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JOINT COMMITTEE ON TREATIES

Reference: Treaties tabled on 16 February 1999

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JOINT COMMITTEE ON TREATIES

Monday, 8 March 1999

Members: Mr Andrew Thomson *(Chair)*, Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Laurie Ferguson, Mr Hardgrave and Mrs De-Anne Kelly and Senators Bourne, Brownhill, Coonan, Cooney, O'Chee, Reynolds and Schacht

Senators and members in attendance: Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Laurie Ferguson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Andrew Thomson and Senators Coonan, Cooney and O'Chee

Terms of reference for the inquiry:

Treaties tabled on 16 February 1999

WITNESSES

Committee met at 9.49 a.m.

ALLAN, Mr Robert James, Executive Level 2, International Policy Division, Department of Defence

BLEAKLEY, Mr Peter Ward, Director of Agreements, Defence Legal Office, Department of Defence

HELDON, Mr Kenneth John, Director, International Logistics, National Support Division, Australian Defence Headquarters, Department of Defence

HENDRICKSON, Colonel James Douglas, Director, Information Policy and Plans, Department of Defence

HODGES, Mr Christopher Robert, Principal Government Lawyer, Attorney-General's Department

LLOYD, Dr David William, Legal Officer, Directorate of Agreements, Defence Legal Office, Department of Defence

MANNING, Mr Michael Grant, Senior Legal Officer, International Branch, Criminal Division, Attorney-General's Department

MASON, Mr David Johnston, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

RITCHIE, Lieutenant Scott Martin, Legal Officer, Directorate of Agreements, Defence Legal Office, Department of Defence

ZANKER, Mr Mark Andrew, Assistant Secretary, International Trade and Environment Law Branch, Attorney-General's Department

CHAIR—Good morning, everybody. I declare the session this morning open. We are here to consider five treaties that were tabled on 16 February. Could I welcome the witnesses who are going to give evidence on the first treaty, the extradition treaty with the Republic of South Africa. For the record I should say that, although the committee does not require you to give evidence under oath, these are proceedings of the parliament in a legal sense and they warrant that same respect. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Who will open the batting?

Treaties on extradiction between Australia and the Republic of South Africa

Mr Hodges—I will if you wish, Mr Chairman.

CHAIR—Thank you.

Mr Hodges—Mr Chairman, we have before you this morning the first national interest analysis of the extradition treaty between Australia and the Republic of South Africa. The

document was prepared on 9 December 1998. It substantially follows the model treaty provisions which have been approved and well established by the parliament. The national interest analysis takes the usual form. We go through the data, the proposed binding action, which is 30 days on the date after each country has notified the other—that is the normal diplomatic process.

To bring the regulations into force in Australia, we will need to have regulations passed, which is again a normal process. The reason, Mr Chairman, for this treaty to come into force is that it is established international extradition practice that we have treaties of a bilateral nature such as this, as distinct from multilateral type treaties—for example, the 1988 Vienna Drugs Convention is a multilateral convention. This is a bilateral treaty in relation to extradition. This treaty formalises the arrangements between the two governments and sets out the understandings under which we will extradite to each other. There are no major disadvantages in relation to the treaty; it follows the normal model lines that we have had approved by the parliament on previous occasions.

We currently operate with South Africa on the basis of reciprocity—what we can do for them, they can do for us—and that is normally a sufficient basis. However, that is not binding at international law. The respective governments considered it necessary to have the bilateral treaty in place and that is the document we have before you this morning. I suppose one of the major things to draw to the committee's attention is that this is an example of a modern type of extradition treaty in the sense that it provides for what is called a record of the case. That is a detailed statement of the conduct of the alleged offences, as distinct from a prima facie case. By way of contrast, a prima facie case requires fairly detailed evidence to be provided at the point of making the extradition request—as the committee would appreciate, in terms of a complex corporate fraud, for example, there would be many bundles of documents that would be required at the prima facie case level. This, however, is a statement of the conduct alleged—'record of the case' is the shorthand way of describing it—and it really does expedite the nature of the evidence to be provided, either to Australia or by Australia, depending on whether we are seeking or gaining a person. Again, that is reflective of modern extradition practice.

Mr Manning—The one other point that you might wish to note is that this bilateral treaty is a bit unusual in that it is actually a second bite. An earlier treaty which was in largely the same terms was signed in 1995 but has never come into force. What happened is that in 1995 the South Africans did not have in their legislation provision for other than presentation of a prima facie case for purposes of extradition. Subsequently, a couple of years ago, South Africa legislated to allow for this alternative means that Mr Hodges has just mentioned, which is variously described either as 'no evidence extradition' or as 'record of the case'. The result of that is that we renegotiated the relevant provision of the treaty. It was considered that, since the treaty had not come into force, it was simpler to sign a new treaty rather than start off with a treaty and a protocol operating together. So, for simplicity's sake, we are starting again with a new treaty, even though this committee saw an earlier version of this treaty back in 1996. I think that is probably the most striking feature.

CHAIR—In article 3, there is the exception regarding political offences or prosecutions about which a party could take the view that they were being undertaken to punish someone for their race, religion or political opinion. What is the scope of that? Has it been tested? Are

there precedents in international law for disputed extraditions built around that sort of exception?

Mr Hodges—Mr Chairman, certainly in terms of Australian extradition practice we have never had to invoke that particular exception. I do believe, however, that on occasions American extradition practice does invoke such an exception. They have a number of treaties with countries where that sort of exception may be relevant. But certainly in Australia's case, I am not aware of any case where either we have invoked that sort of exception or we have had it invoked against us. Again, it is a standard form of clause which is built into all our modern extradition treaties.

CHAIR—Thank you. Any other questions?

Mr HARDGRAVE—Just a quick one, if I may. Are we harbouring people in the post-apartheid era that South Africa may be interested in for crimes they may have committed in an earlier political jurisdiction?

Mr Hodges—Mr Hardgrave, neither Mr Manning nor I are aware of such a situation. However, given the Truth and Reconciliation Commission's work at the moment, that would be a relevant consideration should such an event arise in this country.

Mrs CROSIO—Was the signing of this treaty retrospective?

Mr Hodges—No, there would not normally be retrospectivity attached to a treaty. It is prospective.

Mr BAIRD—With the Phillip Bell situation, were you able to put that in place because of the previous agreement—

Mr Hodges—Yes.

Mr Manning—That was done under the previous arrangement.

Mr BAIRD—Which was never put into law; is that right?

Mr Manning—It was put into law in Australia; otherwise it would not be possible to operate the Australian Extradition Act, but the regulations which gave effect to that arrangement were what we would describe as non-treaty regulations. They simply provided that the act applied to South Africa, subject to certain conditions, whereas in this case there will be regulations which attach a treaty and provide that the act applies to South Africa, subject to all the terms of the treaty.

Mr BAIRD—But why was it in force then in South Africa? Why were they able to use that themselves?

Mr Manning—They also had provision for operating outside a treaty if need be. They were in a position to take action at our request. They were basically in a position to provide us with assistance on a non-treaty basis. That is quite common, certainly among common

law countries, and it depends on the particular legal regime in individual countries. It is not uncommon for countries to have an arrangement whereby they can, as a matter of discretion, provide assistance in relation to extradition.

Mr BAIRD—So why do you need this if it worked before?

