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JOINT COMMITTEE ON TREATIES

Reference: Review of 10 proposed treaty actions tabled on 11 August 1999

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JOINT COMMITTEE ON TREATIES

Monday, 23 August 1999

Members: Mr Andrew Thomson *(Chair)*, Senator Cooney *(Deputy Chair)*, Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly, Mr Wilkie and Senators Bourne, Coonan, Ludwig, Mason, Schacht and Tchen

Senators and members in attendance: Mr Adams, Mr Baird, Mr Bartlett, Mrs Crosio, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly, Mr Andrew Thomson, Mr Wilkie and Senators Cooney, Ludwig, Mason and Tchen.

Terms of reference for the inquiry:

Review of 10 proposed treaty actions tabled on 11 August 1999

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Committee met at 9.46 a.m.

CHAIR—I declare open this meeting of the Joint Committee on Treaties. On 11 August, a number of proposed treaty actions were tabled in both houses of parliament. Today, as part of our normal schedule of reviews, we are going to look at four of them: the proposed termination of the Social Security Agreement with the United Kingdom, the proposed agreement to amend the Scientific and Technical Cooperation Agreement with the European Community, the proposed fourth amendment to the Articles of Agreement of the International Monetary Fund and the proposed agreement with the United States on mutual antitrust enforcement assistance.

We propose to have hearings next week, on Monday, 30 August, on the second group of treaty actions tabled on 11 August. For the *Hansard* record I will name them: the proposed accession to the Food Aid Convention 1999, the proposed acceptance of a new, revised text of the international plant protection convention, a proposed double tax agreement between Australia and South Africa, proposed amendments to the Double Taxation Agreement between Australia and Malaysia and Australia's accedence to the Agreement Concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles.

I now call representatives of the Department of Family and Community Services, as part of our review of the proposed termination of the Social Security Agreement with the United Kingdom.

GREGG, Mr Peter, Director, West Europe Section, Americas and Europe Division, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Organisations and Legal Division, Department of Foreign Affairs and Trade

HOPE, Mr Graeme, Executive Director, Corporate Facilities and Services, Department of Family and Community Services

McWILLIAM, Mr John, Assistant Secretary, International Branch, Department of Family and Community Services

MURDOCH, Mr David, Director, Agreements, International Branch, Department of Family and Community Services

MURRAY, Ms Peta, Assistant Director, Agreements, International Branch, Department of Family and Community Services

CHAIR—Welcome to you all, and welcome back, Mr Mason. Do you have any comments to make on the capacity in which you appear? We will not require any of you to give evidence under oath but I should advise you that these hearings are legal proceedings of the parliament, so they warrant the same respect as proceedings of the House or the Senate itself. Hence the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I invite one among your number to make some introductory remarks, and then we will proceed to questions.

Mr Hope—I am an executive director with the department, with oversight of corporate facilities and services as well as the international policy issues of interest to the Department of Family and Community Services. I will just make a few remarks by way of opening statement. Today you are looking at the issues surrounding the Social Security Agreement with the United Kingdom and the proposed termination of that agreement. The treaty action proposed relates to that agreement which, as you would have noted in the national interest analysis, has been operating in its present form since June 1992. It replaced a series of agreements that date back to 1953. After careful consideration, the government has decided that it is no longer in Australia's interests to continue to be a party to this agreement.

United Kingdom pensioners in Australia rely increasingly on Australia for income support because the United Kingdom's policy of not indexing its pensions means that the value of these pensions reduce over time. Supplementation of United Kingdom pensions, including pensions paid under the agreement, is estimated to cost the Australian government about $100 million per annum. In July of this year, the Minister for Family and Community Services alerted her United Kingdom counterpart to the government's intention to terminate this agreement in view of the United Kingdom's continued unwillingness to index, for the cost of living, more than 200,000 pensions it pays to Australian residents.

Over the last decade, Australia has made exhaustive attempts to resolve the indexation issue. Successive Prime Ministers, ministers for foreign affairs, ministers for trade and

various other ministers have all raised the indexation issue with their United Kingdom counterparts. The United Kingdom has rejected all of Australia's representations and refuses to address the issue.

The UK acknowledges the inequity of its policy, but argues that the cost of indexation cannot be justified. Australia has shown its willingness to accommodate the United Kingdom's concerns about the cost and has suggested affordable compromises that would stop the situation worsening. These too have been rejected. Canada has also been strident in its efforts to obtain indexation for the 134,000 UK pensioners living there. However, unlike Australia, Canada has made it clear that its pension lobby requires full indexation.

Termination of the agreement is seen as an appropriate response to the unfair burden that the United Kingdom's policy places on the Australian social security system, because the United Kingdom arranges indexation of its pensions in many other countries, including the United States of America, the Philippines and the countries of the European Union, through its bilateral and multilateral agreements, but refuses to renegotiate its agreement with Australia to include indexation provisions. The United Kingdom's non-indexation policy impacts directly on Australia's responsibilities and outlays under the agreement.

Thirdly, Australia has proposed reasonable compromises to the United Kingdom to facilitate renegotiation, but these have not been taken up. Fourthly, Australia has not pushed for full indexation but rather proposed low-cost options for prospective indexation that would cost the United Kingdom no more than £1.3 million in the first year, rising to around £6.5 million after about five years. Lastly, the United Kingdom's refusal to renegotiate the agreement perpetuates an arrangement that is not in Australia's long-term interest.

It is also relevant to note that, in letters to its pensioners in Australia, the United Kingdom cites the absence of indexation provisions in the agreement with Australia as a reason contributing to its current policy position. Also, the agreement is out of step with Australia's modern approach to social security agreements. Without indexation provisions it cannot function effectively in our preferred shared responsibility approach.

Termination of the agreement will take effect 12 months after notice is received. No person currently receiving a pension will be affected by termination of the agreement. The agreement, through its termination provisions, protects those already receiving benefits under the agreement at the time of termination, as well as those who lodge claims and would be eligible up to the time of termination.

The agreement will affect new settlers who wish to claim benefits after termination. In Australia, the agreement gives new settlers from the United Kingdom, who reach retirement age before they acquire 10 years Australian residence, access to age pensions, and also provides widows access to parenting payments before they acquire two years residence here.

We estimate that the number of people in Australia who will no longer be able to benefit from the agreement following its termination would be up to about 850 a year. Being affected by termination means that these new settlers will have to serve the normal qualifying periods to get age pension and parenting payments, in the same way as new settlers from any country with which Australia does not have an agreement.

The government does not treat termination of the agreement lightly. However, the United Kingdom has left Australia no recourse other than to terminate the agreement. Australia can no longer accept a situation where the United Kingdom affords its pensioners living in Australia different treatment from pensioners living in other countries. Thank you.

CHAIR—Are there any further presentations, or are you happy to proceed to questions?

Mr Hope—We are happy to open it up for questions. Mr McWilliam, Mr Murdoch and Ms Murray will probably deal with most of the detail as we go, but we will just see how we open it up.

Mr BARTLETT—How does Britain attempt to justify the fact that it indexes its pensions in relation to other countries such as the US but not Australia? On what basis does it justify that differential treatment?

Mr Hope—The differential treatment is probably in reverse. When we raised the issue of indexation with them, they felt that the cost was too high from their perspective. They would prefer not to index in terms of Australia. They do not really use an argument of differentiation where they index in the United States as opposed to Australia. The only argument they usually use against us is that the cost is too high, and that really is a reflection of—

Mr BARTLETT—What would be the cost to Britain of indexing those pensions for its former residents living in the US—presumably far higher than the £6 million that you suggested for residents in Australia?

