necessarily have to be steps that are based upon the impact on the balance of payments. It may well be that you have an industry that is a high employer but which may be a low contributor in terms of the balance of payments; it may be totally domestically driven in terms of its manufacture and supply—it may just supply a domestic market. At the moment, under GATT, as I understand it, it does not necessarily have to have some budget implications. It is about industry implications.

Mr Zanker—Under the GATT there has to be the consideration of issues like balance of payments and serious damage to industries. I think the Productivity Commission, for example, has an inquiry at the moment into the pork industry on this sort of issue. The MAI is just the same.

Senator MURPHY—Which one is that? Are you talking about the salmon?

Mr Zanker—No. I am talking about pork. This same sort of thing is in the MAI, 'to maintain measures that are inconsistent with obligations in the event of serious balance of payments, external financial difficulties, movements of capital cause,' et cetera. They are temporary safeguards, and they draw, to a significant extent, on corresponding

provisions in the GATT.

Senator MURPHY—On page 5, you say:

By virtue of FATA—

that is the Foreign Acquisitions and Takeovers Act—

for the most part, national treatment is not accorded to foreign investors. That is because their investment in Australia can be prohibited on national interest grounds, which is not the case with domestic investors.

Mr Zanker—That is right.

Senator MURPHY—I do not think it is right. Plenty of developments that have been proposed by domestic developers have been stopped by the national government on the basis of what might be considered being in the national interest and in the interest of the national environment—for example, Franklin Dam, Wesley Vale pulp mill and the Hinchinbrook Channel.

Mr Zanker—That is certainly true. Those things have been stopped. You have environmental legislation that has to be respected.

Senator MURPHY—Why would we want to agree to a set of rules that says, 'We can't stop them'? I come back to the question about what is in the national interest. You might have, for instance, a forest company that is initially given a grant to cut down forests in New South Wales. Then you might decide, 'In the interests of the nation, the greenhouse and everything else, we want to stop it,' but this would say to me that you cannot.

Mr Zanker—No, foreign investors have to take the law in the country as they find it.

Senator MURPHY—Doesn't your previous statement say that, in your view, in terms of the rollback and standstill, you cannot introduce new or more restrictive exceptions to the minimum standard of treatment?

Mr Zanker—That is right, but the point about national treatment, which is the point being made on page 5 in paragraph 10, is that you have to treat foreign investors in the same manner as you treat domestic investors. The Foreign Acquisitions and Takeovers Act is the basis on which I say there is differential treatment, because investment procedures by domestic investors are not screened by the Foreign Investment Review Board. Domestic investors put forward their proposals and they are approved. If they have some sort of environmental impact, they have to go through an environmental impact assessment.

The MAI does not really touch on this. Under a national treatment regime, if a domestic investment had to be subjected to an environmental impact assessment, a foreign investment proposal would also have to be subjected to that because that is what the law provides for. There is no discriminatory treatment between domestic investors and foreign investors. The difference here of course is that there is a threshold test which is administered by the Foreign Investment Review Board and the guideline which is applied is whether it is in the national interest in relation to foreign investment.

Senator MURPHY—On page 5 at dot point 11, you then go on to quote about the MAICOM, and I did read somewhere what that was, but I cannot remember now. It says:

> Rollback is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place. It is a dynamic element linked with standstill, which provides its starting point. Combined with standstill, it would produce a "ratchet effect", where any new liberalisation measures would be "locked in", so they could not be rescinded or nullified over time.

Can you explain that to me? I assume the quote continues to say that there are a number of ways of achieving a rollback, et cetera, and it goes on in terms of the OECD. Firstly, how do we get to act in the national interest? Secondly, why isn't that process in the second paragraph a better process?

Mr Zanker—When I first came into this area I was a bit mystified by some of the jargon—'rollback', 'standstill', 'ratchet effect' and so forth.

Senator MURPHY—You are not on your own there.

Mr Zanker—The simplest explanation I could find for it was the one put out by the OECD. It is a little difficult to explain it more simply than what they have said. With rollback, you are gradually reducing and eventually eliminating non-conforming measures. In the context of the General Agreement on Trade in Services—there have been negotiations in the WTO about liberalising areas like financial services, telecommunications and so forth—I suppose that is an example, potentially, of a rollback process.

Everybody says that we are going to liberalise our telecommunications or financial services market up to a particular point but there is still going to be, say, in the case of telecommunications, restriction of foreign ownership of Telstra. But a decision might be made to reduce those limits on foreign ownership and gradually roll back greater equity by foreign investors. Once that increase in liberalisation has been achieved, then standstill comes into operation, which means you cannot backtrack on that, and rollback plus standstill equals this ratchet effect which cannot be retreated from, except by denouncing the treaty, which is always an option, too. No governments are locked into treaties; they can get out of them if they want to.

Senator MURPHY—After 20 years you can get out of this one.

Mr Zanker—I do not think that accurately characterises how it works. You can get out of the treaty, but its provisions and requirements continue to apply to existing investments for a 20-year period thereafter. So it is like transitional provisions in legislation: if you are going to change the rules and people have acted in reliance on the state of the law or policy which existed at a particular time, the feeling is that, in fairness, they are entitled to continue to rely on that. With investment of the sort that we are talking about here, where large amounts of money are involved, that is probably a fair enough judgment.

Again, there are similar provisions in the bilateral investment protection agreements. As I say, the rationale traditionally has been that, if some foreign investor comes in and puts a large amount of money into an infrastructure project or some sort of corporation on the basis that the law in the particular country provides certain things that made the investment attractive but, for whatever reason, the country decides to withdraw from the treaty, the investor should not be penalised by a change in the rules. That is an accepted practice in domestic legislation, of course. The rules say this; if we want to change them, then we do not want to change them retrospectively and there are usually some sorts of transitional arrangements that are put in place. So I do not really see this as all that different.

ACTING CHAIR—But you do not necessarily have to sign on the line of the treaty to live up to the ideals of the treaty.

Mr Zanker—That is right. You do not have to sign on to a treaty. We could put in place unilaterally, if we wanted to, to do away with the Foreign Acquisitions and Takeovers Act and with the Foreign Investment Review Board as a matter of domestic policy.

ACTING CHAIR—I have listened to your fine responses to Senator Murphy's equally fine and extensive cross-examination of your submission. One thing I am wondering about in the back of my mind is: what has A-G's learned from the outcomes of other treaties' arrangements such as, for instance, the now unfortunately celebrated Project Blue Sky v. the ABT case in the High Court? What advice variation do we see now on the MAI versus the construct of the arrangements with New Zealand that were signed a few years ago?

Mr Zanker—I am glad you asked that. I have actually come prepared for that one.

ACTING CHAIR—We are not playing good cop, bad cop here.

Mr Zanker—I wrote a letter to colleagues in Treasury the other day in relation to precisely this issue. I will quote from it, because it also dealt with Blue Sky. In part it

said:

Government policy requires that domestic law should be in accordance with obligations undertaken by Australia in treaties to which it is a party. Therefore, in the formulation of new treaties, such as the MAI, or any other trade or investment treaty requiring national treatment or market access, if it is not intended that foreign nationals should be treated in the same manner as Australian nationals in relation to a particular subject matter, it is essential that the persons concerned with the negotiation of the treaty are clear what that subject matter is, and that they ensure that the treaty text excludes that subject matter from general obligations to accord national treatment and equal market access. My understanding is that this is precisely the course of action which your Department has pursued . . .

Provided the appropriate exceptions are taken out to national treatment in the negotiation phase of the MAI, there should be no question, in domestic litigation that Australia has an international obligation to accord national treatment in relation to the subject matter in respect of which the exception has been asserted. I would reiterate the general point made . . . that it is essential that the persons concerned with the negotiation of a treaty such as the MAI have a very clear understanding of what subject matters should be excluded from the operation of its provisions.

In relation to Blue Sky, in the annex to the protocol on trade in services there is inscribed an exception in relation to broadcasting services, which talks about ownership of broadcasting operations. It does not talk about domestic content of material to be broadcast. What we have got with the Blue Sky thing is that the legislation said that the broadcasting authority must take into account its international obligations such as the trade in services protocol whilst ownership of broadcasting organisations is not subject to the inscription, therefore not required to be accorded national treatment. Nothing is said in the exceptions about television content.

If that had been an issue, it should have been raised squarely in the negotiations with the New Zealanders. It should have been accepted. That should have been the negotiating position and that is that. All the courts did in the Blue Sky case was to apply the law as it is provided for in statutes.

The short answer, at the end of all that, is in negotiating these treaties you have just got to be sure what it is you are signing on to and make sure, if this is important, that there be Australian content in television or radio broadcasts, that it not be subject to national treatment.

ACTING CHAIR—Thank you for that and for reading it into the record. On the question of what has changed and what did you learn out of that, the answer would be quite a deal. I am sure that quite a lot has been learned. There are two parts to the question that I would like to ask now. How compartmentalised is AGs on this? In other words, you have written a letter, fairly recently I take it, offering that advice—I would like to think it has got something to do with the fact that this committee has been drawing that matter out as an example of what can be an unintended consequence of an arrangement; and we are pleased to see you doing that—but what other things can you see

that are likely to be unintended consequences based on what we have currently as a negotiating text, the MAICOM? Where are the hairs and where are they attached?

Mr Zanker—I think that the Treasury has been approaching the MAI negotiations very carefully and very cautiously. In my opinion, the exceptions that they have taken out, as far as I know, should not give rise to any unexpected problems down the track.

ACTING CHAIR—So there is no chance of a foreign investor in Telstra claiming that they should be able to have seven per cent instead of four or five per cent as one holding? None of those sorts of challenges are likely in our higher courts?

Mr Zanker—I do not believe so. The way in which the negotiations have been approached is that the Treasury has taken out exceptions to make sure that the existing domestic regime, as provided for in existing legislation, will continue to apply. That is the point I wanted to make in the letter. You have got to be very careful in the treaty negotiations to make sure that you are not going to get yourself into a situation where you agree with somebody else that you are going to give them or their nationals treatment that you are not really prepared to provide. As I say, the lesson I would draw out of it is that people have to thoroughly consult and make sure that the negotiations are going to be conducted in a way which is in accordance with policy and is not going to cause some sort of surprise down the track.

ACTING CHAIR—What evidence exists to show what was given as advice in the case of the trans-Tasman agreement?

Mr Zanker—I do not know.

Senator BOURNE—Is it the case, though, that any reservations or exceptions we put on it would be subject to rollback, depending on what rollback ends up being, of course?

Mr Zanker—Yes, because the aspirational goal of the MAI is ultimately reaching national treatment and eliminating performance requirements and things like that. So the expectation is that you should continue to liberalise your investment regime, which is the same as what occurs in—

Senator BOURNE—The WTO.

Mr Zanker—Exactly.

Senator BOURNE—When you put this in, which is a while ago, you were saying that the text was still some way from being settled. There were certainly a lot of square brackets in the one we have got of 24 April. Has it come ahead a great deal since then? I know they did want to have a signing date fairly soon but, as far as I understand, it is not

zooming ahead.

Mr Zanker—That is my understanding, but you would really have to ask Treasury that one. I have just been following it on Internet, much the same as everybody else.

Senator BOURNE—Me too.

Mr Zanker—My colleague advises that it has not changed.

Senator BOURNE—The only other question I have is whether you are involved or it is just Treasury that is involved in the negotiations.

Mr Zanker—We have a great stack of files going back to the beginning of the negotiations, which predates my time in the area. We have certainly seen drafts and been asked on a number of occasions to comment on whether the exceptions that are proposed to be taken out are adequate and suitable to protect the existing policy position.

Senator BOURNE—But you have not been over there negotiating, just Treasury.

Mr Zanker—No, because we do not have the wherewithal to do that. We just get the papers in and have a look at them.

Senator COONEY—Is it the case of there is nothing in this multilateral agreement to stop a government giving an overseas company a better deal than a local company?

Mr Zanker—No, there is nothing in there; that is right. Whether a government would do that is a matter of—

Senator COONEY—If we just take an example: say a big overseas company like Microsoft said, 'I'll come in and set up a business in Australia, but I want much more favourable treatment; I want cheaper land and I want special tax breaks and things like that,' there is nothing to stop the local government giving them that?

Mr Zanker—No. In fact, there is nothing to stop them doing that now.

Senator COONEY—I agree with that.

Mr Zanker—I think I referred to that in a couple of examples.

Senator COONEY—Yes, I understand that. There would be no difference, under the Multilateral Agreement on Investment, if that were to happen.

Mr Zanker—No. I think I referred to a couple of instances of Western Australian legislation, like the Midwest Iron and Steel Act which approves an agreement between the

government of Western Australia and some developers. In the agreement it talks about there being state preference, that certain bits and pieces of legislation will not apply and that any disputes that arise will be dealt with by arbitration instead of in the Supreme Court and things like that. Certainly, under the MAI, I think you could not have that sort of state legislation which required preferential treatment for local manufacturers and products. The idea is that, under the MAI, that should not be permitted; it should be the investor does whatever he likes.

Senator COONEY—Yes, but the point I want to make is that, if the MAI came in, an overseas company has to be given no lesser treatment than the local companies, but the local companies do not have to be given equal treatment to the overseas company. The point I make is a fairly obvious one: you could get a very powerful and rich company coming to a smaller one and saying, 'I want special treatment.' There is nothing in this agreement to stop it doing that.

Mr Zanker—Not that I can see, no.

Senator COONEY—It would be assured that it got all the treatment that was given to the local companies because it has to be given the same treatment, in fact, as the local companies in terms of benefits?

Mr Zanker—That is right, yes.

Senator COONEY—I am just trying to grapple with the standstill and rollback. Does that affect the way a particular country might legislate for all the corporate sector in the country?

Mr Zanker—Yes, it does. Basically, if you are agreeing not to retreat from any liberalisation of the investment sector and you have signed on to a treaty to do that, you could not then introduce legislation to restrict what you have done so far, unless, of course, you denounce the treaty. That is the option. The policy is—and it is an infinitely sensible one—if we sign on to international agreements, then we should carry them out. We have seen plenty of evidence this century of what happens if that is not done. But the thing is that if you decide you do not want to continue to be in an agreement, then you denounce it.

Senator COONEY—I think the point was made in Melbourne by Mr Ted Murphy that, if you have a change in government—not only in personnel, but actually a difference from Labor to coalition or from coalition to Labor—what the previous government had done in terms of legislation in respect of the corporate sector could not be changed by a later government coming in if this agreement was signed.

Mr Zanker—I think that is a simplistic analysis, and it is not one that you could make a general comment on. But supposing we were to sign on to the MAI—

unfortunately, this itself is a very simplistic example—and agree to national treatment for foreign investors, then we would be required to repeal the Foreign Acquisition and Takeovers Act and dismantle the FIRB mechanism. We could not go back on that later, consistent with what we have agreed to do under the MAI—that is true; that is right—unless we denounce the MAI.

Senator COONEY—I think it only takes six months to denounce, does it not?

Mr Zanker—Yes, you can denounce it.

Senator COONEY—But then the agreement remains in operation for another 15 years.

Mr Zanker—In relation to existing investments, yes.

Senator COONEY—It does seem to limit the ability that a later government might have to change the policy, the programs and the execution of that policy, because of what a previous government had done.

Mr Zanker—It may well do that, yes. For example, in a situation where we became a party to the MAI and investments had been admitted on the basis that the investor was able to employ whoever they liked—be they Australian nationals or not—and then we denounced the MAI and withdrew from it, we would not be able, consistent with what we have agreed, to change legislation in relation to those existing investors who had invested whilst we were a party to it and then require them to engage locals, use local products or things like that. At the time they invested, this particular regime was the one that we agreed should be in place and that carries over. But, of course, if new investors came in after the period of denunciation, then they would have to take the law as they found it.

Senator COONEY—But an investor can invest in a country and be quarantined from the risks that the local companies face of changes in tax regimes, changes in the labour laws and changes in the environment. Is that not so?

Mr Zanker—No, they have got to take the domestic law as they find it. All national treatment means—and that is the key element of the MAI—is that you are going to treat foreign investors in the same way as you treat domestic investors. If you have got to go through things like environmental impact assessments or you have got to pay tax—all that type of stuff—the foreigner has to do that equally, as the domestic one does.

Senator COONEY—But I thought the position on the standstill, on the rollback, was that the companies, once they came in, could be assured that the law would not change in respect of them.

Mr Zanker—That is in relation to the areas that the agreement touches, but it does not—

Senator COONEY—That is what I am getting at. The agreement does not touch the locals companies, does it?

Mr Zanker—No, the agreement does not touch subjects other than investment activities and how you carry them out.

Senator COONEY—What I am putting is: say a government legislated to change the requirements on local companies—whether they be in terms of tax, in terms of environment or in terms of the law on anything, prospectuses and what have you—that must bind the local companies, but it cannot bind the foreign investors because of the agreement under the MAI. Is that not the position?

Mr Zanker—No. I do not think the MAI has got anything to do with those particular issues.

Senator MURPHY—What about standstill and rollback?

Mr Zanker—Again, the essential element is national treatment. If you can do it to the local, you can do it equally to the foreigner.

Senator COONEY—Senator Murphy is asking: can you just clarify what the standstill and the rollback do? The way I have got it at the moment, I thought that the idea of the standstill and the rollback was to liberalise the investment area.

Mr Zanker—That is right.

Senator COONEY—Therefore, they said, 'If an investor comes in, the investor should be assured that the basis upon which he or she or it invested would remain the same.' When we explore it a bit and say, 'If you want to change it in respect of local companies,' you can do it in respect of the overseas companies as well. Given that, I am not sure just what the rollback and the standstill do.