Mr Manning—Essentially it provides us with a guarantee that we will receive assistance, subject to those exceptions which are set out in the treaty. It gives us a greater certainty about how our requests will be dealt with. Indeed, in the Bell case there was some uncertainty about what would happen because that occurred at about the same time as the new provisions relating to no-evidence extradition were introduced in South Africa. That had the effect of creating some temporary confusion about what documentation was going to be required. Once we have a treaty in place, that gives us much greater certainty about what it is we have to produce for them, and that can be a pretty significant part of the practical exercise of getting someone extradited.

CHAIR—Excellent. Are there any further questions?

Senator COONEY—This would be a template treaty, I suppose, as all the treaties are much the same. It is just interesting that you do not have to have, as far as tax goes, a similar crime in the requested state as you do in the requesting state, which is different from all other crimes, I think. What is the reasoning behind that?

Mr Manning—I think the essential point of that is that taxation obviously varies in its modalities, or whatever you like to call them, from one country to another. In essence, the offence is failing to meet your tax obligations and it does not really matter what type of tax it is—whether it is income tax, a GST, or whatever it may be—it is essentially the same offence. So to avoid a great deal of complexity or difficulty arising simply because not all countries have the same arrangements for collecting tax, we treat it as a single class of offence.

Senator COONEY—So we would not look at the level of tax, even if it was oppressive?

Mr Manning—We might want to look at some of the other grounds for refusal—in the event that it was an oppressive level of tax for some reason, I suppose—but certainly you would not deal with it under that particular provision of the treaty. You would have to look at it in terms of whether the person was subject to some form of discrimination or injustice.

Senator COONEY—The other one I wanted to ask about was clause 3:

> This Article shall not affect any obligations which have been or shall in future be assumed by the Contracting States under any multilateral Convention.

What is the thinking behind that? I would have thought a discrete agreement might take priority over one that had wider coverage.

Mr Manning—I think the essence of that, Senator, is that there are a great many multilateral conventions that deal with fairly specific issues and the objective is to make sure

that where both parties enter into an agreement about a particular issue this bilateral treaty, which deals with the full range of offences, will not necessarily override that. In reality, practice tends to be that multilateral conventions in any case defer to bilateral extradition arrangements where the convention creates an offence of some sort. It would be pretty unusual for them not to, and I am certainly not aware of a case where they do not do that. It is just a protection in the event that both countries subsequently sign up to some international agreement which one would generally expect to be directed towards, in many cases, human rights type issues.

One other aspect that I might mention here is that there is a batch of international conventions relating to terrorism to which Australia and a large proportion of the world's countries are parties. Those treaties all provide that the offences established under those treaties are not to be regarded as political offences for the purpose of extradition arrangements. That would be one case which I think would override, or at least would determine, the content of the reference to political offences in this article.

Senator COONEY—I should have looked this up myself. Article 7 of the International Covenant on Civil and Political Rights is a basis for refusing extradition; is it not?

Mr Manning—Yes, that is right.

Senator COONEY—What is that?

Mr Hodges—It is the International Covenant on Civil and Political Rights, Senator—

Mr Manning—Torture and other cruel and inhuman punishments are the essence of it. I could not for a moment think of the particular phrase.

Senator COONEY—The only other question I had, as a matter of curiosity, is regarding article 2.1, that if the period of a sentence remaining to be served is six months or less then you will not give extradition. Is that just an issue of costs?

Mr Manning—I guess essentially it is expensive and probably unduly oppressive to go to all this effort—which may involve a person being held in custody for a lengthy time in any case in the other country—for a sentence which is almost completed. That is a standard provision in our model treaty and I think it is a pretty normal sort of provision in extradition treaties worldwide.

Senator COONEY—Thank you.

Mr ADAMS—Would you have the figures for the last five years on how many we have got back and how many they have sought from us?

Mr Manning—I certainly do not have them with me. I think we would have to take that on notice. The only one I am aware of which is a completed exercise at this stage is the Phillip Bell case, but I could not guarantee that there have not been others during that period.

Mr ADAMS—There has been an increase in immigration numbers from South Africa to Australia.

Mr Manning—As far as I am aware, there is an increase in movement between the two countries.

Mr ADAMS—Would you like to do those figures?

Mr Hodges—We will get them and present them to the Chairman.

Mr ADAMS—Thank you.

CHAIR—The same witnesses are going to help us on the next treaty so we will move to that.

Mr BAIRD—Yes.

CHAIR—Thanks for the evidence. We will consider that.

Treaty between Australia and Sweden on mutual assistance in criminal matters

CHAIR—Our next treaty is the mutual assistance in criminal matters with Sweden treaty. Mr Hodges, please proceed with the briefing.

Mr Hodges—We have before you this morning a national interest analysis on the mutual assistance in criminal matters treaty between Australia and Sweden. Again, this is based on the model which has been approved by parliament and which we have been negotiating with other jurisdictions. Mutual assistance in criminal matters relates to either the obtaining of evidence or the provision of evidence to or from a foreign jurisdiction for use in a criminal matter. For the sake of simplicity, whereas extradition gets the person or provides the person, mutual assistance gets the evidence or provides the evidence, often in an admissible form. It facilitates, therefore, criminal prosecutions for the other country. For example, if evidence is located in Australia and we get a mutual assistance request from, in this case, Sweden, the treaty sets out the basis on which that evidence can be provided. It also covers whether, if witnesses are in Australia, we can take evidence on Sweden's behalf in Australia and submit that evidence back to Sweden. We could be serving documents on Sweden's behalf in Australia. We could be locating and identifying persons, et cetera. Mutual assistance is based on what is called the principle of reciprocity, similar to extradition. That basically means that, whereas we could do that for Sweden, Sweden could similarly do that for us.

The national interest analysis takes you through the articles in the treaty. The most important ones, I suppose, are: the taking of evidence, providing of evidence, locating persons. Proceeds of crime is an interesting one which again is standard for mutual assistance treaties. It is trite, I suppose, to revisit the international nature of crime with which we are associated, in terms of fighting international crime. International criminals have no problem in crossing boundaries very quickly and the law enforcement processes which are used have to abide by the various protocols in crossing those same boundaries. A mutual assistance treaty, like extradition, enables law enforcement bodies to cross those international

boundaries, with the approval of the bilateral partner, and obtain the various evidence or witness statements, documentation or bank account information.

Again, proceeds of crime is important. Australia is sometimes seen as a safe haven for proceeds: we are, if you like, out of sight, out of mind. But in Australia we have very formidable proceeds of crime tracing provisions not only through the Proceeds of Crime Act but also through AUSTRAC. This is, of course, reflected in the treaty. With proceeds of crime we can locate, we can seize on conviction, and it is a very powerful weapon in the fight against international criminal activity.

As you see at the bottom of the first page, the obligations are the taking of evidence, providing documents, locating and identifying persons, executing search and seizures—so we would be, at Sweden's request, executing search warrants here. This, of course, is in the absence of an Australian offence, so you would be acting on behalf of a foreign government in an Australian process, and that is quite common. Similarly, on a reciprocity basis, Sweden would be acting in respect of an Australian offence in Stockholm.

The treaty does not include the execution of criminal judgments, nor the transfer of prisoners to serve sentences. That is under a different regime, called the international transfer of prisoners regime, which is currently under consideration in a different forum. On the central offices, again it is international practice to specify where these requests come through. Mutual assistance, like extradition, is government to government based; it is not agency to agency. So, whereas at a police to police level you have Interpol agencies speaking with one another, by the time it gets to requiring evidence in an admissible form, then it is government to government. So, on behalf of the Attorney-General, we would be writing to Sweden, or Sweden would be writing to us. It is government to government, as distinct from police to police or agency to agency; it is at a much more formal level.