Mr Murdoch—There are many more UK pensioners in Australia than in the US. The pensions in the US were indexed quite a number of years ago as part of their bilateral treaty. We do not have any up-to-date figures on what it would cost if it had not been done some years ago. It is a little difficult to get a figure on it.

Mr BARTLETT—With which other Commonwealth countries, beside Australia and Canada, does this agreement not exist?

Mr Murdoch—With South Africa and New Zealand. They are the main ones. Those four countries—that is, Australia, Canada, South Africa and New Zealand—are where the bulk of UK pensioners outside the UK live.

Mr BARTLETT—Is there any indication that they might take a similar action to what Australia is taking?

Mr Hope—They have all, at various levels and at various times, sought indexation from the United Kingdom. The Canadians have shown some recent interest in terms of our action here and have made some inquiries as to our approach.

One of the issues with the Canadians in terms of a very strong pensioner lobby within Canada is that the only solution is full indexation, and retrospectively. That may well be where we have started or pursued arguments in the past, but we have also sought to find

solutions with the United Kingdom which are somewhat less than that. New Zealand and South Africa have thought about it, but they have never really taken any direct and specific action.

Mr McWilliam—I should make it clear that South Africa does not have an agreement with the United Kingdom. The only two other Commonwealth countries that have a social security agreement are Canada and New Zealand. Under the UK's domestic legislation, pensions are frozen at the date that a person migrates from the UK, and that is only varied where an agreement comes into place with another country to actually index it. The UK has quite a number of agreements with other countries—something like about 30 countries; it is quite a number anyway—that actually have the indexation provisions but only three where it has agreements that do not have the indexation provisions. But by and large, under the UK's domestic legislation, it starts from the fact that there will be no indexation. So South Africa is caught up in that by virtue of that domestic legislation.

Mr BARTLETT—So, in the 30 countries with which the UK does have an agreement, is it fair to say that they are countries where there is not a net cost disadvantage to Britain?

Mr McWilliam—My guess would be that they would all be net cost disadvantaged.

Mr BARTLETT—But not as much as Australia?

Mr McWilliam—Not as much as Australia.

Mr Hope—The particular countries that seem to be outside the indexation loop are where there are the largest number of ex-British residents.

Senator TCHEN—Do the Australian citizens who are now resident in the UK receive the full pension from Australia?

Mr Murdoch—We do not grant Australian pensions in the UK under the agreement, just to make that perfectly clear.

Mrs CROSIO—If an Australian resident goes to the UK, they can take their pension with them.

Mr Murdoch—Yes, but that is under our domestic legislation; that is under our portability laws. If somebody is actually granted a pension in Australia and then they leave for the UK, they take their pension with them. But if they leave before that pension is granted in Australia, they cannot get it in the UK. They cannot be granted it, even under the agreement.

Senator TCHEN—Would the termination of the agreement affect those people?

Mr Murdoch—No. It would not affect the grant or portability of their Australian pension to the UK. That is done under Australian domestic law.

Senator TCHEN—So the termination of this agreement would not affect any Australian citizens living in the UK?

Mr Murdoch—Yes. It would affect those people who were hoping to get some enhanced rate of British pension under the agreement. Currently former Australian residents living in the UK can, upon reaching British retirement age—which is 65 for a man—claim a UK pension or an enhanced rate of UK pension by using their Australian residence as a contribution period. Once the agreement terminates, they will no longer be able to do that. They will have to rely on UK income support, which is paid to all UK residents.

Senator TCHEN—You said that in the past the UK has been reluctant to agree to a full indexation agreement. What is the likelihood that after we terminate this agreement they will become more amenable?

Mr Hope—We do not know. The track record to date suggests that they have refused or declined every blandishment we have offered, including quite compromised positions which, strictly from our point of view, have been quite generous. That has been insufficient to change their position, so we do not necessarily have a clear line on how the United Kingdom officials and government might necessarily react to this in the context of renegotiating a new agreement. But from our point of view, we think it is the only avenue now left to us to seek to apply leverage.

Senator TCHEN—But it may not be a leverage at all?

Mr Hope—It may not.

Senator TCHEN—Thank you.

Mr Gregg—Can I just add that, since the announcement that the agreement will be terminated, there has been some media coverage in the UK—print media mainly—criticising the government for allowing this situation to arise. So it is possible there is at least some political pressure on the government to respond in some way.

Mr WILKIE—My question follows on from the media coverage about the decisions people have been receiving. Have we had any comments back from individuals about the effect these decisions may have on them—both here and internationally?

Mr McWilliam—We have had some representations from people concerned as to whether they are likely to be affected. By and large, once people know their existing payments are not going to be affected, they are quite comfortable with that. Certainly in one case we had someone write back to us after that to say that they were comfortable with the advice they had received. By and large, the representations we have received have been seeking clarification or have been where people have not understood the extent to which the Australian government was incurring additional costs because of the non-indexation provisions.

Mr Hope—At the time of the announcement, I think it would be fair to say, the media reaction within Australia to the action that was taken was generally positive. As Mr Gregg

has said, in more recent times there seems to be some commentary in the UK press about it which is tending to be a bit quizzical about why the situation has arisen.

Mr WILKIE—As you would expect.

Senator LUDWIG—I want to explore this with you: in answer to the question by Senator Tchen, you were talking about the number of people—these may not be your words—who, because of the time, will miss qualifying for the enhanced UK pension when the agreement is terminated. How many people will miss the enhanced UK pension or lose as a consequence of the termination of the agreement in the UK, who were previous residents of Australia? How much will they miss out on? Do we know that sort of information? One of the things you were talking about very early was, as I understand it, that there was not going to be an impact on people, but it seems that there may be.

Mr Hope—In terms of the UK I can get some information. But there was also a group I spoke about, of up to 850 people who are within Australia who, after the date of termination, are likely to be impacted.

Senator LUDWIG—Yes, I can understand that.

Mr Hope—So it is just the UK resident group you are talking about?

Senator LUDWIG—Yes. As I understand it, that is what you were explaining to Senator Tchen. So there is a group now—we do not know how many—who may, as a consequence of the termination of the agreement, miss out on entitlements. They may not receive entitlements or not receive the enhanced UK pension. Is that correct? I am in your hands with that. That is what I understand you are telling us now.

Mr Murdoch—Concentrating on former Australian residents now in the UK, it is probably best to profile them a little. Some of these people are Australian born people who have gone to live in the UK and they have some contributions to the UK system. Others are UK born people who have lived in Australia and then have gone back to the UK, with various periods of contributions. Others are people who have simply gone to join relatives in the UK after they retire. So it is quite a mix of people.

Currently, under the agreement between the UK and Australia, they can use their periods of residence in Australia to get access to the basic British contributory pension by using their Australian residence as deemed contributions. Also, some of these people will be able to get the British contributory pension based on their own contributions but, because their contribution period has been cut short by their period in Australia, they can use their period in Australia to get an enhanced rate of British pension.

Senator LUDWIG—Yes, that is what you were explaining.

Mr Murdoch—Overall, on our preliminary estimation of the migrant flow here and the people who might be affected, we thought that in future, after the agreement terminates, there is probably going to be something like 1,900 people a year—that is the figure we came up with—who would no longer have access to the UK contributory pension or the enhanced

rate. But the effect on these people is still minimal, because the UK has a secondary safety net system which is called its income support system. That is available to all UK residents. So if somebody is resident in the UK it is very similar to the Australian system: if they do need income support, they can get it through this secondary system rather than through the contributory system.