Mr Zanker—The rollback and standstill can relate only to the topics that are actually covered in the substantive provisions of the MAI. Using telecommunications and Telstra as an example, if we were to agree that it should be open to full foreign investment—100 per cent overseas ownership, which would be the most liberal position—then the effect of the standstill or rollback would be that you could not then impose Australian ownership limits in relation to Telstra. That is what it is talking about; it is not talking about anything else—it is just the position with respect to equity and investment.

Say the Telstra legislation was changed so that it became fully corporatised and

was listed on the stock market. Because of what we had agreed to under the Multilateral Agreement on Investment, there would be no limits on foreign ownership and we, as parties to the MAI, would not be able to legislate to introduce limits on foreign ownership. We would not be able to legislate to take away foreign interests in it. That is all.

Senator COONEY—So the only thing that standstill and rollback do is deal with the level of investment.

Mr Zanker—No, it also deals with other matters that are dealt with in the MAI; for example, performance requirements or key personnel.

Senator COONEY—Page 25 says:

The MAI contains a number of provisions relating to "performance requirements" . . . In particular, Contracting Parties would not be able to:

"impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content . . . "

Or to transfer technology or to locate its headquarters in the territory of the contracting party and so on. Are those all matters that are locked in by the MAI?

Mr Zanker—Let us talk about point (j), which says:

(j) to hire a given level of nationals;

Supposing we took an exception to that and said, 'No, before we sign on to the MAI we want to be able to tell any foreign investor that they have to have at least 50 per cent of their work force made up of Australians.' That is the rollback position, if you like. The standstill effect is that we will not introduce any requirement which would say, 'We want to up the ante; we want 75 per cent of the staff of foreign investors to be nationals.' We would be limited to 50 per cent.

Senator COONEY—But you could do that with local companies, couldn't you?

Mr Zanker—You can do whatever you like with local companies.

Senator COONEY—Take point (c), for example, which says:

(c) to purchase, use or accord a preference to goods produced, or services provided in its territory or to purchase goods or services from persons in its territory;

To take the example you have given, and Senator Murphy's example, if Telstra were taken over you could not say, 'You ought to buy Australian made goods.' They can go wherever

they want. But you could say to your local company, 'You have to buy Australian goods and services only.' Could you say that? Can you see what I am saying?

I am trying to understand the way the local companies are treated as compared with the companies that are subject to the MAI, where an overseas company has come in and taken over the company. If that happens, the Australian government or the state governments cannot say, 'You have to buy locally produced products.' That is what I would have thought, if what is set out on page 25 is correct. But you can say it to your local companies.

Mr Zanker—Again that really depends at the time of signing on to the agreement what exceptions are taken out. If you want to give yourself some room to manoeuvre—

Senator COONEY—If that stays as it is, is that not the position? If the exceptions are not taken out, are we correct in putting that to you?

Mr Zanker—Yes.

Senator COONEY—If that stayed and one government said, 'Look I do not mind whether you buy your goods and services here or overseas,' and then there is a change of government and the new government says, 'We want to encourage local industries; therefore, you have to buy all your goods and services here,' that would apply to local companies but not to overseas companies because the overseas companies are protected by the MAI surely?

Mr Zanker—Yes, because of the standstill and rollback; that is right. You then have to go back to the negotiating table at the OECD and say, 'Sorry, we made a mistake. We want to be able to impose these requirements.' That is what you would do.

Senator COONEY—I was going to ask you about page 32.

ACTING CHAIR—Senator Cooney, could this possibly be your last question?

Senator COONEY—It is my last question and it relates to the statement on page 32 about financial services. Could you just check that for us. The second sentence on that page says:

> These provisions would enable prudential measures with respect to financial services, and measures to ensure the integrity and stability of a country's financial system.

Does that mean the financial system will be outside the cover of the MAI if it is signed?

Mr Zanker—No, there are special provisions in the MAI dealing with the financial sector, but that has got a large measure of square brackets and stuff around it at

the moment. But it is subject to the same procedure. You take exceptions to the coverage of the provisions if you do not—

Senator COONEY—What do you mean by that? Could you just explain what you meant when Attorney's wrote that about financial services? Attorney's seems to be saying there is something exceptional about financial services.

Mr Zanker—I am not really saying that. It is just that that is the way it is treated in the MAI. There are special provisions there relating to financial services because the view of the OECD negotiators is that there needs to be special arrangements about them because prudential measures might need to be taken. There is a possibility that, without organisations like the Reserve Bank or the US Federal Reserve maintaining some sort of prudential control, open slather could lead to undermining of financial markets. That is my understanding of why it is separate, but I could not advance that any further.

Senator COONEY—No, I am not asking you the reason. It is clear that in the agreement itself—this is not an exception to the agreement; this is the body, the core part, of the agreement—there are special provisions dealing with the financial sector?

Mr Zanker—Yes, that is right.

Senator MURPHY—I have got three questions I want to ask.

ACTING CHAIR—Senator Murphy, we are going to get Attorney-General's back again because of the time constraints of this morning's hearings. In order to keep the thing moving, I would like to try to keep to schedule.

Mr Zanker—I would be happy to take questions on notice.

Senator MURPHY—It refers to page 8 where you state:

It is for the Executive government to conclude treaties, and to the extent that domestic law requires change before a treaty can be acceded to, legislation would be necessary. Such legislation normally would be based upon any relevant head of its suite of powers under the Constitution and not just the external affairs power.

Then on page 9 you say at dot point 25:

To the extent that any State, Territory or local government measure was inconsistent with obligations assumed under the MAI . . .

Under the constitution can the national government legislate in respect of a MAI without the agreement of the states?

Mr Zanker—It really depends what head of power you are talking about.

Senator MURPHY—I am asking a general question. Could the national government legislate to enable the signing of an MAI that would then have the impact of ensuring that it had application over and above state or territory laws?

Mr Zanker—The first thing is that the government would not legislate to get permission to sign the treaty. That is a matter for the executive. The standing policy that has been observed for a long time is that domestic legislation should be such as to not be in contradiction with or be contrary to international obligations which have been assumed.

Senator MURPHY—Can you take that question on notice? I noted what you said on page 8. In that context, can I ask you to take this question on notice: under the constitution, could the national government legislate to enable an MAI to be signed and have, if you like, the ramifications of it or the agreement itself apply over and above state or territory laws?

Mr Zanker—The answer is clearly yes to that.

Senator MURPHY—I thought it would be. The last sentence of dot point 26 says:

The Attorney-General's Department will be assisting the Treasury in its consultations with the States and local government—

I assume states and territories—

to assess the possible impact of the MAI on their legislative and administrative arrangements . . .

What consultations have taken place thus far?

Mr Zanker—There are a whole suite of them going on at the moment.

Senator MURPHY—You might take that on notice and give us a written brief as to how many meetings, where they have taken place, et cetera. I would appreciate that.

Mr Zanker—Yes. I should explain, generally speaking, what we do in relation to that. It is a matter for states and territories to identify to the lead department what legislation those states or territories think might be affected by the agreement. Treasury might then ask us if we agree with that assessment. We would say yea or nay to that.

Senator MURPHY—That does not seem to be what is said in this submission. Could you provide me with a brief in terms of what Treasury has done in so far as these consultations—

Mr Zanker—I cannot provide you with a brief as to what Treasury has done because I do not know.

Senator MURPHY—Okay, in so far as what you have done. You say here that Attorney-General's will be assisting in its consultation. I would like to know how you are assisting, what you are doing, when you have done it and how many times.

Ms Musolino—We are currently, as Mr Zanker just said, participating in state and territory consultations with Treasury. Yesterday we had consultations in Sydney with New South Wales state representatives. There will be further meetings next week in Perth, Adelaide, Hobart and Melbourne with later meetings in September for Darwin and Brisbane.

Senator MURPHY—I would like to know how local government gets locked into the process. One of the problems we have had with a number of treaty matters is that somebody says, 'Look, it's really up to them.' They think it is really up to them and nobody really feeds the information out. We always get these claims that come before us that nobody has been consulted. I would like to know the format that is being used, the process of advising people that this is happening, the process of consultation and how they submit queries or propositions in respect of state and/or local government.

Mr Zanker—This is not a question for us; it is a question for Treasury because they are the lead agency. I cannot assist on that.

Senator MURPHY—It is up to them.

Mr Zanker—It is up to them, yes. But that is the position. We are helping to the extent that we are asked, but I just cannot answer that question.

ACTING CHAIR—Mr Zanker, when was that letter that you read into the record to Treasury sent? What is the date of that?

Mr Zanker—It is dated 12 August.

Senator MURPHY—Can we get a copy of that?

ACTING CHAIR—That is what I was about to ask. Is it possible that the committee might be able to make use of that as an example of the advice you have passed on?

Mr Zanker—Yes.

ACTING CHAIR—Thank you. Would that letter and its approach therefore have been basically your approach in this public consultation that you have just been talking about—in other words, using the logic of that letter to Treasury to, if you like, play an active role as another central agency to get other government departments and other levels of government very much focused on the what if this thing is signed and how will it

impact on your area scenarios?

Mr Zanker—Well, that is essential. I think any negotiators must know what the policy parameters are. They may not necessarily know that because of our system of government, obviously. There might be particular sensitivities in the state.

ACTING CHAIR—There is something about our system of government, our constitution, which does require this kind of additional scrutiny, this kind of additional approach.

Mr Zanker—That is right.

ACTING CHAIR—Thank you very much for taking the time to appear before the committee this day.

[11.14 a.m.]

GRIFFITHS, Mr John Frank Lewis, General Manager, Industry Policy Branch, Department of Industry, Science and Tourism, 20 Allara Street, Canberra, Australian Capital Territory 2601

WEBER, Mr Anthony Joseph, Policy Officer, Industry Policy Section, Industry Policy Branch, Industry Policy Division, Department of Industry, Science and Tourism, 20 Allara Street, Canberra, Australian Capital Territory 2601

ACTING CHAIR—Good morning and welcome. I think we received your submission yesterday afternoon, despite the best efforts of the treaties secretariat. I should acknowledge that that is not a reflection on the department's ability to respond to the committee's request for a submission. I understand that it has had fairly sluggish treatment in the office of the minister—my comment, not yours—and that is disappointing. I think this committee would be very determined that all members of the executive of the government which established the committee would be very cognisant of its role and therefore very keen to participate in the activities of this committee. Having said all that, would you now like to make an opening statement?

Mr Griffiths—Yes. Perhaps it would help the committee if I ran briefly through our submission, the main points in it and what we have tried to focus on. The submission starts off outlining the background and the objectives of the Multilateral Agreement on Investment, and it then talks about the benefits that we see flowing from cross-border investments—that is, both investments into Australia and investments abroad by Australians. We state that the department's position is that we support the broad objectives of the MAI, which are to promote international investment flows by providing greater transparency and certainty to investors. Certainly we support the broad objectives of the MAI, but our support for any MAI will depend on the final text of that agreement. At this stage, as we understand it, it is very much early days. We are very keen in looking at how that text pans out.

In the submission we look at the MAI as it is currently drafted, and we try to assess what we see as the effects that the agreement would have. We came to the conclusion that it would make little impact on Australia's foreign investment policy, given the reservations that are currently with the OECD. At the same time we also look at what effects there may be on inbound investment into Australia. I guess we have drawn the conclusion that there could be some assistance. I am referring to it partly helping Australia in the sense that people might invest here if, by our signing the agreement, people thought that it provided greater certainty.

We have concluded that it could be of greatest assistance to Australian companies looking to invest in other countries. An MAI may give them greater protection in some of those countries—perhaps not so much in OECD countries, which would probably have

pretty similar systems to ours, but when some other non-OECD countries sign up and when the benefits of an agreement like this are more widely appreciated then Australian companies could benefit from more liberal regimes in other countries and from greater certainty in that there would be less likely to be any expropriation of their investments in those countries.

The submission then talks about the department's objectives with respect to the MAI. The basic thrust of the submission is that our main interest as a department is to protect those government policies and programs which are administered by the department from being overridden by the MAI. That is why most of our work in consulting with Treasury and at times with the Attorney-General's Department has been looking at which policies and programs we need to seek reservations to protect. In the attachment we have outlined the various policies and programs which at this stage we think would need to have a reservation put in place to protect.

We put in a first raft of reservations to Treasury in October last year. They are the reservations that are currently on the Treasury web site talking about the MAI. At that time we advised that, with the industry statement *Investing for Growth*, which came out in December, we would be looking at possible additional reservations. We forwarded them to Treasury in April this year. Our understanding, from when we last spoke to Treasury, is that those reservations will be put forward to the OECD in the next round of reservations. I think that would include reservations to cover policies or programs administered by the states and territories.

We have had quite extensive consultations with Treasury which has been looking at which policies and programs we administer would need to be covered by reservations. We have had ongoing offers to officers and consultations via the phone. We have also had Treasury people come and provide a seminar for people in the department. Various areas of the department have been liaising with industry groups as to what things are important to them. We have had representatives from industry groups come and speak to us about the MAI.

The department puts out, as a service, an industry brief. A few months ago we attached to that a two-pager outlining the current state of play regarding the MAI and particularly the department's involvement. We had some reaction to that from the Australian Business Chamber; they thought that was reassuring. They did have some concerns that perhaps certain industry policies and programs could run foul of the proposed MAI, but after we put that paper out, there was some press saying that Graham Chalker from the Australian Business Chamber was much more reassured that those sorts of policies would be protected. I actually met with Graham Chalker about a month after that. He seemed much more relaxed and thought it was a useful thing putting out that information.

The submission looks at the key areas of the MAI which are of particular interest

to the department and which can impact on policies and programs administered by the department. Those key areas are the performance requirement provisions of the MAI, those dealing with investor incentives, expropriation, immigration and intellectual property. The submission looks at those various areas and at examples of particular policies which would need to be protected if the MAI were to be concluded in something close to its current form. That is pretty much what the submission is, but the basic thrust of it, and our involvement in it, is to protect those policies and programs which we administer from being overridden by the MAI.

ACTING CHAIR—How does Australia actually measure up? You say you support the broad principles of the MAI, but how does Australia, in its current domestic arrangements, actually measure up as far as the aspirations of the MAI are concerned?

Mr Griffiths—As far as our foreign investment policies are concerned?

ACTING CHAIR—Foreign investment policy, the way we cooperate with foreign companies, the way foreign companies are treated versus local companies, all of these things that are put down on paper by this particular text of the MAI, albeit in a draft form. I guess what I am driving at is: is it really necessary, given that Australia is already doing so much of it?

Mr Griffiths—With the first question, I think we would probably be fairly similar to what other OECD countries are doing in this area. On the question of whether it is necessary, as I said in the outline, probably the main advantage to us would be that, if some non-OECD member countries were also to sign up or agree to these sorts of principles, that would, therefore, make it easier for Australian companies to invest in those countries with greater certainty and protection.

ACTING CHAIR—So you are saying that Australia is already a good place to invest, but Australians wanting to invest offshore are having problems?

Mr Griffiths—I think that, in some situations, yes, they can have problems.

ACTING CHAIR—You have put what the motivation of the exemptions is. Their status is that they are yet to be submitted to the OECD, but that they are on their way. The real motivation behind that is, you said, to protect our current situation, to make sure that the Australian side of the ledger is maintained—our right to maintain certain rules and regulations—but your focus is now really on Australian companies investing offshore rather than in Australia.

Mr Griffiths—As far as the benefits of what might come out of the MAI are concerned, it is probably more on the side of Australian companies investing offshore, but our focus, certainly at the moment, is more on the reservations to protect the policies and programs which are currently in place in Australia dealing with foreigners investing in

Australia.

My understanding is that we probably stack up much the same as other OECD countries with the types of policies and programs that we administer, so I would have thought our situation is not that dissimilar from other OECD countries. I think they are making similar reservations. I should say that we have got a fairly narrow role in this. We are not coordinating it so we are not fully on top of all the reservations other countries are putting in place, but my understanding is that we are not that dissimilar from others.

ACTING CHAIR—The concern I have, and I am sure other committee members have it too, is about the High Court's ruling in Project Blue Sky v. the ABT, which is an area of DOCA and not of your department; nevertheless it serves as an example of advice given by someone to someone else—presumably in the executive—at the time of the CER negotiations with New Zealand. Obviously, it must have been a matter of saying, 'Look, there is a whole bunch of good things in it for Australian businesses to invest in other countries,' that is, New Zealand, 'so let's sign away.' There was an unintended consequence whereby New Zealand television content is now the same as Australian television content. I guess the challenge for departments like yours, despite your understandably narrow focus, is: have you gone through everything in your department to make sure we do not get another Project Blue Sky case in the High Court, down the track, if the MAI goes ahead?

Mr Griffiths—Certainly, the main focus of work in the department on the MAI is to look at all our policies and programs and make sure that none of them would be harmed in any way by the implementation of the MAI in its current form. I think at the moment we are actually seeking advice from the Attorney-General's Department and Treasury on the government's announced new plan for the automotive sector. This is very much an ongoing process and, certainly, I think we are very mindful of the need to keep an eye on the job and make sure that new policies and programs, such as the investing for growth program, that come into place have been looked at and advice sought from Attorney-General's and Treasury to check which ones we would need to seek reservations for.

ACTING CHAIR—Could you undertake to give the committee some tabulated version of how programs get a tick or a cross or a question mark, as a result of those assessments you are making?

Mr Griffiths—You mean on an ongoing basis?

ACTING CHAIR—Yes. This committee's inquiry is probably going to go on for some time because the negotiations over the MAI seem to be rattling on. When you are doing an internal assessment of the MAI text, in its ever dynamically evolving form, against various programs, some will get a tick, some will get a question mark, I am sure. Perhaps at some point you might be able to furnish that kind of table to this committee,

because it would help us to decide where to go on this.