At the middle of the page you see the exceptions to providing assistance. Again, they are following the model treaty: the military and political exception; the race, sex, religion, nationality, or political opinions exception; impairing the sovereignty, security, national interests or other essential interests of a state. The death penalty is not mentioned in this treaty because Sweden has abolished it, and so too Australia signed the second optional protocol of the ICCPR and we have also abolished the death penalty. So there is no need to expressly refer to the death penalty.

Mr BAIRD—Sorry, what was that last one, the second protocol—

Mr Hodges—It is the second optional protocol to the ICCPR, the International Convenant on Civil and Political Rights. That is the international instrument under which Australia has declared its international abhorrence of the death penalty.

Mr HARDGRAVE—What would happen if either country were to reintroduce the death penalty? Would you have to renegotiate the treaty?

Mr Hodges—The position with a reintroduction of that nature, Mr Hardgrave, would be that we have within the Mutual Assistance Act mandatory and discretionary grounds for

refusal on the basis of death penalty. Again, it would fall to the Attorney-General or his or her delegate to decide the issue at that point in time. It is a living treaty in that sense.

Mr Manning—If I could add a comment on that one. The situation has occurred where countries have reintroduced the death penalty in a case where our mutual assistance treaty did not include a provision of this sort. In that case we have so far been able to resolve the matter by an exchange of diplomatic notes indicating our interpretation of some other provision of the treaty, but there is no guarantee that would always happen. It is possible that we would have to negotiate a protocol of some sort in the event that a particular country reintroduced the death penalty.

CHAIR—Are there further questions?

Mr ADAMS—Is this treaty a new treaty in the sense that it deals with a more global trade and everything else, the global economy? Does this allow us to catch up a bit with criminals and the prosecution of criminals on a world scale?

Mr Hodges—That is correct, but when you say 'on a world scale', this is a bilateral treaty between Australia and Sweden. To the extent to which evidence would be located in Australia relevant to a Swedish offence, or vice versa, it facilitates that evidence or the witnesses—

Mr ADAMS—But is this a new way of doing it? Are we doing this a new way or is this just a normal treaty that we have done before?

Mr Hodges—No, it is not a new way. It is fairly standard in terms of following the model treaty. Committee members may have heard the expressions 'letters rogatory' or 'commissions rogatoires'. These are sometimes used. They are expressions which the European and civil law jurisdictions sometimes use. It is essentially the old method of providing mutual assistance between jurisdictions. So it is actually a court based document where one court honours the request of the other court. It is a letter rogatory—a rogatory commission, if you like. But the mutual assistance treaty, being government to government, puts it at a higher level. Hence you enhance the admissibility of the evidence which you are obtaining.

Mrs CROSIO—How many treaties in this form would we have with other countries?

Mr Hodges—We would have about 18. I could get you the exact figure but the last time I looked it was about 18. We no longer have an active program of negotiating bilateral treaties. Frankly, it is too expensive on a one to one basis. We have what is called a passive application of the Mutual Assistance Act. Subsection 7.1 of that act was amended in 1997. That enables Australia, in the absence of a treaty, to request a foreign jurisdiction to provide mutual assistance. In some cases, the foreign country would insist upon a treaty being in place in order to respond to that, but, of course, you always have the ability to exercise executive power. That is indeed what happens where you do not have a treaty. It is within the sovereign right of a country to either accept a foreign request for assistance or to decline a foreign request for assistance. So we have a passive application of the act. The treaty, however, does bring into sharp focus the nature of the bilateral relationship: exactly what

Sweden wants of us and exactly what we want of Sweden in relation to, for example, obtaining evidence, search and seizure, proceeds of crime, that sort of material.

Senator COONEY—Say you get a request for search and seizure, what material is provided for that? Let us put a practical situation forward: Sweden wants some evidence that could disappear quickly. What happens; what is the actual procedure that is gone through?

Mr Hodges—The actual process?

Senator COONEY—Yes.

Mr Hodges—What would happen is that, upon signature of the treaty, so that it is operational, we would get a request sent from what is called the 'competent authority', the Swedish Attorney-General, to our Attorney-General and that would be passed to the relevant departments. It would usually emanate from the law enforcement agency—for example, the Stockholm police—to, say, the AFP here or in Sydney. What happens is that if we get a request for search and seizure we put a submission to the Attorney-General relating to the foreign request. It is specific down to the act and the various criteria which have to be addressed under the act, and the exceptions, which are reflected here, for example: that it is not wanted for a military or political offence, that it does not infringe any sovereignty issues. We would then ask the Attorney to authorise an AFP officer, for example, to approach a magistrate to get a search warrant, as requested by the foreign jurisdiction. The magistrate would then consider the issue in accordance with the act and a search warrant may or may not be issued. Assuming that it is, the search warrant would then be executed. This is going on all the time, of course—when we go back to the office I can assure you there will be applications for search warrants ready to be put in a submission. The material would then be seized, it would then come back for certification, as required by the Swedish government. It would then be sent back to the Department of Justice in Sweden and then back to the law enforcement agency which would then consider it. The certification process can also enhance the admissibility back in Sweden.

Senator COONEY—So the magistrate would have affidavits and—

Mr Hodges—Oh, yes, a separation of powers, precisely, yes.

Senator COONEY—How quickly can that be done? Say a police officer, or an investigator I suppose it would be, in Stockholm wanted material which was about to disappear. How quickly could you get that done?

Mr Hodges—I suppose speed is a relative term, Senator, but certainly it is true that mutual assistance processes, because of their formality, are not as quick as a lot of law enforcement agencies would like. A lot of them would make the phone call and say, 'It has to be done within the next day.' But you have to get the submission to the Attorney to authorise an AFP officer to apply to a magistrate for a search warrant. The magistrate has an independent review again under the act as to whether that search warrant is going to be issued. In terms of urgency, it would normally take three or four days—we have done them like that—but occasionally you have the request that the evidence is going to disappear. In that situation, in order for the Australian police—for example, the Australian Federal Police

officer—to get a search warrant you would have to have what is called a 'domestic offence' so that they can apply on the basis of domestic law, under section 3E of the Crimes Act, to enable the Australian Federal Police officer to get evidence in relation to the domestic offence. Often, there is no domestic offence. We are operating purely at the request of the foreign country, and that is why there is the short delay. I have to say that it does not often arise as a problem, so it is not really a major issue for us thus far.

Senator COONEY—But the process is a good one in the sense that it does protect rights?

Mr Hodges—Oh, yes, there are checks and balances all the way through.

CHAIR—Are there any further questions? There is one last question from me, if I may. What is the position if, for example, there is a Swedish national in Australia, or another national where there are similar agreements on foot, and there is information in the news media, for example, that such a person has committed offences—grave ones perhaps—in that other jurisdiction, and yet no such request comes from there to nab him, so to speak. What right does Australia have to investigate a person who is suspected of committing offences in another jurisdiction? It is sort of the reverse of this, if you like. If there is no such request and yet we want to have a good look at someone, can you get search warrants and so forth on the basis of suspicions of offences that have taken place outside Australia?