Senator LUDWIG—It is only an estimate at the moment. You might be able to provide a discussion paper on how many those are and how much they will lose as a consequence of the termination of the agreement, so that I can understand that age profile that you have been talking about and the number of groups that you have been talking about. I understand you are guesstimating at 1,000-odd, but you really do not know. Or do you?

Mr Murdoch—No, I do not. We have simply done it on the return immigration figures and also on the grants of UK pension under the agreement over the last number of years. But it is really just an estimate.

Senator LUDWIG—Are you familiar with the Commonwealth Department of Family and Community Services web site? It is at www.facs.gov.au, and talks about the impact on migrants from the UK. Are you familiar with that?

Mr Murdoch—Yes.

Senator LUDWIG—It says that special benefits will be available to migrants who are in financial difficulty and ineligible for any other payment, but only after the two-year newly arrived residents waiting period has been served. Exploring the same thing that happens in Australia—is there a group that, as a consequence of the termination of the agreement, may be exposed to the withdrawal of the benefit and then have to apply for a second benefit to make up the difference that might disappear?

Mr Murdoch—No.

Mr Hope—If people who are in Australia are currently getting a benefit under the agreement, there will not be any withdrawal of that benefit.

Senator LUDWIG—Once the agreement is terminated—

Mr Hope—If they are getting it before the agreement is terminated, they will continue to get it.

Senator LUDWIG—And after the agreement is terminated—

Mr Hope—After the agreement is terminated, if you get someone newly arrived after the termination date, they will be treated the same as any other migrant coming to Australia, in terms of waiting periods for various benefits.

Senator LUDWIG—Following on from that, what strategies have you put in place to advise those people that might otherwise rely on those arrangements, to ensure that they are aware of the consequences of the termination? If they are in the pipeline to come to

Australia, they may think that they will be entitled to something, but by the time they get here they may very well not be.

Mr Hope—From the date of formal notification to the date of termination will be 12 months. What we have in mind is, through Foreign Affairs and also with Immigration and more generally, to be looking at ways of ensuring that these matters are promulgated within the United Kingdom to ensure that people are aware well of this before they make decisions and actually commit to coming to Australia.

Senator LUDWIG—You talked about a letter from the UK to Australian UK residents. Is there a copy of that anywhere? Has that been provided?

Mr Murdoch—We do not have it with us but we can find it.

Mr Hope—We will have to send you a copy of that.

Senator LUDWIG—You then spoke about Canada. Where are they up to in the chain? Are they also pursuing the same avenue, or have they abandoned it and no longer are going to?

Mr McWilliam—We are not entirely sure where they are up to. They have been for a number of years pursuing this issue. I understand that in the early 1970s they actually did get an agreement from the UK to index their pensions, but by the time they got to the point where they could put their legislation into place, the UK had moved back from that position. The Canadians have been pursuing the matter, as we understand, for a number of years but I am not sure exactly where they are up to in terms of their negotiation with the United Kingdom government.

Mr Hope—But their public position has been consistently full and retrospective indexation.

Mr HARDGRAVE—From what I can work out from constituents coming to see me about these sorts of matters, the UK pension is hardly worth the trouble. What I am concerned about is the aspect that there would have to be a full 10 years of waiting before they could get access to Australian pensions.

Mr Hope—The age pension.

Mr HARDGRAVE—How do people actually throw the UK pension? How do they get off it? It not just the pension cheque, it is the benefits and other services which come the way of Australian pensioners here. I suspect that those who have maintained their UK citizenship—for example, there were people who came here in 1949 becoming Australian citizens, after 50 years, during the senior citizens ceremony the other week at Government House, Brisbane—are really being badly treated by both systems, because they have been contributing to Australia in one form or another. You get people who are stuck on a UK pension as well and would like to throw the thing but cannot. They have to wait 10 years. And the UK pension is hardly keeping up with the pace of the cost of living rises. Where are those people going to be?

Mr Hope—I would like to explore a couple of things. In terms of someone who has come from the UK to Australia a number of years ago and before the age pension age—let us take 65—under the agreement they could get accelerated access to our age pension by stint of their contributions to the UK pension. Those people would not be waiting for 10 years under the agreement arrangement. The point you are getting at though is that, under the Australian arrangements, the fact that they do have part of their pension funded from the UK means that they do not get full access to a range of Australian benefits that attach to the age pension.

Mr HARDGRAVE—That is correct. So where are those people left?

Mr McWilliam—The people who arrived more than 10 years ago would have an entitlement in their own right. So they would get an Australian pension and, if they have contributions back in the UK, they might also get a United Kingdom pension.

Mr HARDGRAVE—That, then, affects their Australian benefit though, doesn't it?

Mr McWilliam—If they have been here more than 10 years and they have got an entitlement in their own right, it will be affected by 50 cents in the dollar.

Mr Murdoch—If I may add, they would still get the pensioner fringe benefit entitlements which I think you were somewhat concerned about. As long as they are getting some Australian pension, they would still get those.

Mr HARDGRAVE—The main reason I ask is it seems to me that a lot of people come to complain about a circumstance that does not quite exist in the way you have suggested, so maybe they need to go and get further advice. But I will not hold up the committee on that. What I was particularly worried about though was that there is a statement in the NIA that says you will liaise with relevant community organisations during the implementation of this particular agreement. Why have you not liaised with them to put together the NIA?

Mr McWilliam—We have liaised with the pensioner groups over a number of years in terms of our position and have made representations to the UK government. The government decided, after going through all of those representations and getting nowhere with the UK, that Australia would have to take this step. The United Kingdom government was advised—

Mr HARDGRAVE—What I am particularly concerned about is relevant community organisations here in Australia. There are a lot of ex-service organisations, specifically British services for instance, which would be, I would have thought, a pretty steady pool to find people who might be interested in the subject matter when you construct a national interest analysis to bring before this committee. You should have done all of that by now. Why haven't you done that?

Mr McWilliam—We are aware of the—

Mr HARDGRAVE—What are you working on, folklore or specifics, on this question? Have you actually gone and seen these people and said, 'Here is an agreement that we are bringing before the Joint Standing Committee on Treaties and we are putting towards the

parliament. We want your views on it.' Or have you simply just collected what you believe has been the case over a period of years? Understandably, you have got expertise in this area, but there needs to be a specific inquiry reported on the NIA and I do not see evidence of that having been done. Don't be afraid, because just about every other department on the first time they appeared before this committee has made exactly the same fatal error.

Mr McWilliam—We did not consult specifically other bodies in the community in preparing the national interest analysis to put to the committee. We are explaining why the government is taking the action it has decided to take in the knowledge that we have gained over a number of years of the views of community organisations.

Mr HARDGRAVE—Would you be satisfied that, if we were to consult with some of these community organisations, we would find them in agreement with what you have put together in this document you have presented to us?

Mr Murdoch—Could I just add something there? The particularly community organisations—

Mr HARDGRAVE—Would you be satisfied that we would not find groups that would be glaringly at odds with what you have put before us? You are satisfied you have got it right?

Mr Murdoch—I would be certainly satisfied on that from my experience with this general sector. First, no returned service organisations are involved in this because this is a civil pension that is being paid by the UK—

Mr HARDGRAVE—Yes, but there would be a steady pool of contact points is all I am saying.

Mr Murdoch—Yes. There is one group in Australia who represents the interest of British pensioners and it is located in South Australia. It is called the British Australian Pensioners Association. The acronym is BAPA. We have had a lot to do with them over the years but their major interest is self-funded retirees; that is, retirees who do not receive any pension from the Australian government. The chairman of that organisation has also made it perfectly clear that they were not interested in limited indexation options being offered to the UK. They more or less dissociated themselves from the government's proposal in this regard.