Mr Griffiths—Yes. We will certainly do that. I guess we are hoping that when we put the stuff out to industry with the services brief, we will put down what our latest set of reservations are, to try to keep people informed about which policies and programs we think need a reservation put in place.

ACTING CHAIR—I am sure that we share a common aim: what is in it for Australia? That is what we are on about.

Mr Griffiths—Yes.

Senator COONEY—I took something up with the Attorney-General's Department which I would like you to comment on, particularly because your department is the one that is likely to be asked to implement any industry policy, either now or in the future, depending upon what government is in power. Have you taken into account or made an analysis of how the standstill and rollback will affect the department's ability to develop policy and to implement it in terms of an industry policy in the future?

Mr Griffiths—Certainly we have been consulting with Attorney-General's and Treasury on these elements. We have put forward what we think are the policies of programs which need reservations at this stage.

Senator COONEY—Can I just stop you because I think you have said that. The reservations would have to be very extensive, wouldn't they? Can you tell us what sort of reservations you have asked for, or would you prefer not to tell us that?

Mr Griffiths—We have put them in the submission, the policies and programs which we consider we need to put reservations against. I guess one of the important issues—

Senator COONEY—These are ones you have given us this morning?

Mr Griffiths—Yes. I guess the final nature of the reservations will need to depend on what the final text of the agreement is. I guess, depending on the nature of that text, it might dictate how we need to frame the reservations; whether they need to be very general to cover modifications in programs or policies, or whether they can be fairly specific and then there can be some more general reservations for particular types of programs. I think the answer to the question is that it very much depends on the final text of the agreement.

Senator COONEY—Yes, but you might get to the point where the reservations are such that it is not worth signing any agreement. I do not know whether you have looked at the submission from the Attorney-General's Department, but can I just read this bit out to you. It says:

The MAI contains a number of provisions relating to "performance requirements", which would be applicable to all phases of investment from establishment through to disposal. In particular, Contracting Parties would not be able to:

Then it goes through to (c):

(c) to purchase, use or accord a preference to goods produced, or services provided in its territory or to purchase goods or services from persons in its territory;

I would have thought that would be an issue that some government, either the present one or the future one, might want to do in terms of an industry policy. At the same time that seems to be central to what the MAI is all about. I am wondering whether you have turned your mind to those issues that the Attorney-General listed.

Mr Griffiths—Certainly, with the performance requirement provisions of the MAI, that is an area that we have looked at fairly closely. Some of the reservations we have put in place, some of the policy programs, are those which do contain requirements for particular content and things like that—or performance requirements.

Senator COONEY—I have not had time to look at the exceptions and the reservations, but how far do your reservations leave the MAI in place? How much of the MAI is left after you have put in the reservations from your department that you have spoken of, do you know?

Mr Griffiths—I guess our focus has been more to make sure the things we do are protected without looking so much at what other things can be done. Essentially we have been looking at the things that we do rather than the things that could be done elsewhere.

Senator COONEY—Is there an interdepartmental committee on this at all?

Mr Griffiths—Not a formal interdepartmental committee, but we had a meeting a few weeks ago with Treasury and other departments. We had some people from Canada talking about their position and some of their experiences with the MAI. So we got together and discussed some of these issues and the latest state of play. There have been other meetings we have had with Treasury on the MAI.

Senator COONEY—Is there an ongoing meeting—say, between Treasury, yourself and perhaps Foreign Affairs and Attorney-General's—so that this committee could get an idea or an example of what it is that is happening, firstly to the proposed agreement itself, and, secondly, to industry in Australia, indeed to Australians generally? The problem at least that I face at the moment is that I am not sure of just how the MAI is going to come out when you consider first its terms in the treaty as agreed upon, and then the reservations taken into account. What does that all mean?

What seems to be happening—and there is no criticism in any of this because it

has just happened this way—is that you have the various departments looking at very discrete parts of it and then discussing it with other departments as an issue arises, rather than there being an overall analysis made by the departments meeting on a regular and disciplined basis. Would I be right in saying that?

Mr Griffiths—We have not been coordinating the exercise but we have been in regular contract with Treasury, which is the department coordinating the exercise. That has been quite frequent. They have been telling us what the latest state of play with negotiations is and we have gone back to our reservations, looked at them and thought, 'Do they need to be modified?'

Your question seems to be directed at the need for room to manoeuvre in the future if we want to adjust those particular policies, and whether we will have that room to manoeuvre. We have certainly been very mindful of that and I think Treasury has been as well.

As I said at the outset with this question, I think it depends very much on what the nature of the final text of the MAI will be. It will determine what the nature of the reservations needs to be as far as giving us that room to manoeuvre. We would not want to have a very narrow reservation which would prevent any site modifications or the introduction of a similar program.

Senator COONEY—On page 25 of the Attorney-General Department's submission the department sets out a series of things, going from (a) to (l). I get the impression these are the parts central to the MAI. If it could be done, I would like to get some assessment from your department of whether or not they are going to interfere with industry policy and whether or not there are any reservations about them. You would not know what is on page 25 of the Attorney-General's Department submission because you have not seen it. It is a bit of a worry that we seem to be going ahead in a fairly uncoordinated exercise.

Mr Griffiths—We can certainly obtain a copy of that and have a look at those questions.

Senator COONEY—There is only one other matter I want to raise. If you have firms like Ford or Heinz, they are overseas companies I take it—it is investment from overseas into Australia—so you cannot treat them any differently from Australian companies, but you can treat Australian companies in a less favourable way than you can them. Has your department thought about that?

Mr Griffiths—As a particular policy?

Senator COONEY—Whether that presents any problems to your department when you are wanting to go ahead with an industry policy or just any sort of policy for industry.

Mr Griffiths—As far as I am aware, we do not have any policies which set out to do that.

Senator COONEY—It is not a policy that I am asking you about. If this went through, the Australian government would have powers to give more favourable treatment to an overseas company than to local companies. Do you follow?

Mr Griffiths—Yes.

Senator COONEY—According to the Attorney-General's Department—as you heard—all this treaty does is make sure that overseas investors do not get any worse treatment than local investors, but there is nothing to stop local investors getting worse treatment than overseas investors. So an overseas investor could come in and say, 'We will bring these factories, we will provide all these jobs, we will really get you going, if you give us a better deal than you give your local industries.' You must have seen that, in the IT industry for example, oftentimes you get local people complaining because they reckon they do not get such a good treatment.

All I am asking you is whether your department has given any thought to how the MAI, if carried in its present form, would affect the ability of government to look after local industries when a very powerful overseas company could say to them, 'You ought to give us favourable treatment which you don't have to give to your local ones.'

Mr Griffiths—Even in the absence of the MAI, a government could always decide to do that. It could always decide—

Senator COONEY—I am sorry to interrupt you. I am not asking you about what you can do without that; I am asking you if you have thought about that in terms of what the MAI says. When you say, 'Forget about the MAI,' that is not answering the question. Can you follow what I mean? I am not asking you to give the answer now, but can you think about what the MAI does to that situation? I think what you are saying to me is, 'It doesn't really matter.' That is not what I am asking you. I am asking you whether the MAI, in its present form, affects the government's ability to attract foreign investment, look after local companies and engage in industry policy given those matters that the Attorney-General has pointed out.

Mr Griffiths—The submission certainly looks at the issue of 'invest Australia' and the ability to attract foreign investment, but it does not talk about or analyse the issue that you are describing as to whether you could actually—

Senator COONEY—It is whether the MAI takes away the discretion, the flexibility, of government to deal with it. I do not want it now, but could you, at your leisure, look at it? As the chairman says, this looks like going on for some time.

Senator MURPHY—I am interested in the comment in the introduction to your submission. In the third last paragraph you say:

FDI also creates employment as evidenced by a recent Canadian Government survey which found that for every C$1 billion of FDI invested in Canada, 45,000 new jobs were created over five years.

That is nice, but it would not necessarily be the case under the MAI, given that they may well have had a whole range of requirements, et cetera, to get those 45,000 jobs. On page 3, under performance requirements, you say: 'These are the reservations.' I guess this question is really in pursuit of what Senator Cooney has been asking. With the rollback provisions and the standstill provisions with regard to exceptions or reservations that you might put in place in the first instance there is always the intent that, at some point in time, they either be weakened—I do not know whether that is the right description—or in some cases removed or eroded over time. That is the intent of the MAI under the rollback and standstill provisions, isn't it?

Mr Griffiths—Do you mean the review of reservations?

Senator MURPHY—I have to say I am not trying to be an expert on it, but it says that it is the intention that, during the course of its life, rollback means that you will remove reservations either fully or in part to advance the intent of this agreement. You may have some reservations. The ones that you have got there are in regard to technology and endorsed supply arrangements, for instance, which go to the IT outsourcing part of the government's decision where you may say, 'Well, 15 per cent must be local content.'

If we get this signed and up and running, I would think it is quite conceivable that some countries—some of the more powerful economic countries—could say to Australia, 'You've got investments in our country. We want 15 per cent made 10 per cent in the negotiation of the continuing MAI, because if you don't then we are going to whack you.'

That is pretty much the case now in respect of some areas of imports and exports. Why could it not be the case under an MAI for us to say, 'We want an exception. We want the endorsed supplier agreement, the partnership for development, fixed term agreements, carrier industry development plans, et cetera. We want those and they will form a percentage, perhaps 15 per cent.' You may set a level of foreign investment at 35 per cent, as we do have with a telecommunications carrier at the moment.

What is to stop countries more economically powerful than us who are parties to these agreements in negotiations saying to us, 'You have investments over here. If you want those to continue without us placing some impediments, then you must change your policies.' This happens in trade now. I think you know that. Have you looked at that? It is all very well and good for us to have a list of exceptions or reservations, but what capacity do we have to maintain them?

Mr Griffiths—As you said, even in the absence of the MAI, countries can still apply pressure if they do not like our particular policies, and it is up to the Australian government to try as hard as possible to maintain those policies when subject to that pressure. I guess what the MAI does is make the process a bit more transparent in a sense that those policies tend to be highlighted and they could be subject to more scrutiny than what they are at the moment. In that sense, there would probably be some more pressure on those policies in the future when they are subject to some sort of peer review under the MAI processes.

Senator MURPHY—I think you say that it is possible the pressure could be increased. We might have a bilateral agreement at the moment, say, with the United States on beef, fish and whatever else, and we negotiate that bilaterally, whereas the MAI seems to me to possibly provide the major economic countries of the world with the greater power and apply that power to those countries that do not necessarily rate in terms of economic strength.

Mr Griffiths—I really do not have an idea of whether it would increase their power or the amount of pressure exerted on Australia to change those policies. I certainly agree that it would increase the scrutiny of those policies and I guess would create a mechanism to apply that pressure.

Senator MURPHY—If DIST was put in a position and told, 'With regard to all of the things that you have listed there as reservations or exceptions, those will be wound back over the next five years and you will not have the capacity to introduce any new industry measures,' would you be of a view to still support the signing of a multilateral agreement on investment of that nature?

Mr Griffiths—I think our department would be very concerned if there was an explicit provision there that these things would be wound back.

ACTING CHAIR—Do you run any scenarios like that—the old 'what ifs'—when you start making assessments of the impact of something like this?

Mr Griffiths—In a very general sense.

ACTING CHAIR—Given that captains of industry right the way down to the local corner store owner would always be trying to get certain market advantages, and quite legitimately so given their competitive environment, it would make sense for DIST as a lead agency to run some of those scenarios, I would have thought, given that countries can do just as the corner store does to get an advantage. Would you consider doing that?

Mr Griffiths—We will certainly look at that issue.

ACTING CHAIR—What about the MAI, the WTO and the ongoing trade based negotiations? There have been some suggestions made to us that Treasury, having the lead on this purely because of its Foreign Investment Review Board oversight, is not necessarily the right department. I do not want to start interdepartmental wars here—I have watched most of the episodes of various programs that talk about such things. Does it make sense that maybe those involved in trade and those involved in industry should be negotiating these sorts of arrangements rather than simply a central Treasury agency?

Mr Griffiths—Yes, it is a little hard for me to comment on that; I have not really thought about that too much.

ACTING CHAIR—You want a say in this, though, don't you?

Mr Griffiths—Yes, and we feel we have had a say in it. Certainly, Treasury has listened to our views, taken on board our reservations and, with the assistance of A-G's, provided advice to us. As I say, we are not really the experts on the MAI. We have a particular role, and we are trying to fulfil that.

ACTING CHAIR—But you are not going to let Australian industry get done over by it, that's the bottom line.

Mr Griffiths—I guess our principal role is to make sure that it does not get done over in the process.

Senator MURPHY—Turning to page 3 of your submission where you raise the point about the provision of investment incentives, when you look at the MAI and its intent, the current arrangements in Australia for foreign investment and our ability to attract further foreign investment, what things are we not doing that the MAI would require us to do that would get us more foreign investment? In other words, what things, over and above what we currently do to attract foreign investment, do you think the MAI can do to get more foreign investment into Australia?

Mr Griffiths—I guess our assessment would be that it probably would not do all that much more to attract foreign investment, given that our foreign investment regime is fairly liberal.

Senator MURPHY—What about the performance requirement aspect of the MAI? Doesn't that remove a lot of things, as you point out? If it were signed as it stands today in its current text, doesn't that remove a lot of impediments that foreign investors might believe exist in this country at the moment?

Mr Griffiths—I see that it may.

Senator MURPHY—If you say that you do not think there would be any change,

what would be the point of us signing on to it?

Mr Griffiths—As I said at the outset, I guess the main advantage probably would be, particularly with Australian companies investing abroad now, looking at inbound investment—

Senator MURPHY—Where?

Mr Griffiths—You are principally talking about inbound investment, aren't you?

Senator MURPHY—I asked the question with regard to what it means for us in terms of us getting a billion dollars a year and 45,000 jobs over five years, as in your quoted example of Canada. But if you want to talk about our companies going overseas and what it means to them, evidence submitted to us has been—and I think you mentioned it—that most OECD countries have similar foreign investment arrangements to ours and that where the problems lie for our overseas investors is primarily in those countries that are not even on the party list to this development.

Mr Griffiths—I guess where it could help is that, even though we may not substantially change anything that we actually do, by virtue of the fact that we have signed, it may make investors a bit more confident about investing here and the transparency of our procedures. If other OECD countries sign up and we say we do not want to sign up, it may make foreign investors a bit suspicious, even though nothing of substance has really changed in Australia.

Senator MURPHY—That is an interesting statement.

ACTING CHAIR—Thank you very much for your contribution to our inquiry today.

Mr Griffiths—Thank you.

[11.54 a.m.]

MORRIS, Ms Megan Philomena, Assistant Secretary, Film Branch, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 2603

NEIL, Mr John Brian, Assistant Secretary, Enterprise and Radiocommunications Branch, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 2603

ACTING CHAIR—Welcome. Thank you for coming. Would you like to make a brief opening statement?

Ms Morris—I think we have covered the department's position in the submission.

ACTING CHAIR—To borrow the committee chairman's well-used term, I might open the batting on one question that jumps out at me, and that is the unintended consequences of CER. We have drawn the comparison on a number of occasions, at a number of public hearings, between CER and MAI, in particular the way the High Court has determined the Project Blue Sky v. ABT case. The letter has been tendered today from the Office of International Law in the Attorney-General's Department. I guess you have not had time to read it. I draw your attention to point 10 of the letter. I guess the question needs to be asked: what else is hanging out there? Where are the various hairs that are attached to MAI and where are they placed in relation to your department's area? Secondly, as a hand grenade for you, I suppose, why was there not really complete advice at the time of CER on the problem that eventuated, when New Zealand television content being counted as Australian was not anticipated?

Ms Morris—I will answer the second part of that question first by saying that I will not answer it. The relevant section of the Broadcasting Services Act that caused the problem in relation to CER compliance for Australian content on free to air commercial television is currently under consideration by a Senate committee that is due to report later this year. I do not think there is much that I can add in this forum on that issue. I think it is more usefully handled by that Senate committee. There will be submissions to that committee.

ACTING CHAIR—I make the observation that that might be your assessment of it but it is not mine at the moment. With greatest regard to my colleagues in the Senate, I would like to have a feel, if you like, for the incomplete nature of the process of discovery prior to the signing of the CER that occurred within your department. Why was this matter not anticipated? It may not be a failing of your department but rather of the system that was in place to ensure that you had an opportunity to comment on the way CER would impact on your department. I just want to try and get a feel for that. I do not mind if we have to revisit what the Senate might be doing. They are, as you have probably noticed, a

somewhat independent body.

Ms Morris—I would like to check with a colleague from the licensed broadcasting area. This is not actually my area of responsibility. From his advice, I think we will need to take that on notice and provide you with a written answer on that.

ACTING CHAIR—That is fair and reasonable. Thank you for that. Do you want to go back to the first part of the question?

Ms Morris—That is very hard to comment on because the MAI, as I understand it, is in such a nebulous state that I am not sure what is hanging in there. I consider it our job to make sure that we do not end up with unintended consequences, but even the handling of exemptions and how they will be organised have not yet been agreed by the committee so it is very hard to give a clear answer on that, I am sorry. I am not trying to obfuscate, but there is no MAI to comment on as yet.

ACTING CHAIR—There is negotiating text. Have you factored in the content of that negotiating text to gather some sort of understanding of the current state of play as to the way it impacts upon your department?

Mr Neil—I think our submission, to the point that the MAI has developed, reflects the issues that we have identified as being significant for us and the ones that we are attempting to address.

ACTING CHAIR—Have you considered doing what DIST has agreed to do and said in answer to a similar question a few moments ago—that is, to basically take up the challenge offered by the Attorney-General's Department and go through the various programs and areas your department administers and tick, cross or question mark where the MAI might impact, the criterion being what is in it for Australia? In other words, give it a cross, a tick or even a question mark if it needs further clarification and provide that to the committee.