Mr Hodges—The answer to your last question first, if I might, Mr Chairman, is that you cannot get a search warrant in the absence of a domestic offence. You have to be able to swear an affidavit on the basis of reasonable belief that there is an Australian offence. The Mutual Assistance Act and the various treaties under it create this exception in terms of the international request, so there might not be a domestic offence to enable the domestic search warrant to be obtained. If we became aware, for example, of a Swede in Australia and we had not yet received either an extradition request in respect of an extraditable offence or a mutual assistance request to obtain evidence, that is a matter which is handled at the law enforcement agency level, not the Attorney-General's Department as it were—although by the time it came to a formal request it would have to, as a matter of law, come through us for approval by the Attorney or the Minister for Justice and Customs.

So, as often as not, Interpol would be involved very quickly, and they of course keep monitoring functions, as you would expect, as to the fact of a Swedish criminal being active in Australia, perhaps under an alias. Interpol would very quickly be on to that in terms of alerting Interpol Stockholm. That can then give rise to a mutual assistance request after it has come through their channels.

CHAIR—I see. It is very important in cases of money laundering and things like that—

Mr Hodges—Yes.

CHAIR—For those interested in money laundering, I recommend John Le Carre's latest novel *Single and Single*; it is excellent. I read three chapters last night. Many thanks and I look forward to seeing you when another such agreement arises.

Status of forces agreement with New Zealand

CHAIR—We now have three treaties relating to defence, all with the same witnesses by the look of it. Could whoever is to open the batting on this treaty proceed and give that evidence.

Mr Bleakley—This is the second status of forces agreement within a period of weeks which has come before this committee. Last time it was noted that each of the SOFAs that Australia has concluded is different depending on the individual circumstances of the country concerned. Nevertheless, they all follow a standard scheme of coverage for visiting forces and the scheme of provisions in this New Zealand SOFA is not exceptional in comparison with the others.

For that reason, these are not template agreements. In fact this one has been under consideration for a long period of time. It was first proposed in the 1980s and was then subject to very serious consideration and development through the 1990s. We are very pleased to finally bring it before this committee. I might call on Robert Allan to say something about the relationship in general with New Zealand.

Mr Allan—Mr Chairman, Australia's longstanding and close defence relationship with New Zealand is an essential dimension of the uniquely close overall relationship between our two countries. Our respective strategic interests are closely convergent and both countries are conscious that their security is linked to the peace and stability of the Asia-Pacific region. In fact, there is no strategic partnership in our region closer than that between Australia and New Zealand.

Defence relations with New Zealand continue to be good, with open and honest communications at all levels. This can only occur when two countries are close friends and allies. The relationship is such that for the last several years Australia and New Zealand have not required diplomatic clearances to be sought for each other's naval ships and military aircraft when they visit each other's ports and airfields.

I would like to give you some idea of the movement of personnel across the Tasman. In the last 12 months there have been some 30 Australian senior executive and senior officer visits. As well, the minister at the time, Mr McLachlan, visited New Zealand as part of the annual ministerial talks. New Zealand's defence minister, Max Bradford, has been over here on three separate occasions. Seven RAN surface vessels made 10 port calls in New Zealand; four New Zealand naval vessels made nine visits to Australia. Ten Australian C130 transport aircraft, with an average crew of six, flew to New Zealand for scheduled maintenance work and our school of air navigation aircraft make regular training flights across the Tasman. New Zealand military aircraft made some 123 flights to Australia last year. Our defence force took part in seven exercises over there, with 360 personnel involved, and more than 375 New Zealand personnel were involved over here in 15 exercises.

We have something like 58 ADF personnel in short-term exchanges, called the Anzac exchange program. This is a program in which junior officers and NCOs swap places with their New Zealand counterparts for a period of up to three months. Fifty-five New Zealand personnel undertook similar exchanges with Australian units. We have 26 personnel on long-

term exchange with the New Zealand defence force and their Ministry of Defence. The corresponding number of New Zealanders here in Australia is 27. Something like 246 New Zealand defence personnel participated in various training courses here and 194 attended conferences and meetings. Mr Chairman, this is not an inclusive list but it is one to demonstrate the depth of the close relationship between our two countries.

CHAIR—Good, thank you. Are there any questions?

Mr BAIRD—Through you, Mr Chairman, I have a question about nuclear ships. I know that we do not have nuclear ships, but does this pose any issues in terms of arrangements with the US Navy and defence personnel? It has been a difference between New Zealand and us under a previous government and I am just wondering whether it would have any impact at all in terms of this agreement?

Mr Allan—Not directly on the SOFA itself. What has happened over the period of time since the mid-eighties is that there has been a break between the United States and New Zealand. Australia has sought to step in and increase the level of tempo of exercises with New Zealand, such that New Zealand's defence capabilities do not drop to an unacceptable level. There has been an increased requirement for Australia to do more with New Zealand, so consequently we are seeing more personnel here. But that is an indirect effect, not a direct effect.

Mr ADAMS—There has been a downturn in personnel and equipment in New Zealand forces over the last 10 years?

Mr Allan—Yes, there has. Since about 1990 we have seen a drop of about 30 per cent in the amount of money New Zealand has dedicated to the defence force.

Mr ADAMS—Is this the only treaty we have with New Zealand?

Mr Allan—Well, we have the ANZUS alliance, of course.

Mr ADAMS—And they are still a part of that?

Mr Allan—Yes, indeed.

Mr ADAMS—Why did we need another treaty, other than the alliance?

Mr Bleakley—This is something different in focus entirely. ANZUS is about the security relationship. This is about the more practical aspects of the visiting forces in each country. It provides various commitments which will facilitate those visiting forces. It is a far lower level and less formal practical document.

Mr ADAMS—Are we putting in more now than the New Zealanders, because they do not have the same personnel or equipment that we have?

Mr Allan—In about 1991 we made a conscious effort to develop closer defence relations with New Zealand. Last year, in late March, the two ministers invigorated those defence

relations and issued the joint statement on the future of closer defence relations. The aim is to make sure that the two defence forces can come together quickly and effectively in coalition operations.

Mr ADAMS—They can swap bullets?

Mr Allan—Yes.

Mr Bleakley—In fact, that is subject to another treaty we have which is about logistic support, and in similar terms to another one which is to be considered by this committee next.

Mr ADAMS—And Bougainville would be the latest involvement where we have worked together?

Mr Allan—Indeed. That was a very practical example of how well we do work together.

Mr Bleakley—As a general comment, we have a fairly extensive agreement and arrangements relationship with New Zealand. We have many documents. This will provide an umbrella for many activities and will take away the requirement to renegotiate all the various provisions that are in this document on each occasion we try and do a particular activity. We do have a number of treaties and non-legally binding arrangements with them, including the treaty to provide for Skyhawk flying up at Nowra and, as I mentioned, the logistic support agreement and others.

Mr ADAMS—Okay, thank you.

Mrs CROSIO—With all the arrangements that are in place and all the agreements and all the working together we have with the two countries, we have never had an agreement like this before. Why is it necessary now?

Mr Bleakley—It is a question of facilitation of those activities—

Mrs CROSIO—So, in other words, you could not facilitate them before?

Mr Bleakley—Well, it was more difficult without this agreement. Going back a long period of time, I suppose the answer would be that it was considered, due to the closeness of the relationship, that perhaps it was not necessary to put this sort of document in place. Over a period of time, however, it was considered that this would actually facilitate the relationship and it would take away the requirement, as I said, to renegotiate these things on each occasion. It is strange, because it is one of our longest and closest defence relationships, that we actually have not had a SOFA before. If you like, it has been something that, as I said, was under consideration and it is something that we now think is very much going to facilitate the relationship further. Is that a full answer to the question? It is very difficult to say exactly why. We thought the time was right now.