But in relation to any other specific organisations, British pensioners in this country are just totally integrated. They are not represented by any particular organisation. They just come under the larger umbrella.

Mr HARDGRAVE—Would you have, say, consulted different pension groups, pensioners, superannuants' associations or whatever? Could you have simply circulated to them a statement that this agreement was coming up which perhaps they would like to circulate to their members and form a view to put to you or anything along those lines?

Mr Hope—We have not done that in that sense. But, as Mr Murdoch said, I think our general expectation would be that there would not be a great groundswell against it.

Mr HARDGRAVE—With great respect—and you would know more about this area than I would dare to suggest I have any more than a broad knowledge of—I am saying to you that, as a matter of principle, too many departments have done exactly the same thing you have done. The classic one would have to have been the matter relating to what happened on Christmas Island where everyone thought someone had spoken to somebody but nobody had. We really do need to know exactly what you have done before you come here with the NIA and say you are going to consult with the groups after we have given a tick to an agreement. It makes it very difficult for this committee to do its job unless we get submissions which back up what you are saying or at least point to what you are saying being broadly agreed to.

I agree that your department may well have had a longstanding association with various groups but, again, the job of this committee is to be certain that what you are telling us is right. No disrespect is intended by that statement but other departments have made exactly the same fatal error in bringing submissions to this committee. It does not make it easy for us to do our job if you do not consult before you put an NIA together, rather than after you get an agreement on a particular agreement or treaty.

CHAIR—The point has been made. It reinforces in a sense that where there are very contentious treaty actions, the impression can arise—more so in the public mind and among people who are very conscious of treaties and subscribe to some strange theories about conspiracies and all that sort of thing—that government departments sneak things past interest groups and leave us here like stunned mullets when they give evidence. Albeit, if you do consult with them, occasionally you stir up a bit of a hornet's nest. But do not worry; that is our business. We have that all the time. We can deal with those hornets. It is a genuinely meant request for the future.

Senator MASON—On a different tack, Mr Murdoch, with termination about to happen, what is likely to happen next—a new agreement?

Mr Murdoch—We would hope that termination of this agreement will be of sufficient importance to the UK that it will wish to reopen negotiations with us for a new agreement. We would be hoping that a new agreement would be a more comprehensive agreement than the current agreement and certainly more in line with Australia's policy on agreements and than the current agreement is.

Senator MASON—So it will replicate agreements with other nations?

Mr Murdoch—Yes. It would be similar to the agreements that Australia has with nine of its other agreement partners—we call them shared responsibility agreements—which necessarily include indexation.

Mrs ELSON—What is the cost saving in dollars for Australia?

Mr McWilliam—The cumulative savings over the forward estimates period are estimated to be up to $17 million a year.

Mr BAIRD—Is that for the UK?

Mr McWilliam—Yes, for the UK.

Mr BAIRD—Mrs Elson has asked if Australia will gain benefits from the UK.

Mr McWilliam—David, have we calculated the savings for the UK?

Mr Murdoch—One assumes that there would be savings, because there would be at least 1,900 people a year not coming on—if our figures are right—that they would not be paying this enhanced benefit rate to. But it is difficult for us to calculate that. There was, shall we say, a need for secrecy surrounding the preparations for this, because we wanted to make sure that the UK was fully advised about Australia's intentions in this regard before we did terminate. As part of that, of course, we could not really seek a lot of information from the UK at that time on what the cost effects for them would be.

Mrs ELSON—Is this an ongoing cost or is it just short-term savings?

Mr Hope—Savings would be ongoing, but they are not huge in comparison with what we believe the non-indexation is costing Australia, which is in the vicinity of $100 million a year—in terms of the top up we give as a result of non-indexation of the UK pension arrangement under the agreement. Those who are already in receipt of benefits will continue to get those, so it is not as if termination is going to claw anything back. This is against prospective costs—we are anticipating savings of that order.

Mr Murdoch—The other thing that is worth saying, too, is that a lot of these people are helped under a bridging arrangement. Eventually they come on to Australian benefits in their own right. So Australia will be paying for their welfare support after a period anyway.

CHAIR—Tremendous.

Mrs CROSIO—I have a couple of questions. However, I would like to start with an answer you gave Senator Mason about how we hope it will bring England to its senses, and we will be able to negotiate a better agreement. This agreement has been in place since 1953. For 46 years, we have literally been trying to use a feather to knock off a dinosaur. Yet we think now that, by terminating the agreement, all of a sudden England is going to wake up and say, 'Goodness me, what have we been doing? We should have indexed it.' I think it is a little bit imaginative to even envisage that that is going to occur, is it not?

Do we honestly feel so optimistic about the termination of this agreement? As bad as it is, I completely agree with what you have been trying to do with it over all governments. They have been absolutely dogmatic in the fact that they would never index their payments to this country, even though we have allowed ours to go over there at an estimated cost of $100 million. But to honestly contemplate that, by termination, all of a sudden they are going to come to their senses. What is the population of England? Sixty-odd million. They have one of the largest immigration programs to Australia and, in the long term, probably more aged people will come here than what we will have going the other way. What gives you the impression that they are actually going to start renegotiating straight away?

Mr McWilliam—We are not sure that they are necessarily going to start to negotiate right away. We have not, of course, been trying to change the agreement since 1953 but, over the past 10 years or so, we have certainly put in a lot of effort to try to change the UK position. I think it really depends on a number of things, including what other countries decide to do. It will perhaps take some time for the UK government to rethink its position. Certainly the offer that was made to the UK government in recent times was probably one of the lowest cost options they were going to have a look at, because we were focusing on prospective migration.

Mr Hope—Rather than retrospective migration.

Mr McWilliam—It may well be that the UK government will have a think about that. I agree with you that, if the agreement is terminated, it is not likely that they will very quickly come back to the table.

Mrs CROSIO—I think we would have to be astute enough to say the only people objecting are the ones that are already out of the country anyway. The only people objecting would be the people who have left England.

Mr Hope—Yes.

Mrs CROSIO—From a political point of view, I am just saying for my colleagues, sometimes we take note of people who are prospective voters. They might, all of a sudden, be forming a campaign to destabilise government or to change their opinions but, in this particular case those who are trying to do it are trying to do it at a great distance. They are not actually in the country. They are here in Australia.

Mr McWilliam—Yes, that is right.

Mrs CROSIO—I wish you well. In this analysis, a worker in the UK contributes to a national insurance system. Is that system, which is a contribution from their wage, controlled by the government?

Mr McWilliam—Yes.

Mrs CROSIO—In other words, all those workers who have contributed obligatorily over a period of time, and have had to sign on to a national insurance system, thinking in advance that they would benefit from that money on retirement, wherever it was, are now going to be denied that in the future even with or without an agreement. Is that correct?

Mr McWilliam—They will be denied the increases. At the moment, if those people remain in the UK, they are still fine. If they leave the UK at the present, they will still get their payment, but it will be frozen at the rate at which they left the UK.

Mrs CROSIO—A man of 45 comes to this country and works 20 years until he is 65. We assume he has already contributed for 25 years to a national insurance system in the UK. Is he only going to get it at the rate it was worth when he left 25 years previously?.

Ms Murray—It is frozen at the date they leave the UK, or the date of grant, whichever is the earliest.

Mrs CROSIO—In other words, if they have left when they were 45, and have now worked 20 years in this country and are 65, they are getting a pension in their own right if they have not got savings. They have been here more than 10 years. When they then apply to the UK for what was their 25 years of contribution during their working life to that insurance scheme, will they be paid as what it is today?