Ms Morris—In our application—

ACTING CHAIR—You would do that, would you?

Ms Morris—We are very clear in the area of telecommunications and licensed broadcasting because the legislation relating to those programs states very clearly limits of foreign ownership in various areas. We have a very clear idea as to what would need exemptions. It is in the cultural area that we are less clear. We are in a process of meeting with all major cultural agencies and cultural lobby groups together with officials from Treasury to try to clarify that.

ACTING CHAIR—Given that the communications industry, the arts industry as

an adjunct to that and certainly the information technology industry as well are all, by their nature, becoming more and more closely linked—foreign boundaries mean less and less, and the means of distribution and the control of content are really the big games being played in those areas by the big investors—isn't it going to be very hard for us as a nation to try to resist this natural trend towards everybody owning a chunk of something somewhere?

Mr Neil—In the area of telecommunications, which is the one I am most currently familiar with, clearly the government's Telecommunications Act provides for a very open framework for investment. Leaving aside the issues of the limits on investment in Telstra, there are no other explicit limits on foreign investment in the telecommunications industry. So I would assume that the accession to MAI, if that were to come about on whatever basis it did, would not raise major concerns in terms of the general approach to investment in the telecommunications industry, leaving aside of course the issue that we have drawn attention to in relation to Telstra.

ACTING CHAIR—You know what the world is like. You can put pressure on governments. Senator Murphy was asking DIST just a moment ago about general industry pressures that countries can do. As I said, countries can do what corner stores do. They know the market; they know ways of putting pressure on. Surely the MAI would put greater pressure on the government of this country—and, therefore, the people of Australia—with regards to the sorts of laws we are framing in our favour against foreign favour. The MAI would put greater pressure on, wouldn't it?

Mr Neil—It is a question of whether you colour it as greater pressure or as making more transparent the considerations we are taking into account in framing our laws from time to time.

Senator BOURNE—You will have noticed, I am sure, the contribution from one delegation to the MAI about cultural industries, and guess who from, of course. Do you have any views on whether that general concept would be appropriate for Australia as well?

Ms Morris—A cultural carve out, you mean?

Senator BOURNE—Yes.

Ms Morris—It is very tempting. We in our submission argued rather for an audiovisual carve out because that already exists in many trade treaties and the definition is fairly well agreed and understood. Our reservation on a cultural carve out is simply that it may be very hard to define. I do not mean so much for us. I do not think it would be a big issue in this country, but it could result in a lot of friction in agreeing with several European countries, in particular, on what constitutes a cultural industry.

However, I understand that the MAI negotiating committee itself is of a view to change what may be sensible ways to approach exemptions. I do not think that we would be upset if there was a cultural carve out. Either way, there is going to be a lot of work defining specific exemptions that encapsulate government policy rather than getting caught up in the process and the names of the organisations that deliver it. You want to try to encapsulate what you are protecting or there will be a lot of work defining our cultural sector. One way or the other, it will be difficult. Either outcome I think would be satisfactory for the cultural sector.

Senator BOURNE—That is interesting. Printing and press are the bigger problems, rather than audiovisual?

Ms Morris—Yes, printing and press would not be captured in the definition of 'audiovisual', so we would have to be very careful about the way we phrased the wording of the exemptions for those areas. I think we are still trying to work out exactly what the definitions within the MAI mean for a lot of the cultural areas.

Senator BOURNE—In your attachment B, on ownership of broadcasting licences, you seem to be saying that you do not really think that it applies. Is that right, or have I got you wrong there?

Ms Morris—Do you mean that we do not think that the MAI applies?

Senator BOURNE—It obviously does, but do you believe that we should have very strong reservations in that area or do you think that they are not that necessary in that area? Have I read that wrongly in attachment B?

Ms Morris—I think what we are trying to say is: as with telecommunications, the legislation is already fairly explicit about ownership provisions, and the wording of exemptions in the MAI context would have to reflect what we already have in domestic legislation. Does that make sense?

Senator BOURNE—Yes, all right. It is more general than I thought.

Ms Morris—That is what we were trying to get across.

Senator BOURNE—I am having a hard time getting a lot out of many of these submissions. That is good for the moment. Thank you.

ACTING CHAIR—On the subject of consultation, are you meeting with Treasury regularly over those particular concerns?

Ms Morris—It is fairly regularly. Every few months we are in reasonable phone contact. The cultural areas themselves have had various take-ups of the issue. The film

industry—and I am responsible for the film branch—has been very interested in the MAI for some time, are well up to speed on it and have very firm and well developed views. Other parts of the cultural sector are still working with us and with Treasury to work out exactly what the implications are for various parts of the cultural sector. Treasury have indicated that they are happy to include any exemptions relating to culture as worded by us in collaboration with the cultural sector, but we are trying to make sure that we do not end up with what you earlier phrased as 'unintended consequences'.

ACTING CHAIR—So something substantial has been learned from the fiasco around CER.

Ms Morris—You would think so.

Senator MURPHY—Just to follow on from that, firstly, on page 3 of your submission, in the section entitled 'Discussion', you stated that the measures listed in annex A will be subject to standstill and potentially subject to rollback and so on. Then on page 4, you have got a statement that the government's objectives can be achieved through the government's proposed annex A-annex B approach, provided measures to promote Australian content in the audiovisual broadcasting sector and relevant to telecommunications, the arts and heritage are listed in annex B. I am taking it that you are saying 'if they are', rather than 'they are', because they are currently not.

Ms Morris—The annex A-annex B approach I understand at the time this submission was written was the favoured negotiating approach of the Australian government representatives at the MAI committee. It is not yet formally agreed as to how the MAI exceptions would work. We are saying that, if the annex A-annex B approach is adopted and agreed to by the committee, we are satisfied that the policy intent of our portfolio's responsibilities can be met using the annex A-annex B approach.

Senator MURPHY—Has the department read the measures under the annex A-annex B approach that was submitted by the Australian negotiating committee last time?

Ms Morris—Yes, but we also understand that that was not a final list from this country.

Senator MURPHY—I might well accept that.

Ms Morris—It is on that basis that we have been continuing to talk to the cultural sector and to Treasury about wording of exemptions.

Senator MURPHY—I am just saying that page 22—or page 230, depending on which number you use—of the document talks about sector media and then goes to television, et cetera. I want to ask a question with regard to that. Page 34 goes to sector audiovisual, subsector films, and then it sets out the obligation or MAI article in respect of

which the reservation is taken. Then it goes on to a succinct description of the measure in all of those.

Can you tell me whether the department has looked at that—and this really goes back to the question that Mr Hardgrave and Senator Bourne are asking—in so far as the CER, Blue Sky, et cetera situation occurred? Can the department tell me whether or not you are of the view that the description of the measure in both of those cases would avoid another outcome such as the Blue Sky? You can take that on notice if you like.

Ms Morris—I think I will. I am not in the licensed broadcasting area and I think it would be more accurate if we got advice from them.

Senator MURPHY—I am trying to understand with regards to the description of the measure whether or not it is sufficient to cover the problems that have occurred. These relate to things that have already been submitted as part of negotiations. That is really my question. I would appreciate your answer.

Ms Morris—I think we understand your question, but I would prefer to take advice from the area responsible.

Senator MURPHY—That is fine. Thank you for that.

Senator COONEY—Can I ask you about page 69 of your submission. Perhaps this is done in the context of the communications that are occurring between the various departments and particularly Treasury. Perhaps I could start by asking that question. The impression I got from what you said about your meetings with Treasury is that they are casual in the sense that they happen every few months and as an issue arises you may refer to Treasury rather than there being a regular series of meetings. Am I right in that assumption?

Ms Morris—I can talk only for this year, which is how long I have been involved in this area. There has not been a formal process of meetings, however we have made contact with them and found them approachable and have kept up meetings. Officers from Treasury have come and talked to a meeting that is held every six weeks of cultural agency CEOs to talk about the MAI and its implication in the cultural area. Following that Treasury officers went to Sydney yesterday to meet with a grouping of cultural agencies and cultural lobby groups. That meeting was also attended by officers of our department. So there is no formal process as such, but within the bureaucracy it is everything from a formal IDC down to regularly staying in contact over an issue of mutual relevance. I put our meetings at that level.

Senator COONEY—Do you have meetings with Attorney-General's on this matter?

Ms Morris—No, we have not. At some stage we probably would. We have been working with our own legal area to date on this.

Senator COONEY—So the submission you have put in is based on your own thoughts, what you have got from Treasury and from your own legal department?

Ms Morris—Yes.

Senator COONEY—On page 2, about a third of the way down, it is stated that 'DOCA recognises that codification of foreign investment rules under the draft MAI has the objective of improving the decision-making environment for foreign investors'—leading to greater transparency and so on. Is it DOCA's view that what the MAI does is to codify foreign investment rules? If so, what is your concept of the codification of foreign investment rules? I had the understanding that this was an agreement between countries in the OECD to deal with investments between them. Could you explain how the MAI codifies the foreign investment rules.

Ms Morris—I think I would take that on notice. It has been a while since this was written. Some of the original thinking has long since gone.

Senator COONEY—Does that concept come from DOCA or from Treasury?

Ms Morris—It is our understanding based on meetings with Treasury to try to get a better assessment of what the MAI is about.

Senator COONEY—You say that this will lead to greater transparency for investors in Australia. I take it you mean by investors not people who live in Australia but—

Ms Morris—Foreign investors.

Senator COONEY—That this gives greater transparency for investors—do you mean as to the condition of a company? What did you mean by 'transparency' there?

Ms Morris—Transparency of the rules. An example is in the telecommunications area. I would say they are very transparent already. The government is very up-front about foreign investment and foreign ownership in the telecommunications area, as well as the licensed broadcasting area.

Senator COONEY—So what you are talking about there is the transparency of Australian companies. Is that what you are saying?

Ms Morris—The transparency of the ground rules.

Senator COONEY—How is the MAI going to lead to greater transparency if it is already there? What did you mean by that?

Ms Morris—It is already there in some areas. It may not be common across all potential investment areas in the country.

Senator COONEY—What were you thinking of, or was this again a matter you got from Treasury? Is what you are saying here something that is coming from DOCA or is it coming from Treasury?

Ms Morris—It is based on conversations with Treasury to try to get a better understanding of what the benefits of the MAI were. We were trying to typify what it had going for it basically and, within that, what our concerns were.

Mr Neil—Senator Cooney, my personal interpretation of that based on experience from, for example, going to places like Korea to talk to people about the possibilities of investing in the spectrum auctions and so on that we held recently, is that there are a lot of places where people do not know the rules, even though we do have a fairly open investment environment. But they are surprised to hear that we do not require people to have a local partner and those sorts of issues.

I read this codification to say that, to the extent that the rules are common in all those countries that sign up to the MAI, people will know that they do not have to worry about that sort of issue. They will know the range of issues they need to worry about when they are coming to invest in Australia, and the issues will be in common with other places where they invest.

Senator COONEY—There are two things. You have the rules in Australia that you have talked about and so you were able to say, when you went to Korea for example, that you did not need a second partner. There are those rules in Australia, but this seems to be talking about codification under the MAI; that there are some rules in that. Have you been able to distinguish between those two categories and can you tell me about them—the ones that are already here in Australia and the codification of the foreign investment rules that the MAI is going to introduce?

Mr Neil—You are reading rather more into that statement than I think I would.

Senator COONEY—Can I just read it to you?

DOCA recognises that codification of foreign investment rules under the draft MAI has the objective of improving the decision-making environment for foreign investors—

So it is for foreign investors. I am just reading what is written—and I do not want to be pedantic about this—but what I want to get from you is whether this is a repeat of what

Treasury is telling you, or whether you have thought through this and produced it yourself. If what you are saying is, 'This is what Treasury has told us and we are going to hit on that basis', then that is fair enough. But I want to investigate what your thoughts are; that is what I am talking about. If you simply say to me, 'No, this is what Treasury told us and we have put this down and we have gone ahead on that assumption', then that ends the matter.

Ms Morris—It is based on advice from Treasury, but, for instance, within the film area, there are relevant issues. There is a fair bit of foreign investment in film in this country; it has grown by 100 per cent in the last four years. Until a few years ago, there were not really foreign companies in Australia; there were Australian-based producers making films.

The success of our industry has meant that a lot more foreign companies are setting up here and, in terms of how we deliver assistance to the film industry, what the MAI process is forcing us as a department to do is to think through exactly who we are subsidising and what we are subsidising and for what end product. Is it the source of investment in a cultural product we are worried about; is it the actual product itself and what that looks like? So, for us, it has, I suppose, forced us to think through issues that we were going to have to address at some stage in the near future in any case.

For instance, the Film Finance Corporation has for the first time proposed in its guidelines—and they are not yet agreed but they will be meeting on them soon—that foreign owned companies not be allowed to be single investors in FFC product. They can do so in partnership with an independent Australian producer. Until a few years ago, that was not an issue for the FFC; now it is.

Senator COONEY—Your approach to this is to accept what Treasury has said, which is fair enough, and then to try to see—

Ms Morris—For us that was a starting base for analysing whether it was sensible or not to look at it.

Senator COONEY—And to see what exceptions you can bring into the system.

Ms Morris—Yes. Given that the Australian government is negotiating the MAI, what do we need exemptions on to ensure that the policies that we are meant to implement actually are implemented with the desired outcome the government wants. That is the approach we have taken in looking at this.

Senator COONEY—When you say the Australian government is negotiating, from what you have told me and from what others have told me, it sounds as though it is Treasury within the Australian government that is doing that. Am I right in saying that?

Ms Morris—Treasury is the responsible department. They have responsibility for investment issues, so they have been negotiating this within the OECD forum.

Senator COONEY—But, for example, you have not had a talk with Foreign Affairs?

Ms Morris—We may have in the past talked to DFAT about this.

Senator COONEY—Industrial relations, for example, have you spoken with them?

Ms Morris—No, we have not spoken to Workplace Relations and Small Business.

Senator COONEY—Your understanding is that, if the MAI comes on, that of itself will bring this greater transparency to investment in Australia?

Ms Morris—What we are saying is that we understand the theory behind a multilateral agreement on investment.

Senator COONEY—You say that foreign direct investment can bring significant benefits and new technology, management and know-how, work force skills, new export markets, increased employment, both to the FDI hosts and to exporters. Is that a contribution from Treasury?

Ms Morris—The original thought probably came from there, but yet again I could talk about the film industry. We have currently about $100 million a year worth of foreign investment in film. That brings huge benefits to our industry. The sorts of films that are made with foreign money, first of all, have budgets that can be anything from five to 20 times bigger than an Australian financed film; Australian casts and crew get to work on something bigger, especially the technical crew, as they get to develop skills that they cannot get on our low budget films. Actors on foreign films get paid. In many Australian productions, they forgo their fees for a potential expected share of any profits, assuming they come. So, yes, I do see benefits in the film industry, provided it is not at the expense of our local product, which to date it has not been.

Senator COONEY—Would you be alarmed if foreign companies were given advantages above and beyond what local companies are given within the country?

Ms Morris—In theory I think so, but I am not sure that that is what the MAI would actually do.

Senator COONEY—The answer I take from that is that you think it is a theoretical possibility that overseas companies would get an advantage over the local ones but, if they did, you would be unhappy about that. Am I putting your position correctly?

Ms Morris—It depends on what the advantage is. To some extent they probably already do. For instance, in film a bigger budget movie is going to be able to buy things that a small budget movie cannot. They are going to have access to shooting locations that may be more expensive. In the area that I deal with the issues are already there, and it is an issue with purchasing power. I am not sure that the MAI will change the ground rules on that.

Senator COONEY—I take it from that that you are not terribly concerned about any difference in purchasing power between the foreign and local, and you are not concerned about what MAI might do about that?

Ms Morris—We would be a lot happier if the Australian film industry were in such a healthy state and had the same purchasing power as Warner Bros or Fox. I do not think that can be addressed through the MAI.

Senator COONEY—I think you have misunderstood what I have said. If the MAI gives them further advantage, does that concern you? That is what I am asking you.

Mr Neil—It is very hard for me to see how an MAI would advantage them—

Senator COONEY—I did not ask whether the MAI did. I was saying: if the MAI resulted in giving overseas companies an advantage over the local ones, would that be of concern to the department? That is all I have asked.

Ms Morris—It would, but as Mr Neil was going to say I do not see how it would. It could be a failing on my part, I understand—

Senator COONEY—There is nothing that you can see at this stage that would be a disadvantage in this country's signing the MAI in your own area?

Ms Morris—I am talking purely about film. Provided the exemptions cover access to government subsidies for particular genres of product—

Senator COONEY—That is not what I asked you. Just taking your area: you cannot, at this moment, see any disadvantage that Australian entry into the MAI might bring to people in your area?

Ms Morris—Provided the exemptions are properly worded, no.

Senator COONEY—What you are saying then is that is so, as long as there are the proper exemptions?

Ms Morris—Yes, that is what I am saying.

Senator COONEY—You have been in government service for a while and there is no doubt you have been there while there have been changes of government, both in terms of prime ministers and in terms of the political shade of the government. Have there, in your time in the Public Service, been changes in policies?

Ms Morris—Yes.

Senator COONEY—How often has that happened?

Ms Morris—It depends on the area you work in, really.

Senator COONEY—What is the range?

Mr Neil—Define policy, define the scale of policy, define the broad direction of policy. Every time a government changes there is some change of emphasis. A change of minister can change the direction of policy in major ways sometimes.

Senator COONEY—If a policy was locked in in one particular era so that the implementation of a policy could not be changed, would that be out of character with what has been happening up until now? I would presume the answer to that is yes, because you have told me that there are changes of policy from time to time, and if you were locked in and could not change policy or the implementation of policy hereafter that would be a change of what has happened until now, would it not?