Mrs CROSIO—It leaves unanswered why, if everything was working well before, this is going to make it work better.

Mr Bleakley—We hope so, yes.

Mrs CROSIO—How much better; that is the point? The other thing I was concerned about, in reading this report, is the fact that you are saying it will probably take another 18 months to put it into practice.

Mr Bleakley—Yes.

Mrs CROSIO—There will be an election in New Zealand—is it not due before the end of this year? Will that change things?

Mr Allan—There has to be one this year some time, about the middle of November.

Mrs CROSIO—Will that change anything?

Mr Bleakley—We would not expect it to change anything at all, no. The time required is very much New Zealand time to put in place a new visiting forces act on their part. They have now negotiated this new agreement and they find their visiting forces legislation is not adequate to provide a backstop for it so they are developing new legislation. Our legislation, in fact, will be sufficient to cover it. It is very much waiting for New Zealand to put its laws in place.

Mr HARDGRAVE—New Zealand is a long held friend—but for a slight twist of fate it could have been a state of Australia. I think, if history serves me right, a hundred years ago they were more in favour of being part of us than Western Australia was. But despite all that, why should we be signing up to something that in itself is not supported by legislation in New Zealand?

Mr Bleakley—As a matter of practice we frequently sign agreements which require legislative change. New Zealand is confident that it will put its legislation in place. It is our practice, of course, to make sure that our legislation is in place as early as possible. In fact, for this agreement we have our legislative requirements met already. If there is a doubt about whether it is going to come about, I suppose we have some reliance on New Zealand to make good their commitments.

Mr HARDGRAVE—But essentially, even if it did not come about, because of the strength of the relationship for such a long period of time we would be feeling fairly comfortable that what currently exists would be able to continue?

Mr Bleakley—I think we are comfortable with New Zealand, yes, in terms of the relationship, the formal documented relationship. However, there has been a lot of work done on that and we stress that we believe it will facilitate all those arrangements in future. You will not need to duplicate, for example, provisions on jurisdiction and claims, and any arrangement you put in place for an exercise, or what have you, will not have to go through the trouble of actually renegotiating, if you like, those provisions.

Mr HARDGRAVE—One would imagine that in one sense this would have to be one of the easiest treaties that come before us, but I think we should at least ask questions when

there are things left hanging, like lack of legislation to back it up. We get submissions about treaties like this from people who are of the belief that no foreign troops or bases should exist on Australian soil and nor should we send our troops and establish bases on another nation's soil. Do you have a comment that we could perhaps use in our response to somebody who put a submission like that to us—on the importance of these sorts of relationships and the fact that we do allow foreign troops here to train, and likewise we are allowed to train in other places? Can you give us something for the record on that?

Mr Bleakley—I think it is quite clear that our defence force cannot act in isolation as effectively as in cooperation with other defence forces. As far as Australia is concerned, we have a very extensive defence relationship throughout the region and throughout the world. We have an alliance relationship with the US and with New Zealand and we actually have a status of forces agreement to cover US forces in Australia. There is the prospect of negotiating one to cover our forces in the US. This will be a very effective document in our further relationship with New Zealand. We have an extensive relationship with New Zealand in terms of visits, as Robert Allan has described, and this will help it considerably.

Mr HARDGRAVE—Just one question with respect to the view that is put that Australia is wholly responsible for its defence. For the record, you have pulled a face to suggest that the statement 'Australia is wholly responsible for its defence' is perhaps a strange statement—

Mr Bleakley—Oh, no, no.

Mr HARDGRAVE—But what if somebody was to carry that comment further as being a sort of sop for our own failings as a nation to defend ourselves? This is not my view. I am putting this to you to see what your response is.

Mr Bleakley—I entirely agree that Australia is responsible for its own defence within our defence relationships and, in particular, within the alliances we have. We should not make the statement that Australia is, in isolation, responsible for its own defence. We in fact do have alliance relationships and very deep defence relationships with other countries in the region, as I said, and throughout the world, and these are very important in terms of supporting Australia's defence capacity.

Mr HARDGRAVE—So, in short, we would not be signing SOFA agreements unless it was in our own interest?

Mr Bleakley—No.

Mrs CROSIO—You have mentioned the United States, which is still one way at this stage. How many other countries is Australia negotiating a status of forces agreement with?

Mr Bleakley—Well, negotiating; we are not in the process of negotiating many more, apart from the Malaysian and the New Zealand agreements which have come before this committee recently. We have in place a status of forces agreement with Singapore and one with Papua New Guinea, and, as I mentioned, the US status of forces agreement which applies here. We also have arrangements which cover some status of forces type provisions

with other countries. We have one, for example, that we are proposing with Kuwait at the present stage to cover a presence of the Australian Defence Force—

Mrs CROSIO—Are these arrangements similar to what you already have in existence with New Zealand?

Mr Bleakley—To some degree, yes. The Kuwait one is of more general application but, yes, they are non-legally binding arrangements that we propose. There are others that we have negotiated, for example, throughout the South Pacific to cover various defence cooperation activities over the years. They would have some status of forces type provisions about the exercise of jurisdiction, or claims, or entry and exit, or what have you, but we do not have formal extensive status of forces agreements like this one with those countries.

Mrs CROSIO—This is my last question, Mr Chairman. In a case like this, coming back to the 18 months of what has to be gone through in relation to the New Zealand government developing its legislation, if there were changes to be made prior to the SOFA coming into force—and things can change in 18 months time—how would you actually amend this? Do you amend it by just the inclusion of a clause, or just subtract from or add to it? As a new member on this committee, I would like to know how that is done.

Mr Bleakley—It would be very much a matter of crossing that bridge when we came to it. We would not expect that to happen at all. We have had an assurance from New Zealand that it wants the legislation up and running to cover the agreement. We would expect that that would be right as well, for the reason that the commitments in this document are not extreme, they are not exceptional, and they are reciprocal.

Mrs CROSIO—But what if you want to add to it? What if you see something else in 18 months that you want to add to the document?

Mr Bleakley—It can always be amended; there is no doubt about that. We found that even putting the agreements in place for a start, as I have indicated, is a long and involved process and we expect that any amendment would also be difficult.

Mrs CROSIO—So the whole process has to go all over again?

Mr Bleakley—We would have to negotiate the change and then go through the formal process, yes. There has been quite a bit of time put into this, as I said, and we hope that an amendment will not be required in the near future.

Senator COONEY—Following on from what Mrs Crosio and Mr Hardgrave were saying, I think what puzzles me a bit is that this seems to be a very formal sort of a relationship to be establishing with New Zealand given the informality and the cooperation that has existed up until now. It is not a state, as Mr Hardgrave has said, but there is a very close relationship. What is the position now with the decision of the courts? There was at one stage some suggestion in the commercial area that the New Zealand courts and Australian courts would almost form the same circuit.

Mr Bleakley—I am not sure on that one, Senator.

Senator COONEY—I suppose you cannot say any more than you have, but it does seem to be giving a different character to the relationship between the two countries and a more formal one.