Ms Murray—But will never get an increase.

Mrs CROSIO—But regardless of an agreement they cannot be denied access to money they have contributed to at the date they have access to it?

Ms Murray—That is right.

Mr Hope—Not unless the UK changes its domestic law which I think is highly improbable.

Mrs CROSIO—In your briefing to us, Mr Hope, you stated, 'It will be 850 people a year being affected.' Yet in your NIA you say it is 850 people in the first year. Which is the accurate information?

Mr Hope—As Mr Murdoch indicated before, we have looked at the migration flows. Our expectation is it will be around 850 in the first year and then it would be diminishing over time, but we do not have any way of anticipating what that falling off would be over time. The way I characterised it was it would be up to about 850 a year.

Mrs CROSIO—It would be 850 the first year. You have no figures.

Mr Hope—Certainly it would be about 850 in the first year, but we anticipate that to fall over time.

Mrs CROSIO—Could you explain to me a bit more fully how you got those figures? You said you look at immigration and at X, Y and Z. Do you have everyone registered that has come from the UK?

Mr McWilliam—We will ask Ms Murray to take you through that.

Mrs CROSIO—It would be 350 and it could be 1,850, couldn't it?

Ms Murray—We used immigration figures for the last couple of years. We looked at the number of people who were coming from the United Kingdom to Australia after age pension age. Those people would theoretically from the day that they arrived in Australia be able to claim something under the agreement if their income and assets limits were within our limits. Theoretically, a proportion of the people that came to Australia would get it after they were age pension age. Then we went back over time and looked at the number of people that

would be turning 65 in Australia but had come from the United Kingdom within the last 10 years.

As you know, the age pension age for women and men is different. That makes it really complicated. For those persons who have come here within the last 10 years, you have to look at what their individual ages were on entry. We made our estimates from that. That is how we got the 850. That 850 comprises two groups: people who arrived and have been in Australia within the last 10 years; and people who are newly arrived but over age pension age, or just about to turn age pension age. Does that help?

Mrs CROSIO—But, if they are just about to turn age pension age, and it will be 12 months before this agreement is terminated—

Ms Murray—They will still get it.

Mrs CROSIO—Those who are just about—and I would assume that, if they reach age pension age within the next 12 months, they will be covered anyway.

Ms Murray—Yes, that is right.

Mrs CROSIO—So where does the 850 come? Is that for the first year or subsequent years?

Ms Murray—It is the first year after termination takes effect.

Mrs CROSIO—I take you to the NIA you have provided to us, page 6 of 36. Again I come back to 'more appropriate replacement agreement that provides for the indexation of pensions paid in Australia'. In deciding that this agreement should be terminated, has the government envisaged—and I am not trying to be political—the closing of this book so that we can immediately negotiate another one? I am not waiting for England to do it with us; I am waiting for Australia to do it with them. Do we have something in train down the 12-month step when this agreement is terminated to immediately start negotiating a different agreement, or not?

Do we have a fall-back position, in other words? It is all right to say that we are going to terminate this. It will take effect in 12 months time. We know the consequences of it. We guesstimate that 850-plus people will be affected by it. But what happens in the future? Do we have an engine on another train ready to go?

Mr McWilliam—We have certainly made it plain that we see the termination of the agreement as a last step, and we are ready at any time to negotiate an agreement along the lines that serve us. Indeed, if over the next 12 months the UK government were to say that it had had a reconsideration, we would certainly be open to looking at that. After the termination, we would certainly make it plain to the UK government that we were still interested in having a replacement agreement.

Mr Hope—But the nature of that agreement would not be like the current agreement which puts a lot of the cost on to us. It would be more in line, say, with the one we have

with Italy where there is a sharing of responsibility and cost between the two countries—and that would be between Australia and the UK. It would be more in line with what we have, as Mr Murdoch mentioned before, in eight or nine of the other agreement countries which is a much more equitable set of arrangements than we have currently with the UK.

Mrs CROSIO—Following what Mr Hardgrave says, I wonder how many people are planning their future and thinking they will take into account their contributions they have in England when they come to Australia, or vice versa? Also, if they had been consulted and told this that within 12 months this agreement will not be in existence, I wonder what their comments would be. As you say, without very wide consultation, it is very difficult to come up with any opinion about how the people who will be affected will feel about it.

Mr Hope—The number of people currently in the UK?

Mrs CROSIO—No, the people who could be about to come or who, as one of those statistics, are about to arrive and in another 15 months time, not 12 months time, would be entitled to an age pension because they have taken into account the services they have contributed to in the UK. You cannot migrate to this country in a matter of three weeks; even from England it usually takes six to nine months. So it is a long process. I wonder whether those people who are taking part in that process to rejoin their families, or whatever, have been told, 'After 12 months, forget it; you are going to have to stay here 10 years or come under the usual contribution.'

Mr Hope—Certainly it is very difficult to identify who they might be. The only way we can do that between now and over the next 12 months is to have a fairly open—

Mrs CROSIO—Would we put advertisements in the papers over there, for example? Would we put broad ads in saying—

Mr Hope—There is a range of things like that that could happen. But the main source of information would be to ensure that the migration processes and, in particular, our department of immigration—

Mrs CROSIO—So flyers will be issued to the department of immigration explaining the whole situation about what has happening—

Mr Hope—They are extensively briefed as to what the arrangements are and what the implications are, and that will certainly be started from the beginning.

Mrs CROSIO—That has not been done yet?

Mr McWilliam—No, because we have not yet served a notice of termination. So, no, it has not been done yet.

CHAIR—We might recommend that.

Mr WILKIE—Following on from the discussions we were having before about the 1,900 Australians that are in the UK that might be affected, you were saying you have not

really looked at trying to do a lot of research into finding out how much it is going to cost the Brits. We must have some idea, surely, about what it is going to cost so that we could do some sort of cost-benefit analysis to weigh up whether it is worth doing away with this agreement and how that is going to benefit us in relation to what it is costing the Brits in supporting Australians. We need to analyse both, I would have thought, before we make a decision. Have you any idea how much it is going to cost them?

Mr Murdoch—The situation is that they fall out of one group into another, as far as the British are concerned. They have a contributory system—and that is what the agreement gives access to—which pays a basic rate of pension. But they also have an income support system that is available to any resident of the United Kingdom and, like our pension, it is subject to income and assets tests. So, because they do not get access to the contributory system, they will fall into that income support system. The UK will still have to pay. They will just be paying from a different pile of money.

Mr WILKIE—I understand all that. I am wondering what the difference is going to be. How much is it going to cost them?

Mr McWilliam—They will actually save some money. In terms of costs, they will, like us, save some money out of the arrangement.

Mr Murdoch—Because the contributory system is not income tested, so everybody has access to that, whereas the income support system is, so it really depends on your income and assets as to whether or not you get access.

Mr WILKIE—I would be interested to know how much that is, or an estimate of how much that is.

Mr Murdoch—We could certainly try to calculate it.

Senator COONEY—Is there anybody in England and anybody here who are specifically dealing with this issue, or do we just write letters and it goes through the system over there and nobody specific, no particular identity, is in charge of this agreement? What I am getting at is whether this is all being done on an exchange of letter, or are there specific people who are on top of the issues, both in England and here? I am talking about a docket system, like the docket systems in court where you have got somebody who runs the thing right through, a sort of case management. Is there anybody either at this or that end, or at both ends, who has got this under control in the docket system sense?