Ms Morris—You are talking about governance issues in the MAI.

Senator COONEY—Yes.

Mr Neil—I do not think the MAI is unique, I would suspect, in governments committing themselves to a direction of policy to have an open, transparent regime, et cetera.

Senator COONEY—Has Treasury told you about the standstill and rollback?

Ms Morris—Yes.

Senator COONEY—Did it tell you anything about the MAI requiring that once a foreign company goes ahead with an investment things should not change in reference to that investment? Did they tell you about that?

Ms Morris—Yes.

Senator COONEY—If there cannot be a change in the conditions that apply to a foreign investor, does that not mean that governments coming down the line, whether

there is a change in minister or a change in the colour of the government, cannot change what the situation was at the time the investment was made?

Mr Neil—Certainly there is a degree of lock in there. But none of the governments I have ever had to deal with in this country have ever adhered to any other principle that I know of that they would treat companies on that basis. To do otherwise would be counter to the public interest and the national interest anyway.

Senator COONEY—You have not in your time in the service noticed any changes to the Corporations Law?

Mr Neil—Those sorts of things change, but our governments have been firmly committed, over the period I have worked, to operating through systems of law rather than making administrative decisions about the treatment of companies and so on. I do not think we would be trying to put ourselves in the position where the prerogative of the parliament to change the law of the land—

Senator COONEY—Has Treasury told you that MAI makes no difference to what can be legislated?

Ms Morris—We have been told that it overwrites domestic legislation.

Senator COONEY—Governments can be sued if that happens.

Ms Morris—Yes.

Senator COONEY—Have they told you that?

Ms Morris—Yes. That is the intent of the agreement. That is my understanding. I suspect it is less applicable in a country like Australia than in countries that have instability in government.

Senator COONEY—I was wondering what Mr Neil was meaning when he said that he did not think it could.

Ms Morris—One concern this department has—and I think the cultural sector especially has—is the standstill and rollback provisions which would apply to exemptions listed under annex A. As we say in our submission, we would want nearly all exemptions that we have identified listed under annex B. The annex A-annex B approach has not yet been agreed by the MAI committee. This submission was written at a particular point in time based on where that committee was up to. If all our exemptions were under annex A we would have significant problems with it. It would be a very different sort of submission, and we would take a different stance.

Part of what you were saying before in your earlier question is the lock in of policy. Particularly in our portfolio—we are probably one of the departments most at the coalface with technological change—things are changing all the time. Policy has to be responsive to what is happening out there. If we do end up with a situation where there is only annex A—there are no general carve outs, and there is no annex B—we would have very strong concerns about that. This submission was written on the basis that the Australian negotiating team was pushing for an annex A-annex B approach.

Senator MURPHY—Mr Chairman, can I ask a couple of questions about that, particularly as it relates to telecommunications, which is in annex A, and your submission written in June? Were you involved in the drafting of the original exception as it relates to telecommunications?

Mr Neil—I presume that the exception was drafted on the basis of advice from us, yes.

Senator MURPHY—I asked you whether you were involved. You can take it on notice.

Mr Neil—After checking with one of my colleagues, we were involved.

Senator MURPHY—I will ask you more explicitly: did you draft it?

Mr Neil—I did not draft it personally. It was drafted within the department, yes.

Senator MURPHY—So the department drafted the original exception as it relates to telecommunications. Have you redrafted it?

Mr Neil—Since when?

ACTING CHAIR—It was recently drafted, I suspect would be the answer to that.

Mr Neil—No, we have not updated it at this point.

Senator MURPHY—Do you know when the next round of the negotiations will be with regard to exceptions?

Mr Neil—I am told October, and there will be an opportunity to update next month.

Senator MURPHY—What do you mean? Is there any plan to redraft it?

Ms Morris—Yes, there is, and at the moment it is in a state of flux.

Mr Neil—We are planning to redraft.

Senator MURPHY—What will you be including in that redraft?

Mr Neil—Based on the current circumstances regarding the Telstra bill, for example, we will try to take into account the government's latest announcements on that and whatever developments there are between now and then in terms of any legislative progress with it. Obviously it is a bit hard to be specific about that issue just now.

Senator MURPHY—There are just a couple of things that I am interested in in terms of your submission of June. You say:

Australia to seek a reservation to maintain citizenship requirements on Telstra chairperson and directors.

Why was that not in your original exception?

Mr Neil—As I read those, those were the exceptions that we have sought.

Senator MURPHY—Further, you say at the bottom of page 5 on attachment A:

Australia would seek a reservation to maintain the provision that Telstra's head office should be in Australia.

Why would that not be 'must be' in Australia or 'will be'?

Mr Neil—It means the same thing to me, Senator.

Senator MURPHY—I would suspect that it does not mean the same thing, and 'will be' in Australia and/or 'must be'—

Mr Neil—To the extent that that is a requirement of the Australian law, it means nothing other than what is in the Australian law.

Senator MURPHY—If I can also take you back to Ms Morris's statement—and I think you both agreed, with regards to the annex A-annex B exception process that, as it is currently being negotiated, there is a capacity on the one hand with annex A for them to be subject to the standstill and/or rollback or both, whereas, as it currently stands in negotiated terms—yet to be finalised, of course—annex B may be more protected. Its capacity to hold—

Ms Morris—Almost quarantined, you could say.

Senator MURPHY—Yes. Why is it then that, with telecommunications and the

case of the 35 per cent overseas equity or a foreign investment equity, et cetera, you would want it in annex A? Why would we not want it in annex B? Why would it not be fair for a future government, of any political persuasion, to argue that, as a result of the requirements of the MAI, we have to raise the level of foreign ownership?

Mr Neil—I am sorry; I missed a bit of what you said.

Senator MURPHY—As we agree, annex A is subject to rollback provisions, that is, the reduction of or removal of particular requirements that may be agreed to in the first place—I suppose I should say 'could be subject to'. Why then would it not be the case that a future government could argue, as a party to a multilateral agreement on investment, that they have to agree to a raising of the level of foreign ownership of our telecommunications industry?

Mr Neil—Our submission, as I read it, says that we are seeking to have the issues of telecommunications listed under annex B.

Senator MURPHY—Well, you might be—

Mr Neil—So I am a bit mystified by your comments.

Senator MURPHY—But you see, you drafted the original one, you were involved in the process, and they are in annex A. One would assume that you agreed to that.

Mr Neil—I can only undertake to take on notice how that particular position has come about. It is not consistent with the position that we are taking now which is that it should be in annex B.

Senator MURPHY—If at all possible, I would like to get a letter from the minister that that is the case.

Mr Neil—I will take that on notice. I cannot commit—

Senator MURPHY—I know; I understand that. And I would like to receive some information with regard to your redrafting; what you intend to put in the redrafted exception.

Ms Morris—Is that for the portfolio as a whole or for telecommunications?

Senator MURPHY—No, just on telecommunications; and when you expect to finalise that. Have you started it?

Mr Neil—Started redrafting?

Senator MURPHY—Yes.

Mr Neil—I am not aware of us doing any specific work on it just at the moment. Given the state of the MAI negotiations, we have other more pressing priorities just at the moment.

ACTING CHAIR—I want to go back to one of the things raised right at the beginning, which may have been missed through the heat of the debate. It would be very helpful to this committee if the whole of department appraisal of various programs and proposed programs was tabulated, with the effect that the MAI noted, as in the case of 'Yes, it will not affect it,' or 'Yes, it will affect it,' or 'There are questions to be answered about this'; because it really is the role of this committee, in discovering the 'What's in it for Australia?' criterion, to invite departments to participate vigorously in that approach.

Ms Morris—I thought we had agreed earlier to take that on notice.

ACTING CHAIR—Yes. I just wanted to reiterate it. Thank you very much for your time this day.

Proceedings suspended from 12.43 p.m. to 1.37 p.m.

[1.37 p.m.]

REYNOLDS, Ms Anna, National Liaison Office, Australian Conservation Foundation, PO Box 2699, Canberra, Australian Capital Territory 2601

ACTING CHAIR—Welcome. Would you like to make a brief opening statement?

Ms Reynolds—Yes. Thank you for having me and for taking an interest in the ACF submission. I presume people have some idea of our concerns. I also sent members of the committee a summarised version of the submission because I understand that you were overwhelmed with submissions. That probably came to you about six weeks ago.

Rather than go over our concerns, I would like to mention three pieces of new information that are relevant. The first one relates to consultation. The ACF has been trying to get some detailed information about the environment and Australia's position on, for example, the binding clause on environment and various other things. We have done that through the use of the Freedom of Information Act. Unfortunately, until recently we had some difficulty gaining access through the Freedom of Information Act. Although we submitted a request in January we did not really see any movement until we took Treasury to the Administrative Appeals Tribunal. I have a couple of letters that I can give you that detail the process and the time it took to get the application dealt with.

Basically Treasury began by saying that they could not process our application because our request covered 32,000 documents, which shocked us a bit. We thought, 'Oh dear, we did not mean the request to be quite that big.'

ACTING CHAIR—How many trees die as a result.

Ms Reynolds—But, as it turns out, we have a hearing in the AAT on Monday. It is good that Treasury has decided that it will process the application. We have set out a timeline to process that in the next two months. It turns out that only 200 documents fall under our request, not 32,000. That just demonstrates that it is very difficult to get more detailed information, more specific information, apart from what is publicly available unless you go down the track of pursuing an FOI.

ACF would not normally take a department to the AAT. It costs you $500 to file an application and you need to get a solicitor to help you, so it is a long way round to get fairly standard documents—a lot of them are now going to be released without exemptions—like, for example, Environment Australia's comments to Treasury on some of the environmental implications. That is not particularly controversial but it did take us about six months to pursue.

The other thing that has happened since we wrote our submission is that we have become aware from international colleagues that in late October 1997 the OECD, because

of debate and concern about the impacts of the MAI on domestic environmental laws and policies, actually decided to undertake a study across the OECD. They made a request for all negotiating parties to prepare a study which looks at how the MAI will affect domestic environmental laws and how they imagine it will affect them in the future.

We have in various consultative forums—for example, through the Department of Foreign Affairs and Trade trade and environment consultations—raised this report with both Treasury and Environment Australia. We know that Finland, the UK, France, Korea and Japan have completed their studies. They went back in October and asked their environment secretariats to do this special study. But we cannot really get a clear answer either from Treasury or Environment Australia as to whether someone is doing this, when they are going to get it finished and whether they are going to have some special consultations or perhaps seek some special legal advice to do this. Given that the OECD has made that request—it shows it believes this is an issue worth looking into in a bit more detail—we would simply like to know whether this is actually being acted on or whether it has just fallen into a black hole.

The third thing is that—again, this is from international colleagues—there is some talk that an investment liberalisation agreement may be moving into the WTO in time for the ministerials next year. It is relevant for this committee because, although your inquiries are into the MAI, the public would certainly have similar concerns if an almost exactly similar document or agreement was going to be pursued through the World Trade Organisation. I do not know what implications that has for this inquiry but it is something worth keeping an eye out for.

ACTING CHAIR—I will attempt to paraphrase some of that: essentially, you are not very happy with the process; you are feeling that there is not the openness that you would have liked.

Ms Reynolds—Until this inquiry was established, it was very difficult to get any information at all. As you know, it was only because of this inquiry that things like Australia's reservations were released and that the draft MAI agreement was available publicly. It really has been through public pressure that we have seen a bit more openness on this treaty.

I compare it with, for example, the climate change convention, which I worked on a lot last year. Everybody who had an interest in the issue—certainly people who read the newspapers—would have, in the lead-up to Kyoto, been very aware of the government's views and the material on which the government had based its position. There was a lot of debate about it. If you compare that with what was occurring on the MAI in the lead-up to when the MAI was due to be signed, which was in May, there was almost nothing and we certainly did not know much about the government's stance on the issues. It is certainly good that there is now some discussion and a bit more information but it is a shame that we have to go through the process of the Administrative Appeals Tribunal to get

information about these matters.

ACTING CHAIR—In my opening remarks this morning I suggested that we probably were not going to pursue the question of consultation too far, but I think it is important that you have outlined the difficulties you have had. I guess the centre of concern for the ACF is that such an agreement, as is proposed, would take away Australians' rights to demand of their government some time in the future—as well as probably now, you would submit—direct action on environmental matters, direct action that might prevent problems and direct action that might make a contribution to the overall world environment.

Ms Reynolds—The thrust of our submission is to set out that our concern is not necessarily that foreign investors will not be bound by domestic environment laws. We have quite clearly said that we do not necessarily agree with the people who have just said that foreign investors will not have to be bound by Australian law. Of course that is not what the MAI says or will probably lead to.

What we are concerned about, though, is the culture of litigation that the MAI provides for. We have had experience of dispute resolution processes through the World Trade Organisation. We see that there are a lot of problems with the way various protections that the MAI supposedly has for government as well simply do not stack up when it comes to international dispute resolution. I will give you an example: performance requirements. A government is meant to be able to set performance requirements if the government can say that this is necessary for protecting human health or the environment.

There are very similar clauses to that in the World Trade Organisation. A government can make a restrictive trade measure if it is a necessary step for protecting domestic health and environment. However, we have seen that time after time in the World Trade Organisation. Australia recently lost a case on salmon imports where it was restricting salmon. Also the European Union lost a case. It was trying to ban beef because of beef hormones. The whole of the European Union decided that they were concerned about that.

Senator MURPHY—The beef case has not been lost yet.

Ms Reynolds—They have lost the initial round.

Senator MURPHY—The WTO has only ever completed one case.

Ms Reynolds—You can always come back with those things, but it is all about the messages that are being sent to governments and what they will get away with. The message that is being sent to governments is that 'necessary' as defined by a WTO panel or 'necessary' as defined by some panel that is set up by the MAI will be so high that you

will have to have an ecological disaster on your hands before it is deemed to be necessary. The whole idea of precautionary principle is simply not seen as necessary. So in the MAI where there are some clauses which allow a little flexibility for governments and perhaps allow governments to challenge or to have a case when they are being sued by a corporation we are concerned that those outs for government are not strong enough. It is simply that they will not win basically if we take WTO case law as a precedent.

ACTING CHAIR—So it perverts thinking globally, acting locally. The prospect of local action is going to be diminished in this.

Ms Reynolds—Yes. The threat of litigation by corporations will, we believe, make governments more reluctant to introduce new regulation or be a bit innovative with their environmental regulation or to improve standards. It is not because they will not be able to apply those laws to foreign investors, but the MAI's investment protection and expropriation clauses will provide a vehicle for corporations unhappy with those new and innovative measures to take action. They may still get their new law or new policy through, but they will have to compensate. We think that is unfair. If a government decides that it is in the best interests of the environment or the people to improve standards, then that is fair enough.

I think most governments these days are very cautious on improving environmental regulations and we do not need to add another layer of caution. Governments already are very sensitive to industry's needs. Whenever they are introducing a new measure, they often start with a voluntary measure. Most of our greenhouse measures, for example, are voluntary. So governments around the world, because they are competing for investment, are being very careful and slow with new and innovative environment measures. When you add on top of that the potential threat of litigation, we believe they going to be even more cautious. The case that a lot of people have quoted in the submissions is the Ethyl Corporation case. Have you heard about the results of that?

ACTING CHAIR—Tell us. Bring us up to date.

Ms Reynolds—The lawsuit was settled out of court, so the $250 million challenge taken against the Canadian government failed in a sense, but the out of court settlement was still $13 million, which the Canadian government paid to the Ethyl Corporation. It might not be $250 million, they may not have won the case, but it still meant that the government had to pay out $13 million, which is a significant amount of money in anybody's book. If there is a series of those over a number of years, we can still see litigation and compensation becoming much more a part of the culture governments are going to have to deal with.

Senator MURPHY—The Ethyl case is something we have not received any concrete advice on that would indicate what was specifically involved as to why the expropriation came about. I go to the point you were making on the environment under

the WTO and potentially the MAI. Certainly the submission being put to us by Attorney-General's and various other departments would be that a government can maintain and increase laws to protect its natural environment, providing they did not apply unequally to foreign investors over domestic companies or operations. That is the case with the WTO. You can take measures under the WTO rules, or GATT rules, to protect your own environment. You may decide that you are not going to cut down trees anymore or whatever the case might be. Indeed, you can apply that to a foreign corporation or investor. I understand what you are saying, but you went on to talk about environmental measures per se and the setting of greenhouse emissions, and they are global standards rather than domestic standards. There is a bit of a difference.

Ms Reynolds—On the first point, that you can apply standards so long as they are not discriminatory, my understanding of the expropriation and investment protection clauses is that they actually are a bit looser than that, and that is our concern. If all it said was, 'Thou shalt not have one law for the foreign investors and one law for the others,' that would probably still be open to debate—

Senator MURPHY—Do you have a specific part of the investment protection you would like to discuss?

Ms Reynolds—The two I am thinking of, and we point them out in our submission, are, firstly, clause 4, investment protection, which is on page 57 of the latest draft that I have got, where it just says, very broadly:

A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory]—

there is debate over those alternatives—

measures the operation, management, maintenance, use, enjoyment of disposal of investments in its territory of investors of another Contracting Party.

That is a very broad principle, particularly depending on whether it is 'unreasonable or discriminatory' or 'unreasonable and discriminatory'. Which wins out of those? If it is 'unreasonable or discriminatory', it means that, if a corporation can make a case that they have been treated unreasonably and their investment has not been protected, perhaps they will be able to take a case that they have been treated unreasonably. It may not even have to be discriminatory if the wording comes in that it is 'unreasonable or discriminatory'.