Mr Bleakley—Yes, I appreciate that might be one perspective. The reality though has been that when we have undertaken an activity with New Zealand we have set down, and always would want to set down, provisions like this to cover the activity. I mentioned before the Skyhawk aircraft flying out of the naval air station at Nowra. In that treaty we actually had provisions similar to this but specific to that activity. Now, if we ever want to do that type of activity again, or anything else that we might want to do in terms of an exercise or even just a small contingent visiting, we really should put in place similar provisions to cover it. Therefore, this will take away the need to do that, and, hopefully, save a lot of bureaucratic work on both sides and a lot of negotiation on both sides.

Mr Allan—Could I just add that one of the practical advantages of this is that when our people under the SOFA go on a long-term exchange to New Zealand and take their whitegoods or stereos or things like that, the customs duty aspects are addressed and they can move them in without having to pay duty, whereas at the moment they are subject to some sort of duty which is a problem to them.

Mr Bleakley—That would be in relation to large numbers of people. In fact, in terms of individual exchanges, at New Zealand's request they were actually excluded from the application of this document. But, in terms of large numbers, that is quite right—visiting forces as such, rather than a visiting person.

Mr HARDGRAVE—New Zealand are going to lose revenue as a result of this agreement, are they?

Mr Bleakley—I could not comment on that. No, the document is in fact reciprocal and it is very difficult to say actually where the revenue balance is going to lie. We would expect over time that it would even out, and that is how the document has been negotiated.

Mr HARDGRAVE—Okay, thank you.

Mrs CROSIO—Do we have any figures on what the current level of personnel interchange is between New Zealand and Australia?

Mr Allan—The figures I gave before were indicative, and they do change year by year. If the major exercises were in Australia, you would expect large numbers of New Zealanders to be across here. If those exercises next time were over there, you would seem to have a large number of Australians over there. It really depends on the exercise program and just where we are in that four-year cycle.

CHAIR—Any further questions? If not, we will move to the next agreement.

Treaty on acquisition and cross-servicing with the United States of America

CHAIR—Do you want to start, Mr Bleakley?

Mr Bleakley—I actually might leave it to Mr Ken Heldon to talk about the agreement in general to start with. Mr Heldon is the person who has been the major sponsor of the agreement within Defence.

Mr Heldon—Acquisition and cross-servicing agreements are the normal vehicles through which cooperative logistics is carried out between the United States and its defence partners. As at 1998, the United States had 32 acquisition and cross-servicing agreements in place across the world, 10 under negotiation, and about another 50 nations are eligible to have such agreements with the United States. Acquisition and cross-servicing agreements are designed to facilitate the reciprocal provision of logistic support, supplies and services by defence forces; for example, things like spare parts, food, fuel, repairs and transport. They are used primarily during combined exercises of training, deployments, operations, and other cooperative efforts, and for unforeseen circumstances and exigencies. In other words, they are primarily for use in the field when forces are deployed. They are not used for routine peacetime procurement.

Acquisition and cross-servicing agreements explicitly exclude the transfer of weapon systems, major items of equipment, and the initial quantities of replacement and spare parts associated with the initial order quantity of major items. Also excluded from transfer by either party are any items the transfer of which is prohibited by its laws and regulations, such as guided weapons, naval mines and torpedoes and nuclear ammunition.

Mr Chairman, the agreement before you replaces the current acquisition and cross-servicing agreement between the government of Australia and the government of the United States which was signed on 30 August 1990 during Operation Desert Storm, perhaps more commonly known as the Gulf War, and amended on 17 January 1991 to give it broader effect. Revision of the agreement has been made necessary to cater for changes made in 1995 to US legislation to clarify the agreement's legal status as one that is legally binding in international law and to give greater ease and flexibility of use to both parties. The agreement imposes no direct costs on Australia, or the United States for that matter. Costs are only incurred when the agreement is used to purchase logistic support from the United States in the circumstances I have just described. The agreement is non-controversial in nature and it raises no new international defence policy issues. Thank you.

CHAIR—Questions?

Senator COONEY—How do we enforce these? Do you ever have a court case arising out of one of these agreements?

Mr Bleakley—No, and in fact we have provisions that matters will not be referred to any international or domestic tribunal. They all work on a cooperative basis and there is a measure for settling up, in cash or kind, and it all works very well.

Senator COONEY—So it is more or less a note of what the understanding is?

Mr Bleakley—Yes. There is quite a hierarchy of documents we have with the Americans. There is actually an agreement even above this ACSA which is the agreement concerning cooperation in defence logistic support, which came into force on 4 November

1989 and that is a very general umbrella. This one is one tier below it and below this one there are a number of implementing arrangements. The implementing arrangements are non-legally binding arrangements which are put in place to cover specific activities or on occasions are general implementing arrangements to cover particular exchanges between areas in the Australian defence organisation and the US defence organisation.

Senator COONEY—The thing that led me to ask that question is that I see that the payments are either by cash or exchange and I thought, well, this does take on aspects of a contract. Say we did not pay or they did not pay; what would happen then? The cooperation would cease?

Mr Bleakley—Well, if it ever got to that stage, but it never does get to that stage for the reason that it is in both countries' interests just to maintain the cooperation. Records are kept and at the end of an activity the settling up occurs.

Mr ADAMS—There is one here on the costs:

Australia is responsible for the payment of trunk lease charges resulting from the carriage of United States communications traffic to New Zealand via Australia, . . .

So I guess we pick up the cost of that. Do we get anything back from New Zealand?

Mr Bleakley—I think that might in fact be in the next agreement.

Mr ADAMS—The bilateral agreement?

Mr Bleakley—These are a little confusing. We have two which do relate to logistic support and that is more specifically a communications one. This is the more general logistic support agreement.

Mr BAIRD—It appears to me that here we are in 1999, having been through several wars with the United States and we are now doing this. How come we have waited until this time to put such a treaty in place? What real difference, in practical terms, does it make?

Mr Bleakley—I am happy to talk in very general terms—

Mr BAIRD—I would like specific terms.

Mr Bleakley—All right. The US requirements change over time for the exchange of logistic support and to a large degree we are responding to US formal requirements for documentation to actually play in the game of exchanging logistic support with them.

Mr ADAMS—They are trying to watch their costs.

Mrs CROSIO—And they also want to have a document where, if they have to move, they want to move like yesterday, not tomorrow.

Mr HARDGRAVE—Is this more of a bureaucratic thing though? I always worry about all of these treaties and agreements being some departmental official's place in the frequent flyer points sun.

CHAIR—Cynic.

Mr BAIRD—Blame the bureaucrat.

Mr HARDGRAVE—I am a dreadful cynic, yes, I am. Well, is it? What is the pressure to bring this about? Mr Baird has rightly said that we have stood beside the Americans—they will have us believe that they have stood in front of us, but I think they push us forward—in most wars, and yet now we have to have this document.

Mr Bleakley—As an example to demonstrate the requirement, during the Gulf War, if we had not had this, logistical support exchanges with the US would have been very difficult indeed—in fact, may not have been there. It is a formal requirement and also a document which facilitates the exchanges. It actually provides mechanisms for payment and provides a framework for having the exchange take place.

Mr HARDGRAVE—Are you telling me we could not fight a war unless the paperwork is right?

Mr Bleakley—No, I am not telling you that at all. I am telling you that the paperwork, nevertheless, helps in terms of recovering costs.

Mr BAIRD—Did you say that this was what was in place during the Gulf War?

Mr Bleakley—No, the earlier document in fact was not a treaty. It was negotiated as being a document—binding, we understood—in US domestic law. That understanding, unfortunately, was not shared by the US at the time and consequently this one has been clarified as being a treaty. This will be the new one to replace that one.