Mr Hope—I am not quite sure that I am with you.

Senator COONEY—Is there anybody specifically who deals with this and this only, or does it change?

Mr Hope—The short answer to your question is no. We do not have anyone specifically in England who deals with the UK social security authorities on the details of pensions, nor do they have anyone in Australia who does the same. There is a dialogue between our

department and the relevant department or agency in England, and from time to time visits, but there is no infrastructure set up at either end.

Mr BAIRD—Could I say something by way of a finality, Mr Chairman. We have had a lot about the problems. Can we also say that this is highly appropriate. This has been a rort that has been going on for years. These people here have sought hard to try and find a solution, and we should be congratulating them rather than putting them through the type of third-degree we have heard this morning. It has been a nonsense. This is long overdue—it should have been done years ago. From my point of view, well done.

CHAIR—A good way to finish that. Many thanks to all the witnesses for their evidence. We will now move to the proposed agreement to amend the scientific and technical cooperation agreement with the European Community.

[10.46 a.m.]

BAIGENT, Mr Karl Gwyn, Senior Project Officer, International Science and Technology Policy Branch, Department of Industry, Science and Resources

DE SOUZA, Mr Peter Rodney, Assistant Manager, International Science and Technology Policy Branch, Department of Industry, Science and Resources

JAMES, Mr Eric, General Manager, International Science and Technology Policy Branch, Department of Industry, Science and Resources

MASON, Mr David, Executive Director, Treaties Secretariat, International Organisations and Legal Division, Department of Foreign Affairs and Trade

CHAIR—Welcome. We are not going to require you to give evidence under oath this morning, but these are legal proceedings of the Parliament so they warrant the same respect as proceedings of the House or the Senate and, hence, the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of Parliament. I invite you to make an introductory statement before we proceed to questions.

Mr James—Australia has had a science and technology agreement with the European Union for some years. The most recent form of that agreement provided Australian researchers and Australian companies with access to the European Union's framework program. The framework program is a collaborative research and development program to which all the members of the European Union subscribe. It is separate from the research and development activities of the individual countries that make up the union.

Since 1994, Australian researchers have had access to the then current version of the framework program, which was the Fourth Framework Program, but subject to certain restrictions on the areas of research in which collaboration could take place. The purpose of this amendment and, indeed, the great benefit which it offers Australian researchers is that that restriction on fields of research has now been removed and it is possible for Australians to enter into collaborative agreements with European Union researchers in any field of research.

CHAIR—That raises the question: what fields were restricted in the past?

Mr James—The fields to which it was limited in the period 1994 until this year were: biotechnology, medicine and health, communications technologies, environment and climate, information technologies and marine science. I might say that those were fields which were offered to us by the European Union. They were not our choice, or it was not a negotiated matter. If I can just speculate on the reasons for that, Australia was the first non-European Union country to be accorded access to the framework program and we think that that access was offered in an exploratory way, with a limited number of fields of cooperation being made available to us in the first instance.

Mr BAIRD—Do you believe there has been sufficient consultation on this to warrant making the change? To what degree do you have the support of the various communities on this?

Mr James—In a formal sense, we need to consult with the states and territories. Minister Minchin has written to the premiers and chief ministers and has obtained their agreement. It is important to the states and territories because a number of them fund research and development activities that might well be affected by this.

In addition to that, my department maintains continuing contact with scientific organisations and researchers with the academies of science, the major public sector research organisations, the universities and researchers in private industry.

Under the Fourth Framework Program, the one just concluded, there was what I suppose we would regard as a promising level of collaboration between Australian and European researchers. In our discussions in our meetings with people, we have certainly seen an interest in continuing and expanding that, so I think we can say with some confidence that, within the research community, there is a welcoming attitude to the changes that are proposed. In addition to that, we have been working with the European Union representatives in Australia to increase knowledge and awareness of the opportunities that are shortly to become available. We have been conducting forums and providing information through our normal sources, and we are hopeful that there will be a very positive response to this from the scientific community and from industry as companies become aware of the opportunities and take advantage of them.

Senator LUDWIG—Does it entail a reciprocity? Does the agreement also provide for reciprocal arrangements?

Mr James—For intellectual property?

Senator LUDWIG—Those sorts of things and, for argument's sake, for the ability of the same access for research and development projects in Australia.

Mr James—To answer the last question, it is not a reciprocal agreement, although, amongst the other programs that my department manages, we do encourage collaboration between Australian researchers and those in other countries generally, and we do provide some funding to make that happen. You will find that quite a number of Australian research programs provide for access by overseas researchers, although generally there is an Australian benefit provision which seeks to ensure that Australian government money benefits the Australian community.

On your earlier point about intellectual property rights, there are provisions in the agreement which require that any research which is conducted under the auspices of this agreement also include a technology management plan. Not only in the case of the EU but in the case of our other bilateral agreements, we have found that to be the most effective way to proceed, rather than to try to prescribe in an umbrella agreement what sort of intellectual property arrangements might apply. We believe it is best that they should be worked out on a case by case basis and that an agreement, which is a formal agreement in the nature of a

contract, should be entered into. As I say, in the amendment that is now being entered into, for any project to be approved by Australia and the EEU, it would be a requirement that such an agreement had been negotiated and was in place.

Senator LUDWIG—To follow on from that, the agreement has been restricted to six sectors, and the proposal is then to open it up to any sector, as I understand it.

Mr James—That is correct.

Senator LUDWIG—You have said that there has been a consultative process gone through with the various states. I am curious as to whether that includes places like SIMTARS—the Safety in Mines Testing and Research Station in Queensland—and whether they would be aware of the agreement, or is it the Heads of Agreement with the states with which they would be aware? If they are not, what action are you going to put in place to ensure that those sorts of research stations are aware of the existence of these sorts of agreements. For example, they specialise in coal, and there is significant research in coal in Europe.

Mr James—I understand. Disseminating information to the science community in Australia is quite a substantial task, because the organisation of science in Australia is very segregated. There is a very large number of organisations that represent scientists in particular disciplines and, of course, in the industrial sector, there are a lot of industrial organisations.

Generally, they all belong to umbrella organisations, and there is a trickle-down effect for information. For example, the Federation of Australian Scientific and Technological Societies has a large number of member organisations which represent particular disciplines in science and technology. So, if we get information—for example, information about these amendments—out to the umbrella organisations, we can be reasonably sure that it will trickle down to the various sectors. As I said earlier, in addition to that, we are doing some general promotion, and we are trying to encourage companies and their industry associations, and scientific groups to attend seminars and to read material which we are putting around.

Clearly, we know that there are areas of particular strength within the European Community, and, of course, coal and steel were amongst the earliest areas on which collaboration took place. So, yes, we would seek to inform those people, and, of course, our department has a special responsibility for resources, including coal and minerals.

Senator TCHEN—Mr James, in answer to Senator Ludwig, you said that you expect the information would have a trickle-down effect. This is actually nothing to do directly with this particular amendment, but can you tell me whether the department has a role in dissemination of information to practitioners?

Mr James—About its programs and those that it supports, yes, we do. A lot of this information is provided through a part of the department called AusIndustry, which is our program delivery area and which is our primary interface with the business community. AusIndustry disseminates information by way of hard copy and information on an Internet site—a web site. In addition to that, we have formal relationships with some of the scientific

bodies that I have referred to, and we meet with them so that there is, I think I would claim, quite a good ongoing level of communication between us and the research community. Of course, some of the major governmental research bodies—the CSIRO, the Australian Institute of Marine Science and the Australian Nuclear Science and Technology Organisation—are part of the ISR portfolio, so we communicate regularly with them.