Secondly, just after that there is the whole area of expropriation and compensation. What we are concerned about is that we will not really now how this plays out until we start seeing cases being taken and governments being asked for compensation. But it does say that if a government takes measures having the equivalent effect of expropriation—and that is a very broad definition; it might be a whole range of actions by government—a corporation may be able to argue that is in direct expropriation. Sure, the government can still take that action, but the government will still be required to pay compensation if a case can be shown that the government's actions have affected the party's enjoyment or maintenance of their property.

So it is all about what is going to be possible and played out in whatever the investment liberalisation tribunal ends up being. At the moment it looks as though it will be very similar to a WTO dispute panel. It will probably be made up of investment experts, whose main interests will be the implementation of the MAI and ensuring that investment liberalisation is happening around the world. Community groups from the nation probably will not be able to provide evidence or, if they can, they will not be able to fly to Geneva or wherever the hearing is held, even if it is somewhere in Australia. So we are concerned about how this availability of litigation and seeking compensation plays out.

Senator MURPHY—I do not disagree that some clarification needs to be given with regard to investment protection as it relates to laws as they may be applied or decided on a national basis. Do not misunderstand what I am saying, as I am no advocate of the MAI, but it says that you can apply and make domestic laws, providing that in so far as operation of industry and/or investment you apply them equally, or no less favourably, to foreign investment and industry than you would to domestic investment and industry, which is pretty much the case in the WTO. I think the only case that they have finalised is the US gasoline case. The US has obviously now put in place the mechanisms they really wanted in the first place, and I would imagine you have probably looked at some of those decisions. If you have not, they are worth looking at, particularly from an environmental point of view.

Ms Reynolds—The non-discriminatory section of the MAI is a different clause from, for example, expropriation. So that principle of non-discriminatory treatment is its own principle, and then the expropriation clauses sit in quite a separate place. So I do not think we should necessarily say that the non-discrimination clause then applies to everything else. I think the problem is that that is sitting there as one principle that governments are agreeing to, and then there is a new range of rights—such as the right to take action for expropriation or failure to protect investment—being made available under the MAI. So I do not think we should necessarily get them confused.

While we are on non-discrimination, as we said in our submission, we are not necessarily as strongly opposed to the clauses that simply say that governments will not treat foreign investors differently from domestic investors. But we did want to make the point that sometimes discrimination is okay and sometimes discrimination is actually necessary for protecting the environment or for protecting the needs of local communities.

The two examples we gave in our submission refer to developing nations in our region having a shorter tradition of investment regulation and environment regulation than we have in Australia. So, for them, it is really important when a big investor wants to come in that he have access to a very large area of natural resources, have bigger machines and newer technology to get in and extract the resources quickly—and potentially cause a lot of damage—or do more to that natural resource than locals have ever done before. They may be caught without the laws that are adequate for covering that

particular situation. In that case, it is appropriate for them to treat differently this new investor who is different from every other investor. It depends on whether the investors are different as well; maybe you do have to give them different treatment. Some parts of regional Australia may be similar in that they also want to treat foreign investors differently.

The other example we gave is where a government is dealing with a sensitive sector. Say, for example, they have some real problems with fisheries and the fishery is going to basically collapse unless they implement very restrictive regulations on the fishery. A way to make that acceptable to the local community may be to give access to the community which has depended on that fishery for hundreds of years, or maybe the local township depends on fishing. The way to both get the support of the local community that needs that fishery for the economy and also allow that fishery to be sustained into the future is to actually give preferential treatment.

We are certainly not as concerned about the whole idea of non-discrimination as we are about other areas like expropriation, but we would still like it noted that there should perhaps be some provisions for discrimination to occur in circumstances where it is necessary to protect the environment.

Senator MURPHY—With regard to investment protection—and I assume that this information is available on the net; I think that is where we got this commentary that goes with the latest version of the text of the proposed agreement—the commentary addresses the whole range of issues that have been raised, as the secretary points out, clause by clause. Have you got that blue-covered document?

Ms Reynolds—Yes.

Senator MURPHY—There are some parts of it on page 29 that relate to investment protection which are a bit thin on the ground. And I accept your argument that we need to get a broader description and understanding of these things. It says there that these things would be subject to other aspects of the agreement. I assume they mean your capacity to apply domestic laws, provided you do it equally or no less favourably, et cetera? Mind you, that does not give me a great deal of confidence. Anyway, that is something you might have a read of.

Ms Reynolds—Yes. Further down on page 57, it does say that the government does have a few options, that it can expropriate or indirectly expropriate if it is in the public interest on a non-discriminatory basis in accordance with due process of the law and accompanied by compensation.

The problem is that, while you can take the action if it is in the public interest on a non-discriminatory basis in accordance with due process of the law, you have to prove it. We think there might be debates about whether an environment measure is in the public

interest or not. Somebody could say that this environment measure is totally over the top, and it will mean that communities will have to restrict their use of this, that or the other, but it might be being taken because of a precautionary—

Senator MURPHY—Yes from a global point of view, but no from a domestic point of view. That is basically set under the WTO. A government can take whatever steps it deems necessary within its own national boundaries to protect its own national environment, but it cannot then transfer those standards or requirements to the environments of other countries.

Ms Reynolds—But when people are wanting to bring their products into your country you do want people to comply with your standards.

Senator MURPHY—That is a different matter, is it not?

Ms Reynolds—But these are the kinds of laws that we need in the—

Senator MURPHY—I understand fully what you are saying. But it is somewhat different from addressing a question that you raised from a legal point of view that an argument could be developed by a foreign investor that Australia, after being party to the Multilateral Agreement on Investment, has suddenly signed an agreement for an investment under the terms of that agreement with a company from overseas to do something and has then said, 'No, we are only going to allow you to dig one hole in the ground or chop down one tree now and so be it.' I do not think there is any capacity for the company, providing the same rules apply to domestic industry, to develop an argument that Australia does not have that sovereign right. That is one of the fundamental things that we have been looking at in terms of the sovereign right of a country to maintain standards or laws.

Ms Reynolds—They can still be taken to court.

Senator MURPHY—I do not think they can.

Ms Reynolds—That is exactly what this allows for.

Senator MURPHY—No, I do not think it does in respect of laws that are applied equally. If you say, 'The ACF can cut down six trees but the company from overseas can cut down only two a week,' then they might say that that is unfair and take you to court.

ACTING CHAIR—We will let you ponder that one. In the interests of time, I will move on to questions from Senator Bourne.

Senator BOURNE—I have to say that I read it in the same way that you do. There is so much scope that I think it would be a court—and God knows what sort of a

court—that would decide it. I have two questions. Firstly, you mentioned that you would rather see basic environmental standards—and I guess labour and all the rest of it—inside the MAI rather than have them put in as exemptions. I take it that is because of the lack of opportunity for a non-OECD country to put in exemptions. Is that what you are most concerned about there?

Ms Reynolds—I guess it is the general principle that we are concerned about. We are concerned that the MAI or something like it in the WTO will create even more problems for developing nations. We are aware that this particular clause will face more trouble if this agreement comes up in the WTO because the developing countries will be concerned about a domestic standards clause. We are also concerned about developed countries; that we are all competing, that the rhetoric of governments across the world is that the business community needs an absolutely regulation free environment or they will not be interested in investing in Australia.

In our submission we quote from some trade policy papers. There they quite clearly say that our trade policy is to get rid of regulation because it is a burden for business and that, as we all compete, governments are trying to lower standards and remove so-called red tape to attract investment. We think that is a poor outcome across the world, because you can never win; no matter how far you go, someone will go under you. It is called 'a race to the bottom'; that is one of the expressions used.

Governments are always having to compete with each other, so in some way there has to be an agreement between countries that we will not play unfair, using tactics that lead to further environmental degradation or a lowering of labour standards.

Senator BOURNE—You also mention in your submission that:

Australian negotiators should support the inclusion of a provision which expressly states that the MIA will not ordinarily over-ride international environment agreements.

So it is your understanding that there is nothing in the MAI that actually gives you a baseline for what the bottom standard would be for environment, for labour, for health. But you see, as what you think the bottom would be, the international agreements—like ILO, like environment agreements. Is that right?

Ms Reynolds—The thing about international environment agreements is that they do not have a dispute and enforcement mechanism in the way that these do. So in saying, 'We do not have to worry about environment standards in this agreement because they are covered by some UN environment program treaty,' or 'The labour scene is covered by the ILO,' the difference is that so many of the environment treaties do not have a dispute and enforcement mechanism. When it relates to domestic law, we all know that the laws that really mean something and the laws that actually achieve something in society are the ones that have enforcement and some sort of way to resolve disputes about that law.

One of our concerns is that some of the most successful international environment agreements in the past have used trade as a way to move that agreement forward. For example, with ozone depleting substances, one of the major reasons we have had success in turning that problem around is because trade bans were included as part of the Montreal protocol, meaning that you could ban substances. Now with the framework convention on climate change, they have not yet talked about enforcement. But there is a lot of concern from some countries that we cannot ban, say for example, coal from a nation that is not a signatory to this because that might be in breach of the WTO and other such agreements.

These trade and investment agreements that have all the power because they have enforcement are really having an impact on the development of equally strong environment agreements. I think the head of the World Trade Organisation even quite openly admits, if you look on their web site, that there is no counterweight to the World Trade Organisation in environment.

We want environment standards in the MAI because this is an agreement that has legal force and there will be an enforcement mechanism; that should be part of the agreement. When cases come up, when there is litigation and when lawyers are sitting around debating this point, if those principles about environment standards are not part of the law, they simply will not be able to be included in those cases; whereas, if they are, we might hang on to some environment standards which we certainly cannot expect international environment agreements to bring us because they are voluntary, there is no enforcement and they often take years to really see action occurring when compared with economic treaties.

Senator COONEY—You would almost want a right to intervene when there is a dispute between, say, a company and a government under the MAI, if it comes into operation. What would you say about a right for environmentalists—because that is your area—to intervene?

Ms Reynolds—To provide evidence?

Senator COONEY—No, just to put submissions and, in fact, run a case.

Ms Reynolds—Yes, I think that is essential for anyone working on the international level, particularly with this kind of system, whatever is set up. If it were removed from the local community, we would be creating these economic agreements in a vacuum of understanding what it actually means on the ground. I would imagine that if I were an MAI investment decision maker sitting in a room cut off in some city or country further away from the dispute, I would actually like to have an idea of what this meant on the ground so that I was not just receiving information from experts.

This is the concern: that the theory of investment liberalisation becomes so important that people forget that all these treaties are designed to achieve some

liberalisation of investment or trade, but not at all costs. Even the WTO is not meant to be free trade at all costs. Article 20 is meant to be there to allow countries to have their own domestic things. The problem is that, with a lot of these agreements, if they do not constantly have the involvement of NGOs in the negotiating halls and they do not get the information from the local people about what it means, the actual trade liberalisation becomes all that it is concerned about. Let us have trade liberalisation but let us not damage other things.

Senator COONEY—Are you saying that the MAI plus other treaties of that nature are creating—you use the phrase 'cultural litigation'—a culture of investment and that is the only thing that becomes important? That is what I understood you to be saying. You have got importance attached to trade treaties because you attach to them means of enforcing them through the courts by attaching penalties to people who transgress them, but you do not do the same sort of thing for the environment and for other matters: everybody's thinking is that trade is more important than anything else and that everything else must be subsidiary to that.

Ms Reynolds—I think that is the concern. There has been so much innovation in terms of trade liberalisation and investment liberalisation in the last 10 years that I do not think any advocates of that cause really have much to complain about, if you compare it to the movement there has been in environmental treaties. The fact that those agreements do have enforcement and that governments are constantly worried about how their actions might be challenged really has meant there has been real movement, and that is good. There are some good aspects of that but, unless these processes are opened up—and, as you say, there is other information—it goes a little too far and we do not actually consider the other impacts.

Senator COONEY—The culture of litigation—if there is a lot of litigation—favours the big, wealthy companies because they have got the resources to litigate. Indeed, I suppose some companies would probably have more resources to litigate than the country itself.

Ms Reynolds—That is right. This agreement is going to be of most use to the 500 corporations that account for 80 per cent of international investment and 70 per cent of global trade. There has been some publicity saying, 'This will be great for Australian investors wanting to get into new markets overseas. The little corner store might want to expand and this will be great for them.' I think the reality is that the people who will use this and who will have MAI lawyers and experts and an MAI department in their head office will be those 500 companies, and those companies are already having quite a lot of success just in getting access to investment through going and chatting directly with governments. If anything, that is why we say that an MAI should really provide governments across the world with some greater rights to regulate those companies who have just got so much power to move capital here, there and everywhere. Even quite conservative economists now are saying that we need to think of ways to put sand in the

wheels. That was something that was said recently by an American economist. There is actually quite a lot of talk about slowing down and having some more control over these really large corporations that are creating a lot of havoc for governments.

Senator COONEY—You would say, 'While they are out in the desert getting the sand to put in the wheels, they ought to be in the desert praying a bit.'

ACTING CHAIR—Thank you, Senator Cooney. I feel blessed to have heard that last comment. Ms Reynolds, I thank you on behalf of the committee for taking the time to appear before us today.

Senator MURPHY—Can I have a few minutes?

ACTING CHAIR—Time is a problem, Senator Murphy.

Senator MURPHY—I know. ACF, in terms of article 20 of the GATT and also NAFTA 11141, has been partly discussed and partly proposed by some parties. Does that meet your idea of a—

Ms Reynolds—The sections after the performance requirements almost mirror article 20, which says that a government may put performance requirements if the—

Senator MURPHY—So it does not?

Ms Reynolds—No, because every government these days that is using those clauses is being told 'This is not necessary.'

Senator MURPHY—Has the environmental movement established or developed any clause that they believe is sufficient to cover it?

Ms Reynolds—To tell you the truth: no. That work is probably being done by some of the international groups. They are looking across the board at how it relates to both this and the WTO as well. I can certainly get some stuff about that.

Senator MURPHY—That might be useful.

ACTING CHAIR—Thank you again.

[2.21 p.m.]

FILLING, Ms Vivienne Louise, Principal Adviser, Australian Industry Group, 214 Northbourne Avenue, MTIA House, Braddon, Australian Capital Territory 2612

ACTING CHAIR—I welcome Ms Filling, representing the Australian Industry Group, formerly the MTIA. Would you like to make a brief opening statement?

Ms Filling—Certainly. I will today be addressing the issues that MTIA raised in its submission to the inquiry. As you may be aware, since making our submission, MTIA has merged with the Australian Chamber of Manufacturers. The new body represents 11½ thousand companies throughout Australia, has $100 billion in turnover and $25 billion in exports, and employs one million Australians. The views expressed in the MTIA submission are the views of the Australian Industry Group.

In summary, the Australian Industry Group supports the broad objectives of the Multilateral Agreement on Investment: promotion of liberalisation and transparency of foreign investment regimes, protection of foreign investors and establishment of effective dispute resolution mechanisms. However, we do have concerns about the MAI in relation to: the lack to date of wide-ranging consultations between the department with carriage of the MAI and industry, the scope of the agreement, related principles and the extended withdrawal period, the implications for Australian industry development programs and policy—both current and future—and for differing state and federal industry development policies and programs, the lack of involvement of developing countries in MAI consultations, and the operation of the dispute resolution mechanism.

Despite protracted negotiations on the MAI, agreement has not been reached on a number of key issues, notably: exceptions to the coverage of the MAI; what, if any, requirements for winding back these exceptions would apply; and, what standstill requirements would apply. It is therefore not clear to the Australian Industry Group what impact the MAI would have on the ability of the Australian government to maintain and introduce industry development policies subsequent to possible accession to the agreement.

These are fundamental issues and until they are resolved the Australian Industry Group cannot support accession to the MAI. Given the complexity and far-reaching implications of the MAI, it is essential that consultations are conducted which provide industry and other interest groups with the opportunity to influence the development of the text of the MAI before negotiations are concluded. We further recommend that Australia participate in the MAI negotiations on the basis that all exceptions listed by our government are to be accepted and that this position be non-negotiable.

The MAI would introduce binding dispute resolution mechanisms. While recognising the fundamental relationship between certainty and transparency and the provision of adequate dispute resolution mechanisms, we would strongly oppose the

implementation of any dispute resolution mechanism which had the effect of removing Australian sovereignty over industry and investment policy. We would also support the inclusion in the MAI text of an explicit statement that the agreement applies to government measures. This would better enable countries to make a clear evaluation of the extent of their obligations and assess what issues need to be reserved pursuant to signing on to the MAI.

It is also of significant concern that negotiations have largely excluded developing countries which are increasingly capital importers and which generally still seek to regulate foreign direct investment in the interests of national development. The establishment of MAI has the potential to encourage significant opportunities for Australian outwards investment in some overseas markets, particularly if non-OECD countries in the Asian region were to join the MAI. We believe that the lack of engagement of the developing countries in the MAI negotiation process has been a failure of the process.

Finally, we welcome the intention of the MAI to free up the entry and temporary stay of key personnel to work in support of MAI investments. However, we recommend that MAI provisions allowing for freedom of movement by investors and key personnel do not include minimum employment requirements. We further recommend that the definition of specialist be extended to include trainers.

ACTING CHAIR—Thank you. That puts the executive summary on the record. It was suggested to DIST that they might like literally to make a checklist of government programs that they perceive may be under question as a result of MAI—some that might be without any difficulty, some that may have difficulties. Whilst I do not expect you and your organisation to have the resources that, hopefully, DIST has, it nevertheless might be interesting to see the perception of your organisation on that question as compared with what DIST comes up with. Would it be possible for you, over time, to develop a list? There is no urgency. We do not need it tomorrow, but over the next little while if it is possible for you to put something together it might be a very useful comparison.