Mrs CROSIO—Why was the 10-year period set with this agreement?

Mr Bleakley—That is very much a figure that came with the US document or the US draft and it is standard—

Mrs CROSIO—So it was standard or their demand on us?

Mr Bleakley—It was standard in terms of their drafting and we had no difficulty with it. It was very much their request.

Mrs CROSIO—It also says explicitly—and I think it was referred to in the evidence—that this 1998 agreement excludes the transfer of weapons and major items of equipment, et cetera. Was this added to address a potential or existing problem?

Mr Heldon—The answer to that is no. That is standard in all of the 30-odd agreements which the United States has around the world, the 10 under negotiation, and the rest that will

come along. That same provision exists. It is a United States requirement to say that under US law they are not allowed to transfer or sell equipment under this form of agreement to any country.

Senator COONAN—Can I just ask one question. Are there some schedules of what is being referred to by weapons systems, major items of equipment, and initial quantities of replacement and spare parts associated with the initial order quantity of major items of organisational equipment? Is that interpreted somewhere?

Mr Heldon—No, it is not, but it is fairly clear to the people who are using the agreement. It has to be an agreement on both sides: one country has to want to buy and the other country has to want to sell. It is an agreement put in place for logistic services, transportation, spare parts and the like. For major items, this is not the agreement to be used.

Senator COONAN—So those in the know would know and those who do not will not?

Mrs CROSIO—Can I just follow up Senator Coonan's question a bit further. Reading that page, implementing arrangements, it says, 'A written supplementary arrangement'.

Mr Bleakley—Yes.

Mrs CROSIO—So it is in writing?

Mr Bleakley—The implementing arrangements are in writing, yes. Perhaps just to follow on from there, many of these provisions rely on a basic understanding of what is logistic support and what is required and the way these things work, so it is not necessary to go into great detail in describing those things. If you like, yes, I suppose those people who would be using logistics support and supplying it would have a common understanding of what might fall within the realm of logistic support. But at the same time, it is not being restrictive. If there is something which can fall within the agreement and both sides agree it can be provided as logistic support, well and good.

Mrs CROSIO—I think with that answer I am getting Mr Hardgrave's cynicism.

Mr HARDGRAVE—Sorry, it is catching.

Mr Bleakley—In terms of requiring the paperwork to fight a war: no, you do not need it, but I suppose it helps.

Mr BAIRD—Can we follow this through. How many people are actually involved in negotiating this agreement with the US from the Australian bureaucrats; how many people are employed doing this?

Mr Bleakley—Well, there would have been Mr Heldon, who had the main carriage, and it would have been cleared through the legal area, which is my area, and cleared through the Department of Foreign Affairs and Trade legal area and the Attorney-General's legal area.

Mr BAIRD—Does this include travelling between here and Washington?

Mr Bleakley—No, no trips were involved at all, as I understand.

Mr Heldon—No, none at all.

Mr Bleakley—I think it was all done by electronic communications—by email largely these days.

Mr Heldon—May I add to that and say there really is not a lot of negotiation to take place. This is a standard acquisition and cross-servicing agreement. It is primarily a United States document and it is used between the United States and all countries with whom they see the need to have reciprocal support. There was not a lot of negotiation in that sense. Certainly, it was all done from Australia and from the United States. There was no travel involved.

Senator COONAN—Has anything actually changed from the document that was submitted by the States? Was anything actually varied or negotiated at all?

Mrs CROSIO—Or was anything permitted to be changed?

Mr Heldon—The major difference between this agreement and those with other countries, as I understand it, is the reference in it to the cooperative defence logistic support agreement, the broad agreement which Mr Bleakley referred to earlier on. That therefore links it to the ANZUS treaty. Not all countries have a treaty status cooperative logistic support agreement. Not all countries have something like ANZUS with the United States. So we do have a rather special relationship with the United States.

Mr BAIRD—Through you, Mr Chairman, that does not answer the question. The question was: was it altered substantially and in what areas was it altered?

Mr Bleakley—No, it was not altered substantially. It was altered at the edges and in some areas and, as was mentioned by Mr Heldon, in terms of reference to the earlier umbrella agreement. It is certainly not the case that we agree with all the drafts the US provides us, if that is—

Senator COONAN—No, my point really was that this virtually, in a civil contract sense, is an adhesion type contract where there is not much opportunity to vary it. You take it on these terms more or less. You modify it slightly to take ANZUS into account and that is it, is it not?

Mr Bleakley—Yes, to a large degree.

Senator COONAN—That is all right. I just wanted to clear that.

CHAIR—Can I ask: why do you exclude specifically this list of weapons and various ammunition or munitions? Is there another agreement specifically covering transfer or handling of those sorts of equipment or ordnance?

Mr Heldon—No, there is not. They are normally commercial arrangements between the two countries. No, there is no agreement which covers those types of items. This specifically refers to logistic support, supplies and services, as listed within the document itself. It assists forces to cooperate in the field by providing transportation to each other, fuel to each other, spare parts to each other—

Mr HARDGRAVE—Is that not what quartermasters are for?

CHAIR—So this concerns food, water, billeting, transportation, petroleum, oils, lubricants, clothing, ammunition, and yet there is a whole list of things, weapons systems and things, that are not eligible for transfer. How would you possibly conduct military operations with all the things that are listed within it but not with weapons systems and guidance kits for bombs and chaff dispensers and so forth? What do you do with them?

Mr Bleakley—There is a difference, presumably, between what assets you bring to a conflict and what support can be provided to support those assets. This agreement is about the support, not the actual purchasing or acquiring of new weapon systems when you are there. It is about logistic support which is about maintaining the operations or the assets when you need to.

CHAIR—So when it says 'not eligible for transfer', that is the operative word, is it?

Mr Bleakley—Yes.

CHAIR—We mean 'transfer' as in they give us certain things for our use.

Mr Bleakley—Exactly.

CHAIR—If, for example, they bring, whether it is a naval vessel or some sort of land based vehicle or an aircraft that has weapons systems and so forth in it, and they need some maintenance, we can do that, can we, under this?

Mr Bleakley—If we have the capacity in terms of maintenance, yes. It is the same with the US in relation to us and our systems. Maintenance services is an element of logistic support, certainly.

CHAIR—Thank you. That makes it clear. Are there further questions?

Senator O'CHEE—Who gets the commercial advantage under this agreement?

Mr Heldon—There is none. There are two ways essentially that a transfer can take place: the first is via cash payment, and the second way is by what is called exchange in kind. The latter means an equal value exchange. For example, if two ships are operating together exchanging fuel, then providing the cost of the fuel is similar; the fact that one ship gives fuel to another ship and vice versa can be covered without payment of cash. Also, equal value exchange covers different sorts of spares, but with equal value. But they are more the exception. Normally it is a matter of agreeing to buy and sell items and in both cases each party recovers the full cost of those items.

Senator O'CHEE—I understand that. If we did not, I would be very worried. My question is: who gets the commercial advantage? In other words, who is doing most of the buying and who is doing most of the selling?

Mr Heldon—That would be hard to answer. I think it is more likely that the United States has spent more in Australia than vice versa. The most recent instance of this being used was in 1997 when we purchased crowd control equipment from a United States vessel in the Pacific for potential use. It was put in place also for the exercise Tandem Thrust when United States marines were operating in Australia. I do not know the figures for how much they then purchased from Australia.