CHAIR—Terrific. Many thanks for your evidence this morning. We will report in due course on the proposed treaty action. We will now move to the fourth amendment proposed to the articles of agreement of the International Monetary Fund.

[10.58 a.m.]

MASON, Mr David, Executive Director, Treaties Secretariat, International Organisations and Legal Division, Department of Foreign Affairs and Trade

BEENDERS, Ms Vanessa, Specialist, International Monetary Fund Unit, Department of Treasury

SPINDLER, Ms Karen, General Manager, International Finance Division, Department of Treasury

CHAIR—Welcome. I have to advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. Therefore, the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I invite you to start with an introductory statement, then we will go to questions?

Ms Spindler—Thank you, Mr Chairman. I thought I would start with a few general words about the IMF first and move on to a few specifics about this particular amendment. The IMF is a cooperative intergovernmental, monetary and financial institution with a near universal membership. It was established in 1945 to promote international monetary cooperation, facilitate the expansion and balanced growth of international trade, promote exchange stability, assist in the establishment of a multilateral system of payments, make general resources temporarily available to its members experiencing balance of payments difficulties and shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members. Australia joined the IMF in 1947.

The proposed fourth amendment to the articles of agreement of the IMF provides for a special one-time allocation of special drawing rights, or SDRs, to IMF members. SDRs are interest bearing international reserves that were first created by the IMF in 1969 to supplement existing reserve assets of gold and foreign exchange. SDRs are also the unit of value of the International Monetary Fund. Their value is calculated in terms of a basket of currencies, and one SDR is currently worth just over $A2.

Under the IMF's existing articles of agreement, general allocations of SDRs can be made to members to meet the long-term global needs for reserve assets, with that need influenced by growth in trade and the need for international payments. However, a general allocation can only be made if there is consensus among IMF members that there is a need for a general allocation. In mid-1996, the managing director of the IMF concluded that there was no such consensus.

However, at that time the executive board of the IMF was concerned that for a number of reasons, members' cumulative SDR allocations were inequitable. The board of governors, which is a ministerial level board of the fund, therefore adopted a resolution in September 1997 approving the proposed fourth amendment to the articles of agreement which allows for a special one-time allocation of SDRs.

That allocation would bring members' cumulative SDR allocations to an equal 29.3 per cent of their quota, if all members took up the allocation, and they have the option to decline the allocation if they wish. It would also allow countries which join the IMF in the future to receive a special allocation of SDRs, which has not been possible in the past.

Australia has indicated its support for the proposed fourth amendment for two reasons. Firstly, promoting greater equity in the operations of international financial institutions is consistent with government policy. Inequitable SDR allocations could result in some members becoming less committed to the goals and functions of the IMF and that would hamper the operations of the fund. Secondly, the special allocation would add to the foreign reserves of all IMF members unless they elect not to take up their allocation. This would allow poorer countries to meet part of their reserve needs at a lower cost than otherwise, and that should help to ease the demands on the international financial institutions and industrialised countries to provide poorer countries with financial assistance.

Under the proposed allocation, the Commonwealth of Australia would receive 213,500,000 SDRs, which is worth around $A450 million. Australia intends to take up its allocation if the amendment goes ahead. The allocation is not expected to impose any costs on Australia, and it is not expected to affect our budgetary position because it is regarded as a financing transaction.

For the proposed amendment to enter into force it must be accepted by three-fifths of IMF members having at least 85 per cent of total voting power. To date, 68 members accounting for approximately 45 per cent of total voting power have notified acceptance of the proposed amendment. Australia is the 15th largest member of the IMF and our acceptance would send a positive signal to other members and help to build momentum towards meeting the required conditions for its acceptance.

CHAIR—Thank you.

Mr BARTLETT—By way of a background, is a country's quota of SDRs proportional to its other reserve assets? How is its quota calculated?

Ms Spindler—There is a difference between a country's quota and its allocation of SDRs.

Mr BARTLETT—Yes, I appreciate that, but the quota itself?

Ms Spindler—The quota itself, which is our capital subscription to the IMF, which is different from what this amendment deals with, is related to a country's size and its economic prosperity. Quotas are reviewed every five years and are increased or decreased in line with the country's relative position in the world economy.

Mr BARTLETT—Concerning this general allocation, is that going to be equal for each country, or is that proportional to its quota?

Ms Spindler—General allocations are made in proportion to quotas, but this special allocation is designed to equalise the proportion of cumulative SDR allocations to quotas.

Countries will receive very different amounts of SDRs in proportion to their quotas in an effort to make those ratios equal. They are unequal at the moment for a number of reasons; in particular, because a number of countries have joined the IMF since the last general allocation of SDRs. That is especially the case for the emerging nations in Eastern Europe. They have zero cumulative allocations of SDRs because there has been no allocation since they joined.

Mr BARTLETT—So if these special allocations are not equal and in fact are in proportion to the quota, then the ability to assist less developed countries is not very great because presumably they will receive a much lesser allocation than the wealthier trading countries. Is that correct?

Ms Spindler—It depends on what their current cumulative SDR allocation is, but there are quite a few less developed countries that have a zero allocation. They would therefore receive many more SDRs in proportion to their quota than, say, Australia, or other industrialised countries.

Mr BARTLETT—In proportion to their quota, but in proportion to other countries?

Ms Spindler—In proportion to other countries, what matters is their size.

Mr BARTLETT—Does this general allocation have the potential to relatively improve the position of the reserve assets of a less developed or developing country vis-a-vis the more developed or wealthier countries, or will it exacerbate the difference?

Ms Spindler—It certainly has that potential, and to the extent that it is developing countries that have joined the fund more recently, it will do that. Looking at the list of countries that currently have zero allocations, they tend to be countries in Eastern Europe or countries in Africa that in some respects at least you would expect to fall into the developing countries category.

Mr BARTLETT—In terms of the impact on Australia, since it is a financing transaction, does that mean that it will marginally reduce the interest financing costs of the Commonwealth, because this is relatively an interest free source of finance, coming from the Reserve Bank, by selling those SDRs to the RBA?

Ms Spindler—That is a possible outcome. The way it works is that the SDRs are allocated to the Commonwealth. The Commonwealth sells them to the Reserve Bank in exchange for Australian dollars and the Australian dollars go into consolidated revenue. The SDRs are not interest free. We are charged for them by the IMF, but we also receive interest on them at the same rate, so in net terms it is a zero cost. To the extent that those SDRs replace other reserve assets that we would have to pay interest on, it is possible we will be able to hold the same level of reserves at a lower cost.

Senator TCHEN—Ms Spindler, you indicated that some countries in the past have not taken up their allocation of SDRs. Can you tell us which countries, and under what circumstances?

Ms Spindler—I am afraid I cannot, Senator, I do not have that information, but I can take it on notice.

Senator TCHEN—Do you have any idea why they did not take it up?

Ms Spindler—I am afraid I do not know that either. I will take that on notice too. In partial answer, I imagine that has been a relatively rare occurrence. The main reasons for countries having a relatively low cumulative SDR allocation to quota is the one that I mentioned before, that they joined the fund after the last general allocation of SDRs, or possibly that their quota has been increased in one of the five yearly reviews of quotas since the last general allocation. I would imagine that very rarely do countries decline to take up their allocation of SDRs, but we can certainly investigate that for you.

Senator TCHEN—You also said that taking up SDRs basically indicates support for the IMF. It seemed to me that taking up SDRs is regarded as an obligation as well as an advantage. Is that correct?