Ms Filling—We would be pleased to put together an assessment of any programs we feel would be endangered or affected by the MAI. We believe it would be very useful for DIST to develop a similar list to enable us all to get a clearer picture of precisely what the ramifications of accession would be.

ACTING CHAIR—That also tests the third dot point of your support for the broad objectives and your significant concerns.

Senator COONEY—We got some evidence earlier this morning which suggested that while government could legislate to put local companies at a disadvantage they could not, because of MAI and the thrust of the MAI, do the same thing to overseas investors. Does your organisation have any thoughts about that?

Ms Filling—My understanding of the MAI is that you must afford foreign investors no less favourable treatment than you accord your Australian investors.

Senator COONEY—But it does not require governments to give local companies the same rights.

Ms Filling—That is right, so it could be possible that the Australian government may offer an incentive to a foreign investor to invest in Australia. I am only talking hypothetically here: if there were a particular industry sector in which we wanted to establish or develop some expertise in Australia—

Senator COONEY—IT, for example.

Ms Filling—Yes. It may very well be determined to be in the interests of Australia to attract a major player within that industry to establish in our country in order to create some expertise, transfer some technology, employ Australians and, hopefully, increase our exports. So yes, I do take your point: there is nothing in the agreement, as I read it, that requires the Australian government to provide as favourable treatment to Australian investors as they might to overseas investors.

Senator COONEY—I take it that, if a dispute arose between a local company and the Australian government, you would have to go to Australian courts. As I understand it, if there is a dispute between the Australian government and an overseas investor, they go to another court—a different tribunal.

Ms Filling—I understand there are a range of options available in the MAI. The disputing parties can choose to go to local courts, but they also have the option of going to tribunals and the various steps outlined in the MAI.

Senator COONEY—Whereas local companies have got the choice of only one range of courts, mainly the local courts?

Ms Filling—Yes, I believe that is correct.

Senator MURPHY—I find your submission rather interesting, given the submission that we received from ACCI. You seem to raise a lot of issues that I thought their members ought to have had some concerns about; likewise the Business Council of Australia, when they appeared before us in Melbourne, seemed to have the blindfold well and truly on.

ACTING CHAIR—It was a courageous submission, I thought.

Senator MURPHY—I was going to ask a somewhat cynical question: it is not a membership drive or competition, is it?

Ms Filling—Our submissions are always based on the views expressed by our members, and the submission did go through our state council processes. They are our primary policy development bodies. So it does have the support—

Senator MURPHY—Never with an eye to new membership?

Ms Filling—Always with an eye to new membership, but we would like to represent ourselves as having the interests of Australian industry at heart.

Senator MURPHY—Have you looked at the exceptions that have been put forward thus far?

Ms Filling—I have looked at the Australian government's listing of exceptions and I have attempted to summarise those in two tables in our submission. They are quite broad. In principle, we do support those exceptions as they are stated there. I note, however, that those exceptions do not at this stage include state and local government programs. So that is an issue that does need to be addressed.

Senator MURPHY—Are you happy with such things in the exceptions as, say, in the case of fishing, when it says:

. . . a foreign vessel is one that does not meet the definition of an Australian boat, that is, a boat based in Australia which is owned by an Australian resident or a corporation.

Is it not possible for it to be owned by an Australian resident or a corporation based in Australia but be owned by overseas money?

Ms Filling—Yes, I believe that is the case.

Senator MURPHY—Have you looked at any of those aspects of the exceptions or the reservations—as to whether or not there is sufficient coverage to ensure that they cannot be exploited through back-door means?

Ms Filling—I think we do have more work to do in examining the exceptions. With specific regard to the fishing industry, no, I have not looked at those at all. But I take your point.

Senator MURPHY—I was giving that as one example. There is no definition of what an Australian corporation is. How do you define it? Does percentage share of ownership come into it? What does it mean? There is no definition of those things. In terms of the definitions versus the exceptions and the reservations that you might put in place, without there being some underpinning description or explanation of how they can apply, you could get a corporation that might be owned by an overseas company, which then gives them greater access to other things than might be the case. I thought that might

be something that worried the local business community.

Ms Filling—Certainly, that is a very important issue. I note that the Department of the Treasury's submission stated that any disputes over whether or not an exception covered a particular matter should be left to the country to determine and that that particular matter should not be open to dispute. However, we would like some more clarity in the whole arrangement so that we know precisely what we are dealing with.

Senator MURPHY—That is in the exceptions, but that is not agreed to. On the face of it, I cannot see how you could ever have a multilateral agreement on investment that would be a multilateral agreement if you seek to be judge and jury with regard to yourself about all these things. What would be the point of the agreement at the end of the day?

Ms Filling—I take your point there. Also there would be the concern that signatories to the agreement would have very broad exceptions with limited detail, which would then make it very difficult for you to be able to determine precisely what exceptions are covered. I agree that we need to have a great deal more analysis of particularly what the exceptions cover.

Senator MURPHY—With regard to the exceptions take, for instance, the submissions we had this morning and answers to questions about the telecommunications industry which is, at this point, in time in annex A. That is subject to standstill and rollback or both. It would seem to me to be a bit of a worry with regard to domestic industry, particularly as it relates to local content and all of those things. Have you raised those concerns with DIST or with the Treasury or with Communications—any of the departments?

Ms Filling—At this time our primary document dealing with our concerns with the MAI is the one that has been submitted to this inquiry. We have not had the opportunity to participate in broad ranging discussions with Treasury or DIST at this time.

Senator MURPHY—Have you sought any discussions with them?

Ms Filling—We have indeed sought discussions with them.

Senator MURPHY—What responses have you received?

Ms Filling—When the issue of the multilateral agreement really started to become of concern to our membership—it is an issue that in the last eight to 10 months has become more of a concern to our membership than previously, as we are moving further down the track of negotiations—we did approach the Department of the Treasury seeking further information. To be perfectly frank, we found it difficult to obtain that information. We have since been able to put in writing to them that we wish to be consulted on this

particular issue and since that time have received a letter stating that we would be involved in negotiations or discussions on the matter, but there has been nothing further since that time.

Senator MURPHY—When was that?

Ms Filling—I believe that was in April or May.

Senator MURPHY—Would it be possible to provide a copy of that letter to the committee?

Ms Filling—Yes, I believe so.

Senator MURPHY—You have probably gone to the head department with the responsibility rather than do industry sector type approaches.

Ms Filling—My consultations have been completely with Treasury and the Department of Foreign Affairs and Trade. I have found the Department of Foreign Affairs and Trade quite helpful in providing me with a copy of the negotiating text and providing me with a briefing as to the Australian government position on the negotiating treaty. Then they directed me to the Department of the Treasury as being the department with the primary carriage for the consultations.

Senator MURPHY—Did the MTIA ever receive initial correspondence from Treasury to say that this is the road we are heading down or has there been updated correspondence with MTIA that says that this is where it is at?

Ms Filling—Not to my knowledge, no.

Senator MURPHY—Could you check that?

Ms Filling—I will see what is available. The carriage of this particular issue lies with me within the organisation. I do not believe there have been items of correspondence bringing it to our attention. It is my belief that any consultations with Treasury have been initiated by ourselves.

ACTING CHAIR—What would be your organisation's attitude if the extensive list of exemptions that we have been talking about was not actually upheld if the government does not take the position that they are non-negotiable?

Ms Filling—Our position, in principle, would be to oppose accession to the MAI.

ACTING CHAIR—If there are no further questions, thank you for your time and for appearing before this committee today.

Proceedings suspended from 2.39 p.m. to 2.50 p.m.

[2.50 p.m.]

HAMILTON, Mr Stuart Anthony, Executive Director, Australian Vice Chancellors' Committee, 1 Geils Court, Deakin, Australian Capital Territory

ACTING CHAIR—Welcome. Would you like to make a brief opening statement?

Mr Hamilton—Only the briefest. Our submission says what our position is and nothing has caused us to change it. Broadly, we have no problems in principle with an agreement such as the Multilateral Agreement on Investment. Universities consider themselves to be at the forefront of internationalising the Australian economy and it would be deeply hypocritical of us to oppose something like this where our universities are involved in making investments overseas.

There are a number of issues about which people have raised questions and about which we would want to know that there were clear answers before we could give our unequivocal support. Those are set out in the submission. They are not, in themselves, necessarily concerns if the various assurances can be believed but they are things that we would want to have satisfactorily answered. There are four issues that I have set out in the submission.

ACTING CHAIR—It would appear therefore that, while it may suit your sector, from your position, to be involved in this, you are looking at things in a broader, more community focused way.

Mr Hamilton—In the sense that we believe that higher education is critical if Australia is to take part creatively in the international community. It is in our interests to have an internationalised system. Free flow of investment is something that we would actually be perfectly relaxed about and, in fact, would support as part of that international economy, provided that those sector-specific things are looked after.

ACTING CHAIR—Those four main issues are international universities acting in competition with Australia's private universities; access to government funding by international organisations; the ability of government to impose requirements on universities and the use of funds; and the use of the reservation power. Would you like to step briefly through each of those to give us a 10- , 15- or 20-second statement on what really sums up your concerns?

Mr Hamilton—Yes. It seems to us, from reading the agreement, that there is no particular issue about public universities because the agreement would be about treating like investments in a like way, so really the comparison is a potential investment by a private university or a private company setting up a private university with the existing private universities in Australia, of which there are two: Bond University and the

University of Notre Dame. One of those is a member on whose behalf I can, to that extent, speak. That is Bond University.

The point I made is that, if they are allowed in, they should be treated exactly the same as our private universities. There are provisions about not lowering standards, which we believe would support continued regulation for quality. Right now, Australian governments have the capacity to require certain standards to be met via, for example, the act of parliament establishing a university, including a private university. To the extent they retain that power in relation to Australian universities, they should apply it to private universities. We are not necessarily saying they should retain the power, but it should be a level playing field.

ACTING CHAIR—On the side of funding, therefore, you would have some concern about the concept of funding being allocated on a per student basis, which is how I broadly understand the funding to be.

Mr Hamilton—There are a couple of broad issues there. If the government chose to put funding into the private sector—into private universities—we would, in fact, support the fact that they should. Again, they should do that on an equal basis. If the Multilateral Agreement on Investment required private universities to be treated in some preferential way or required them to be funded in a way analogous with the public university system, that would clearly be a great concern. But, as we read it, it would simply require that a private university owned overseas be treated the same as a private university in Australia.

ACTING CHAIR—Would you be concerned therefore that—in order to attract some investment in this particular sector, as would probably be the case in every sector—governments will go out of their way to say, 'If you do this, we will do that,' and that there will be a premium approach for them?

6 **Mr Hamilton**—There are two points there. Once again, they would have to apply it to the existing private universities—for example, in expansion in a private university. Secondly, we would be very concerned if funds allocated to the university sector were diverted to that, in other words, if that were done at the expense of the existing funding of the public system. If it was additional funding, obviously we might have other priorities on how that additional funding would be spent, for example, on more places at public universities or better funding of research. In fact, we would have quite a large number of priorities before they started tempting more private universities from overseas. So as a matter of priority, I think it should be a very low priority. That is not to say that it is, per se, something we would oppose; we would only oppose it as a priority.

ACTING CHAIR—Would you be concerned about a situation where a private university came into being as a result of foreign investment and that then became the place that, say, foreign nationals from that capital funding source went to, with literally the money coming in and going out the door and Australia simply being the venue for

education? Would you be concerned about a situation like that?

Mr Hamilton—That university would have to be subject to the same regulations as any other university in Australia. That would have to be a genuine—

Senator COONEY—Why do you say that? Why would that university have to be subject to the same regulations? Unless you have found it, there is nothing in this agreement that says that the overseas companies must be treated the same as Australian companies, except in so far as it would be a disadvantage. From what Mr Hardgrave was saying, there is nothing to stop an overseas university coming here and being treated better than the local universities.

Mr Hamilton—I am saying, as a matter of policy, they should not be treated better. I am making that as a policy prescription, not as a statement of law under the agreement. The agreement would stop it being treated worse, I agree. We say they should not be treated better either.

ACTING CHAIR—And if those are the terms and conditions under which they agree to come here, then so be it. We may say, 'You're going to come, these are the rules, these are the regulations; if you don't like them, don't invest.'

Mr Hamilton—That is right, yes. We certainly do not believe they ought to be tempting them in by advantageous rules.

Senator MURPHY—Could I ask a question with regard to a question Senator Cooney asked about your view—which is in your submission—that private universities, for instance, should not be able to lower the standards. But, as I understand it, the MAI in its current form, as proposed, and reservations as it relates to education, only go to public education, not to private education, in so far as standards and measures go.

Mr Hamilton—Yes. The agreement has a provision, I think in article 3, concerning standards, which, as I understand it, could be applied.

Senator MURPHY—I guess I am talking about the things that relate to reservations or exceptions that are listed in the two annexes A and B and one that relates to social services. The succinct description says of the measure:

> Australia reserves the right to adopt or maintain measures with respect to the provision of public law enforcement and correctional services and the following services to the extent they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

Not private education?

Mr Hamilton—No, but my point is that there is a separate provision which says

that, in any field, the government can act to maintain quality standards between a foreign investor and a domestic investor, and our stance is that that should be maintained. It is not an education point; it is a point about promoting quality standards, which is article 3 of the MAI. The third area we mention is imposing requirements on universities, which I think we have dealt with.

The fourth area is the use of the reservations power. To the extent the reservations are in there—for example, the reservation in relation to government grants and subsidies—we see no case at all for having a wind-back clause in that. It is not quite clear from the text that I have seen whether there is to be a commitment to rollback. Our view is that, if the government decides it needs to have a reservation in relation to government grants and subsidies, that seems to us, by its nature, something that would be an ongoing reservation and there should be no requirement for rollback.

ACTING CHAIR—What are the so-called standard criteria that apply for the establishment of a university?

Mr Hamilton—It is done at the state level, so they are not necessarily uniform across Australia. The AVCC has its own criteria which governments frequently call on. They are to do with the quality of academic standards, the quality of the supervision, the research reputation of the university, the diversity of offerings and those sorts of things. It is implemented at a state by state level rather than the federal level.

ACTING CHAIR—Are you satisfied with Treasury's assurances to you that the draft MAI would not limit the government's control, from a fiscal policy point of view, over who funds, how and on what basis it should be retained?

Mr Hamilton—All I can say is that we have been assured that that is the case. We obviously would want a clear recognition that that is the case. If there was any doubt about that, we would certainly not be supporting the framework. They have assured us the case they are reading for the document plus the scope for reservation means that we believe there is ample mechanism to make that the case.

ACTING CHAIR—On the basis of Treasury officials, the lead agency on these negotiations, fulfilling the obligation to you and to others about particular reservations that are put forward, you would be fairly happy for this thing to proceed.

Mr Hamilton—On my current understanding, particularly with the reservation about grants and subsidies, about public education and the formal provisions about the ability to regulate standards, we believe that is ample to meet our potential concerns.

ACTING CHAIR—So the other question that begs asking is this: on the basis that, on balance, the particular reservations that you and everybody else have are not met and the MAI is consigned to the dustbin of history, would you be unduly upset if we just

simply proceeded along the current path we have and tried to encourage foreign investment in your sector by other means?

Mr Hamilton—No, I would not. We are in the position of saying we are not opposed to the MAI's standards, but we are not up there in the barricades saying it has to happen. It does not have to happen from our perspective. It will not hurt us. It will make some marginal differences which might be beneficial, but it is not a big issue for us in that sense.

Senator BOURNE—I think you are absolutely right in that changing the main text is by far a better way of going about writing a treaty in the first place rather than putting in reservations. Do you have any comment on the fact that non-OECD countries cannot put in reservations? Would that have any effect on the way you would deal with it if, for instance, in this region, we had ASEAN countries assigning but unable to put in reservations? Would that make much difference to the way you would deal with those countries?

Mr Hamilton—I guess I would turn that around. To the extent that Australian universities are involved in countries of the region either by direct investment through developing campuses, as several universities are doing, for example, in Malaysia, or in other ways interacting with those other countries, we would only want to do that if we are welcome in those countries. If a country had reservations with a small 'r' or whether they put in a reservation with a big 'R', we would not be forcing ourselves upon them.

Senator BOURNE—Thank you.

Senator COONEY—Following on from what the chairman was asking relating to what you had been informed of by Treasury as to the meaning of parts of the MAI, you were happy to accept what Treasury said subject to it being more formalised. Is that your position?

Mr Hamilton—We accepted what they have said, but we believe it would be very useful if this committee independently verified what was said, which is the tone of my submission.

Senator COONEY—I am wondering who can verify it. If the issue came to a matter of dispute, it would be decided by a tribunal. Have you got any thoughts about the tribunal that is going to be set up?

Mr Hamilton—I have not really given it much thought, so no is the simple answer to your question.

Senator COONEY—Have you given any thought to the fact that an overseas university funded from overseas could go to that tribunal or to the local courts but the

universities here could go to the local courts only?

Mr Hamilton—I think there ought to be equal treatment of the two parties. I do not think that is a reasonable restriction. But I would have to say that, frankly, the issue of foreign investment in Australia to set up a private university is not really at the forefront of our thinking. The issue that we are much more focused on is distance education via the Internet and other technological means whereby major existing overseas universities can compete with our universities without setting foot in Australia. On the other hand, to go back to my opening point, so can we. The issue of actually coming to Australia and setting up campuses here is a bit of a prewar way of thinking on it. These days we are thinking much more of that sort of foreign competition, and it goes in both directions: Oxford University offering courses online in Australia; the quite well-known Phoenix University offering basic courses; and we are beginning to do it too. That is the way it is going rather than foreign investment.

Senator COONEY—Are you saying that Australian universities do not establish campuses overseas?