Senator O'CHEE—It just strikes me as rather peculiar that you might actually negotiate a treaty with somebody about acquisition of goods and services without first acquainting yourself with which way the money is going to flow. If I was negotiating an agreement with anybody, I would want to know which way the money flows before I sit down and write the agreement.

Mr Bleakley—Which way the money flows is obviously very important. However, in the defence context obtaining logistic support for an operation is more important and this agreement is put in place to facilitate logistic support operation so that we can operate with that support where we may need to. From a defence point of view, that is the higher priority. It is very difficult over any given period of time to say where the flow of funds may be. Once more, it is reciprocal in its terms and its terms do not provide for a profit to be made by either side, so consequently we would imagine over the fullness of time there may be some evening out, but the primary purpose in putting the agreement in place is to actually secure the logistic support cooperation.

Senator O'CHEE—What changes are made to Chapter 138, Title 10, of the US Code of Provisions (Subchapter I—Acquisition and Cross-servicing Agreements)?

Mr Bleakley—We will perhaps take that on notice.

Senator O'CHEE—The national interest analysis says this is principally done to reflect changes in US law. I was rather hoping you might know what those changes were.

Mr Bleakley—Once more, we will take it on notice if we may, Senator.

CHAIR—Are there further questions? We will move on to the final agreement.

Defence communications services agreement with the United States

CHAIR—Mr Bleakley.

Mr Bleakley—Just as a brief introduction, essentially this is a technical agreement concerning some aspects of defence communications cooperation. I think the workings are fairly well set out in the NIA. I will call on Colonel Hendrickson to say something about the agreement in general.

Col. Hendrickson—The agreement replaces an agreement that was in place for five years which expired a while back. The agreement is about the interconnection of messaging systems between Australia and the US primarily for the exchange of information on a wide range of issues, but basically defence messaging in support of intelligence, indications and warnings, planning and preparation for operations and exercises, and the day to day routine administration of each other's elements in the other country. The agreement has been in place since 1982 and in 1989 the US sought to formalise the arrangements in an agreement, which expired at the end of 1994. There has been significant difficulty in getting the agreement reaffirmed. We had a change of government. We had the Defence Reform Program which changed our organisation and therefore required some changes to the terminology of the agreement which, on the face of it, would have seemed to be pretty simple but in reality turned out to be most difficult, and then we had some reorganisation in the US arena as well.

If I can make some statement in mitigation of the US, having served there as a liaison officer, the US is a bureaucratic behemoth—they are a rules based society and individuals in it are reluctant to act without cover. The gentlemen's agreement approach that we have alluded to in the previous treaties that we have spoken about is no longer satisfactory for the US side and they are keen to have some sort of formal cover to enter into actions that cross national boundaries. The agreement before you provides the division of responsibilities for the interconnection of that messaging system and the passage of data. As Peter says, it is largely a technical agreement on how we actually do that.

Mr ADAMS—Is the US getting tighter with its money? Is there a sort of cranking in?

Col. Hendrickson—I can give you my opinion on that, but that does not impact on this agreement. Yes, I have seen a tightening of finances, as financial realities extend—

Mr BAIRD—Through you, Mr Chairman, is it substantially different from the previous agreement? Obviously it is now bilateral instead of trilateral, but are there any substantial differences the agreement reflects?

Col. Hendrickson—From a working point of view there is no change: we are doing business the way we always have. I am mindful that I am flanked by the legal profession, but I am astounded at the difficulty it took, particularly on the US side. We would change one word, for instance 'corporate information program' to 'defence information systems group'. That would seem to be a pretty simple change and it took months to get that agreed.

Mr BAIRD—They have a lot more lawyers in the United States than we have. So the changes are relatively minor?

Col. Hendrickson—Yes.

Mr Bleakley—The previous one was bilateral as well.

Mr BAIRD—Oh, was it?

Mr Bleakley—Yes.

Mr BAIRD—I thought it included New Zealand.

Col. Hendrickson—It included New Zealand as a service. Part of the cost sharing arrangement is that the US pays for the trans-Pacific link, for messaging and data to travel to Australia. The link actually links the US, Australia and New Zealand together in a data sharing arrangement. The deal is that the US pays for the trans-Pacific link and we pay for the trans-Tasman link. The New Zealanders get something for free but I am sure there is some other rub we get off them; maybe we get extra lamb or something.

Senator COONAN—Do we not have to pay for cross-sharing for police services for spare capacity on trans-Pacific communication there? I am just trying to get a feel here for how this cross-sharing works.

Col. Hendrickson—Basically, we pay for a basic service, which is dimensioned to 1,500 messages a day, each about half a page, each way, with the ability to go to double that for intense periods. The spare capacity, which is the provision for operations or a crisis, can be used for other purposes. When it is, it is user pays.

Mr ADAMS—That is an advertising opportunity, is it?

Col. Hendrickson—Yes, if you like. If we had an exercise for which we wanted to use spare capacity, if there were any available, then we would pay for that extra capacity.

Mr ADAMS—So the trunk lease charges resulting from the carriage of United States communications traffic to New Zealand via Australia are paid for by Australia?

Col. Hendrickson—Yes.

Mr ADAMS—That would be a bit of a leverage there on our side, would it not?

Col. Hendrickson—I am sure it is; I am sure Peter uses that for all it is worth when he is dealing with it. I am not aware of what the quid pro quo is for us doing that for New Zealand.

CHAIR—What is the budget for such communications?

Col. Hendrickson—About $10,000.

CHAIR—Do you make any reference to the cost of civil telecommunications? For example, do you measure it in data cents per minute or whatever it is charged by Telstra?

Col. Hendrickson—They are commercial circuits that we use, albeit with security services overlaid on them. The technical term is a leased line. It is a data pipe of a certain size that we buy and that is about $10,000 a year; you buy a certain size pipe.

CHAIR—This is a fibre-optic cable?

Col. Hendrickson—No, it is a variety of means: cable, HF transmission and satellite transmission.

CHAIR—Any other questions?

Senator COONEY—Without putting words in your mouth, I can see now the basis of your amazement about the time it took to get the agreement bedded down, if $10,000 was the amount involved.

Mr Bleakley—I might say, Senator, from our perspective the original agreement was not one that we considered needed to be a treaty, but from the US perspective they required it to be binding in international law.

Senator COONEY—I take it from what Colonel Hendrickson said that it was the United States that had the problems.

Mr Bleakley—Yes.

Senator COONEY—All I am saying is that I can understand his amazement: $10,000 would not seem to be the biggest item in the American budget. That is what I am saying.

Mr Bleakley—Yes.

Mr ADAMS—I have some concerns regarding the responsibility. Is Australia responsible for the pathways pertaining to the Australian embassy to the Pentagon hardline? I guess the concern is why we pick up the total cost?

Col. Hendrickson—That is the cost of a leased line from the embassy in Washington to the Pentagon in Arlington.

Mr ADAMS—So we want it?

Col. Hendrickson—The history of it is that we actually had a link from the Pentagon to the embassy before we had the other piece of the puzzle, the service which was the trans-Pacific link. That was already in place; we were already paying for it, so I presume when they wrote the agreement we did not say, 'We will pick up the tab for that.' It was already in existence and we had established it; I presume that is why it was written that way.

CHAIR—Many thanks for your evidence this morning. That concludes our hearing.

Committee adjourned at 11.18 a.m.