Mr Hamilton—Of course we do; that is happening. What I am saying is that, in terms of others coming to Australia, I think Internet delivery of services is far more the issue than people being likely to want to come to Australia and invest in setting up universities here.

Senator COONEY—Why haven't the Australian universities taken that course rather than setting up campuses overseas?

Mr Hamilton—They are doing both, actually. Different universities are pursuing all those options. There are very attractive reasons to set up some of those universities overseas where a university in a developing country is wanting to develop itself and likes to go into partnership with a developed country institution and makes it very welcome. It makes a lot of sense to have a joint Australian-Asian campus in an Asian country. That is quite different from the attitude that a United States university might find if it wanted to set up in Australia. There would be no particular advantages for us to do it, so there would not be the welcome that one of those other countries might give to an Australian campus.

Senator COONEY—So you can assure us, on behalf of the vice-chancellors, that it is unlikely that any university from overseas would try to set up a campus here.

Mr Hamilton—Well, I cannot assure you. It is not the way things are going. The way things are going is on the Internet rather than through establishing campuses in countries like Australia. I cannot rule it out, but it is not the most likely scenario.

Senator MURPHY—I have one further question with regard to our discussion

before about not lowering standards. Do you believe article 3 actually provides protection with regard to not lowering education standards?

Mr Hamilton—I will have to refresh my memory on that one. I cannot recall the exact provision. Excuse me a moment.

Senator MURPHY—If you like, you can take that on notice, and just give us a view about how you perceive that. That is probably one of the reasons that it is listed as relating to public education in the exceptions. I am not sure that article 3 provides the protection; it is just my reading of it.

Mr Hamilton—Article 3 is one that is still very much being developed. We do not know exactly where that would come out. It does depend a little on which options come out. If it did not come out to our advantage—

Senator MURPHY—I noted that it refers specifically to occupational health and safety, labour and environment standards. It makes no specific mention of education. Education is picked up in the exceptions under appendix B, as it relates to public education. This may be totally irrelevant. When you said that, I thought I had not seen any specific mention of education standards.

Mr Hamilton—No, I am talking more broadly about quality standards, such as health and safety.

Senator MURPHY—With regard to the consultative process in so far as the vice chancellors are concerned, where have you been getting information from, if you have been getting it? Has it come via Treasury?

Mr Hamilton—In terms of government, we have been talking to Treasury, but we have been consulting with our members.

Senator MURPHY—No, in terms of the department that has carriage of this process, you have been consulting with Treasury?

Mr Hamilton—We have talked to Treasury. When we first found out about this, we sought a meeting with Treasury. We had a lengthy discussion with them. We have been exchanging questions with them. But within the sector, obviously we have been consulting with our members.

Senator MURPHY—You did not find out about it from them?

Mr Hamilton—No, we approached them. They did not approach us. There was a slight implication in some of the papers which I have seen that they approached us. We approached them.

Senator COONEY—Did you get any feedback from Attorney-General's or have you had any of your own lawyers look at it?

Mr Hamilton—As I say, we have talked within the sector and consulted on the views. Nobody has come back to us with views which are against those which we have put here. In terms of formal consultation with government, it has only been with Treasury.

Senator MURPHY—DEETYA has not consulted with you at all?

Mr Hamilton—We spoke to DEETYA but they suggested that we talk to Treasury.

ACTING CHAIR—If there are no further questions, I thank you for taking the time to put together a submission and appear before the committee today. It has been very helpful.

[3.13 p.m.]

BELL, Mr Christopher Mark, Policy Manager, Finance and Micro-economic Reform, Australian Local Government Association, 8 Geils Court, Deakin, Australian Capital Territory 2600

HARTNETT, Mr Brendan Wade, Director, Policy and International Affairs, Local Government and Shires Associations of New South Wales, 215 Clarence Street, Sydney, New South Wales 2000

ACTING CHAIR—Would either or both of you like to make a brief opening statement?

Mr Bell—Yes, I would be happy to make a brief opening statement. I am here today, as I say, from the Australian Local Government Association. We are a federation of the state and territory local government associations in Australia. Through them, we represent the interests of 704 local councils throughout Australia.

We have detected a large degree of concern amongst councils and individuals within local government about the potential of the proposed Multilateral Agreement on Investment to impact on local government and communities. Today, we are reflecting the concern of our members about the interference that this potential agreement would have on local government's ability to transact its role in society. Also, we are here representing the interests of communities whose amenity might be affected by the implications of giving business activity less restricted behavioural norms to comply with.

One of our main complaints is that there has been very little or no consultation, no real consultation, with local government on the negotiation of this agreement. Our understanding of the agreement is that it certainly circumscribes the sovereignty of local government, in that local governments are affected by the implications of it. It imposes certain obligations on local government, including that local government actions are challengeable in legal tribunals which can enforce financial remedies.

We have access to published documents, of which I did supply one—which I thought was quite good—to the committee. In terms of international law, it suggests that municipal governments—particularly in Canada, but which we think would apply, by extension, in Australia—would be affected through the operation of their planning decisions, that it would impose obligations for councils to act in a way towards foreign investment which gives favour to that investment over the treatment it could mete out to domestic investors, that these things could disadvantage local communities by stopping local government from acting in a way that it otherwise would. Part of this—that I think I pointed out in the submission—has to do with the risk aversion that councils might practice, in that they might be prevented, by virtue of understanding the risks that they were subject to, from undertaking fully their responsibility towards communities.

In conclusion, the ALGA supports the recommendation of the committee in its interim report that the treaty should not be signed until there has been proper examination of not only the benefits but the costs of the agreement in terms of the ability of Australian governments to govern in the interests of Australian citizens. We also recommend that there should be some exceptions for legitimate activities of local government in the areas of planning and so on. We request, as per the recommendation of the committee, that there be some sort of consultation with local government, perhaps including education of local government as to its potential responsibilities under the agreement and the changes of behaviour that local government may have to make to comply with the agreement.

ACTING CHAIR—Mr Hartnett, would you like to say a few words?

Mr Hartnett—Yes. My purpose in being here is to represent the Local Government and Shires Association of New South Wales, to which all 177 general purpose councils belong. This issue has become of great concern to us through a number—more than 30 per cent—of our members contacting us either in writing or by telephone. We have more telephone calls logged than that. I cannot be more specific because we have not kept a record of all of them, but I can say that at least 30 per cent of our members have contacted us to express their concerns about the MAI.

It is unfortunate that until recently there has not been a great deal of information available in the public domain, so the concerns have been expressed in fairly general terms. The general expressions of concern have really been a bit emotive because there is concern in the community, but some of the concern has been whipped up by elements who themselves have an agenda to run. We would have much preferred to have had some contact with Treasury, Attorney-General's, all the other senior instrumentalities of government, to discuss in a rational way what the issues were, and then to be able to come to a decision about what were the implications for local government. But, unfortunately, that has not happened.

From our analysis of the MAI—and I emphasise this is only in a very general sense—we have concerns about the rollback provisions, the standstill principles and the fact that there is no exception proposed for local government. I do not want to go over the same ground that Mr Bell has already covered. I think the important issue is the exceptions and having local government part of that process, for all the reasons that Chris has outlined.

The New South Wales associations would commend the committee for its recommendation that there be no action to sign the treaty until it can be proven that Australia's best interests have been served. We would strongly support that. We would have grave reservations about supporting the treaty, in any case, unless there were firm guarantees given to local government, as a sphere of government, that it was part of the exceptions provisions. That is all I would like to say at this stage.

ACTING CHAIR—Thank you.

Senator BOURNE—In what sorts of areas would you be most concerned that you would need reservations for local government? Would it be in things like development applications?

Mr Hartnett—Yes, in areas like planning provisions and environmental provisions—those sorts of areas where councils need to be able to make decisions on behalf of their community and in the best interests of that community rather than in the interests of some multinational corporation whose interests might not best be serving the local community.

Senator BOURNE—For instance, if you were maintaining a road, and three local companies and an international company put in bids for its maintenance, and the international company put in the lowest bid, you would want to be able to pick one of the local ones because it is local. Is that the sort of thing?

Mr Hartnett—All things considered, a number of councils do have policies supporting local preference. That is quite legitimate, particularly in the more remote areas of Australia where local government is a very key employer in the community and needs to be able to keep that social benefit role as well.

Mr Bell—That is separate from the concern about planning laws, though. Our understanding is that the expropriation sections of the MAI would treat as expropriation any removal of rights through a change in a zoning decision or something else which would be taken by the council in the public interest to stop the mixing of incompatible activities and that sort of thing.

ACTING CHAIR—Are there any instances now where councils act differently towards a foreign sourced investor than towards a local investor, as a deliberate action? It may not be permanent policy, it may be something that occurs from time to time. In your submission you talk about some of the local government authorities in years past running sanctions against the economic activities of particular countries—South Africa, for example.

Mr Bell—I believe it is their right to do that. I do not have figures on the number of councils that do that. But I am aware that councils feel that it is within their prerogative to do that sort of thing on behalf of their community. I am also aware of some councils which have proposed to take action against the Republic of Myanmar—Burma—over some recent actions. My understanding is that these sorts of legitimate community actions would be outlawed under the agreement.

ACTING CHAIR—On the positive side of the ledger, in south-east Queensland, where I come from, just about everybody has taken it upon themselves to have a sister city relationship with someone. Taiwan, understandably, seems to be a very popular place.

A lot of that is hinged on the hope of investment. Are you suggesting that it is your advice that another country might in fact state that Taiwan is unnecessarily advantaged by a sister city relationship with a particular local government and may take exception, if you see what I mean.

Mr Bell—It is not something that I have thought about specifically but since you raise it, it is an interesting issue. These sorts of sister city relationships do not amount to much if they do not encourage some sort of mutual favouritism amongst the two cities involved. I guess those sorts of things could be open to challenge.

One of the problems with this is that we are not aware of how far the agreement necessarily goes in respect of its impact on local government, so we are not really sure what is covered and what is not. We are on an information gathering exercise as well. Naturally enough it is only one of a number of issues that we have to deal with. But it has sparked a large community interest and it is important that we do know what the implications are for those sorts of agreements.

Senator COONEY—An issue that has been raised—and I think you have raised it now, too, and I want you to expand on it—is what happens if the standstill provisions apply. You know what that is, I understand. We found out today that, if an investor comes in, he, she or it should be able to face the same situation 10 years from now as he, she or it faces now. I think that would limit flexibility in policy making. Can you see any problems with that, in that you would not be able to change your policy, no matter what council came in?

Mr Bell—It is one thing to have stability for these things but, yes, local circumstances do change and there has to be give and take in these relationships. What the agreement would do is that it would give the investor more power to challenge the decision than the council would have to ask for some sort of change in behaviour on the part of the investor. That certainly is a consideration.

As I said, we believe that changes in planning laws and so on can be interpreted as expropriation. Any sort of benefit or right which was taken away from a foreign investor—which is potentially the case in those sorts of agreements—even if they had not been using that right, even if it was just a potential right, could call the council's actions into question, and therefore circumscribe its ability to act on behalf of the community.

Senator COONEY—I take it, from the description you have given, that council is very immediate to the citizen, if you like. It collects the rubbish, plants the trees, keeps the streets clean, provides the playgrounds and what have you. Is there a variation in policy and programs from council to council? In other words, is there a need for flexibility?

Mr Bell—There may well be. If you are talking about political change between administrations or something like that or a change in emphasis, that would be the case.

Some councils also may have a policy of encouraging investment into their region for reasons and so on. Their policies are not always completely at odds with those of investors, but I take your point. I think what you are saying is that there needs to be flexibility in interpreting something and enforcing things. As I said, there may be rights that exist for an investor on paper which they have never taken up, and to take those rights away from them only creates a position of greater certainty for the community, without actually taking away anything from the investor. The investor could potentially take action on that path.

Senator COONEY—I suppose the other thing it might do as well is crush competition. If one enterprise comes into a council, the council cannot offer better conditions to a second enterprise if the first enterprise is not given the same conditions. The more I think about it, the more I think this is a savage attack on the principles of competition and efficiency—and it comes from Treasury, as I understand it.

ACTING CHAIR—I am glad that is on the record.

Mr Bell—The concept of competitive federalism is not a new one. There have been reports done which suggest this sort of competition can be a negative thing. I think councils competing amongst each other in terms of lower standards would not be a good thing, but in terms of promoting investment to benefit their region, yes, why not?

Senator COONEY—But I think if MAI comes in, you will not be able to compete, because the first enterprise will not tolerate giving a second enterprise a better go in another council.

Mr Bell—That happens in a small way with local purchasing and that sort of thing.

Senator MURPHY—When did you first find out about the MAI?

Mr Hartnett—New South Wales found out about it through reading the newspapers and surfing the Internet.

ACTING CHAIR—How long ago was that?

Mr Hartnett—Six months ago.

ACTING CHAIR—Since this committee started its work, essentially.

Mr Hartnett—Yes.

Mr Bell—We might have found out about it just slightly before that. We had correspondence, e-mails and so on from concerned councillors, the green movement and

that sort of thing who were on to us early.

Senator MURPHY—So there has been no communication, officially at least, written to the Australian Local Government Association saying, 'Look, this is the situation'?

Mr Bell—None whatsoever.

Senator MURPHY—Not from any department?

Mr Bell—No.

Senator MURPHY—Not from any state government department?

Mr Hartnett—I cannot speak for all the associations.

Senator MURPHY—No, I am talking about the national association.

Mr Bell—We have had nothing from any sphere of government or any department on this issue.

Senator MURPHY—Once you found out about it did you endeavour to speak to either the department responsible for local government or Treasury?

Mr Bell—No.

Senator MURPHY—Not only speak to them, but did you endeavour to correspond with them?

Mr Bell—We have not. One of the reasons was that, in the early days of the agreement, I did not believe that it could have some of the implications that people were saying. To be frank, local government is a very broad church and we believed that some people were exaggerating the difficulties with this or whatever. But as we learnt more about it, we became more concerned. As the breadth of concern became apparent to us, we decided that it was worthy of more action than perhaps we had been taking.

By that stage your committee was already up and running and we thought that this was a good vehicle to voice our concerns. So we did not approach the bureaucracy as such. Then we were gratified—I guess that is the correct word—that the committee found to recommend in its interim report that there be some consultation with local government if there were local government concerns. We had been expecting that consultation to arrive from the Treasury contacting us.

Senator MURPHY—One would have thought that to understand whether or not

you have any concerns a process for them would have been to write, 'This is what is proposed. Draft text is available on the Internet. Potential ramifications for you are these. Do you have any views that you wish to express?'

Mr Bell—Yes.

ACTING CHAIR—I think the committee is very focused on some of the unintended consequences that could come from this. You can read the *Hansard* when it arrives to see some of the discussion that we had earlier today. I note that you had a more suitable model of exceptions. Your words were that it should be considered and there are four points basically: local government jurisdiction—and we are not going to get into remodelling the constitution to look after you on that at this particular juncture—the impact of urban development, the functioning of the various planning powers of the state and local authorities; the incapability of investment with environmental principles, ecologically sustained development and all those sorts of things which, quite frankly, I am glad there is local government to do because at the federal government level rightly we would not be able to get down to the nuts and bolts that you guys do. What do you plan to do with these things? You put them to us. Would you also be willing to write to each of the state ministers responsible for local government? You are a creature of the state governments.

Mr Bell—We might argue with that.

ACTING CHAIR—Could I suggest—and I would like your view on it if you are willing to do it—writing to the federal minister responsible, who I think is Alex Somlyay. At least by doing that you will alert them to these things.

Mr Bell—We have been glad that this committee has had carriage of this. If you feel that there is a need for us to stir up things in a wider sphere, we would be happy to do that. We have certainly got a mandate to do that.

ACTING CHAIR—It is not my place to tell you what to do. The only reason I am suggesting on the public record is that earlier today the Attorney-General's Department produced a letter which they have sent to Treasury which is basically now a bit of a yardstick in that it is suggesting all departments should be investigating the unintended consequences of entering into any agreement, not just this one. I would submit that, if the ALGA, the New South Wales counterpart, the Queensland counterpart, et cetera were all willing to work from the grassroots up while the top is working down, we might get this matter proceeded with a little faster.

Senator MURPHY—It might be useful if you were to write to Treasury with regards to the concerns that you have had raised thus far and any questions you have because we would be interested in the response you get.

Mr Bell—Yes.

ACTING CHAIR—On top of Senator Murphy's good suggestion, if it is possible—I have a feeling that it is going to be a big task, and I do not want to burden you—could you tabulate areas of policy and areas of process that you think could be ticked or crossed as a result of what we have seen so far and what is question marked?

Mr Bell—That is what we need. We need answers to the questions. We are not even sure whether the concerns are valid, to tell the truth.

ACTING CHAIR—I think that is probably because this is dynamic, ever evolving text. There are certainly lots of challenges in this for all of us.

Mr Bell—I think it is being approached from the point of view that there are benefits in the investment and that may well be true, but it is not being approached from the point of view that there are costs in terms of our representative system of government.

Senator COONEY—Does it worry you that the Treasury is returning to the philosophy of the command economy? It is a very interesting matter, isn't it?

Mr Bell—I do not know how to answer that.

ACTING CHAIR—I think that is what the record should reflect. There are no further questions. Thank you very much for your contribution to this debate.

Mr Bell—Thank you for listening.

ACTING CHAIR—That completes our program of witnesses for today. Another hearing will take place next Friday in Sydney, which will see the completion of the current program of hearings on this matter by this committee. As I suggested this morning, we assume that the inquiry will continue in the next parliament if the 38th parliament is dissolved before this matter is completely settled. I would like to formally thank all witnesses for appearing here today and for the time and effort devoted to the preparation of submissions. Without this effort the inquiry process would be the less.

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

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

Committee adjourned at 3.36 p.m.