Ms Spindler—Possibly, although I would imagine it would be regarded more as an advantage of membership rather than part of the obligation of membership.

Mr ADAMS—Is it or isn’t it is the question.

Ms Spindler—It is not compulsory. Every country has the right to decline an allocation of SDRs. Whether there is a cultural issue within the fund, I am not sure.

Senator LUDWIG—You talked about the aims of the IMF and then went on to talk about the effect of the SDR. Does the SDR further the aims of the IMF? You talked about the reasons why the IMF was established. Will this general allocation further those aims, or are they just an overstatement apart from this?

Ms Spindler—They were introductory comments about the fund. I think it would be fair to say that this allocation would perhaps not directly further the aims of the fund. But it is the view that inequities amongst member countries in allocations of SDRs relative to quota may make some member countries feel less committed to the fund.

If a country has missed out on what is seen as a benefit, they may feel less inclined to share information with the fund, take their advice and participate fully in the important policy debates that go on within the various international financial fora. One of the aims of this amendment and one of the aims of improving the equity of distribution of SDRs is to ensure that all members feel a full member of the fund and are therefore able and willing to participate in its operations.

Senator LUDWIG—Did the last general allocation that Australia participated in, in 1981, further the aims of the IMF?

Ms Spindler—I cannot give you evidence on that but, yes, I would say that in general terms it would have.

Senator LUDWIG—In general terms, but not in terms of assisting economic problems that may subsist in other countries?

Ms Spindler—No.

Senator LUDWIG—And will the general allocation that may be taken up by other countries assist their economies?

Ms Spindler—Could I make a distinction between a general allocation and this allocation. This is a special allocation where SDRs are going to be allocated to countries not evenly across the board as they would be in a general allocation. They are going to be allocated in order to even up the allocations across member countries. So I think there are special benefits from that type of allocation.

To answer more directly your question about whether this allocation helps countries' handling of economic issues, I referred in my opening statement to one of the benefits for poorer countries, in particular, which is that this allocation may enable them to hold a particular level of reserve assets at a lower cost than would otherwise be the case. They may be able to release other parts of their reserve assets such as foreign exchange which these SDRs will replace. Reserve assets are an important part of a country's economic position.

Senator LUDWIG—Yes, I understand that. Was there any observed data in 1981 when that was done? In other words, if there was a general allocation of SDRs in 1981—and you are saying that as a consequence this special SDR allocation may have those effects—was there any observed data in 1981 that that in fact took place?

Ms Spindler—Some swapping of the composition of reserves?

Senator LUDWIG—Yes.

Ms Spindler—We would have to check that for you.

Senator LUDWIG—Do you see what I mean?

Ms Spindler—Yes, I understand.

Senator LUDWIG—You are making the statement that data was about, presumably, around 1981 that would have had that effect. But you do not know of that?

Ms Spindler—I would need to take that on notice.

Senator LUDWIG—You said that we ranked 15, as I understand it, in standing with the IMF. Of those that are above us, how many have notified that they will take up the SDR?

Ms Spindler—The IMF does not release how particular members have voted, I am afraid, so we do not have that information.

Senator LUDWIG—Is there a closing-off date? How long does it remain open?

Ms Spindler—It remains open until the required threshold of countries and voting power is reached.

Senator LUDWIG—Notwithstanding that that may not be reached, it just remains open until either it is or is not reached?

Ms Spindler—That is right—until the board decides to close off the possibility for change.

Mr ADAMS—You say that the special allocation is because things have become uneven.

Ms Spindler—That is right.

Mr ADAMS—Why have they become uneven?

Ms Spindler—They have become uneven because some countries have joined the IMF since the last general allocation of SDRs. So they have a zero allocation. Some countries' quotas have been revised upwards since the last general allocation. Those reviews take place every five years. For example, Australia, which has grown faster than average, has had its quotas revised upwards since the last allocation, and so our cumulative SDRs are not in line with our quota. Also in the past some countries have declined to take up their general allocation of SDRs.

Mr ADAMS—Can you just explain again how the quota is set?

Ms Spindler—Yes. The quota is our capital subscription to the fund. It is what we pay to belong to the fund, and the sum of quotas makes up the financial resources that the fund draws on for its operations. The quota is set in relation to both the fund's needs and a country's size, essentially. So it is our GDP relative to world GDP.

Mr ADAMS—Who sets the interest?

Ms Spindler—The fund sets that. They set both the charges and the interest paid on SDRs, and the rate is the same on both sides.

Mr ADAMS—There is a ministerial council that sits as the board. Whereabouts is the general administration located?

Ms Spindler—The general administration of the fund?

Mr ADAMS—Yes.

Ms Spindler—It is located in Washington.

Mr ADAMS—Do many Australians work in the fund?

Ms Spindler—Quite a few Australians work on the staff of the fund, and we also have representatives on the board and in the office of our executive director.

Mr ADAMS—Thank you.

CHAIR—Thanks kindly for your evidence. We will consider that and report in due course.

[11.18 a.m.]

SPIER, Mr Hank, Chief Executive Officer, Australian Competition and Consumer Commission

WING, Mr Anthony Charles, Assistant General Counsel, Australian Competition and Consumer Commission

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

WILLING, Ms Annette Maree, Acting Principal Legal Officer, International Branch, Criminal Law Division, Attorney-General's Department

MASON, Mr David, Executive Director, Treaties Secretariat, International Organisations and Legal Division, Department of Foreign Affairs and Trade

JEPSEN, Mr John, General Manager, Structural Reform Division, Department of the Treasury

MASTERS, Ms Nicole Marion, Manager, Trade Practices Unit, Structural Reform Division, Department of the Treasury

CHAIR—I welcome officers from Treasury, the ACCC and the Attorney-General's Department to give evidence on the proposed agreement with the United States on mutual antitrust enforcement assistance. Can I invite one of you to give an introductory briefing and then we will proceed to questions. I should make it clear that we are not requiring you to give evidence under oath this morning, although these are legal proceedings of the parliament and warrant the same respect as proceedings of either the House of Representatives or the Senate. The giving of any false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. That said, can we proceed to the introductory briefing, Mr Jepsen.

Mr Jepsen—Thank you. I would like to make some introductory remarks which are in the nature of a general overview of the proposed agreement. I will keep my remarks fairly brief because a lot of the things I have to say have in fact been included in the national interest analysis which has been provided together with the agreement and because other comments may be made by my colleagues from the Attorney-General's Department and the ACCC.

This agreement was signed in April this year after a process of negotiation between Australia and the United States. It has also been available publicly in both countries and has been the subject of consultations with state and territory governments. The outcome of those consultations is that there has been general support for the agreement. Some of that discussion is covered on pages 5 and 6 of the national interest analysis.

The essential purpose of this agreement is to facilitate the enforcement of competition law. Broadly, the agreement provides for each country's competition authorities to cooperate

in obtaining evidence of anticompetitive activity and to notify each other of anticompetitive activities which may require enforcement activity. For Australia, this will involve the Australian Competition and Consumer Commission and the Attorney-General's Department. In the United States, the agreement relates to the activities of the Department of Justice and the Federal Trade Commission.

There are two points to be made about the rationale for this agreement. The first arises from the fact of the increasing internationalisation of economic and commercial affairs, which means that more and more of business may not be wholly conducted within our national borders. There may be decisions made outside our borders which have the potential to affect competition within Australia. This means, in turn, that the enforcement of competition laws may require the gathering of information and evidence in more than one jurisdiction and may involve, in that process, the competition law authorities of more than one jurisdiction. The trend is likely to be that enforcement will increasingly require this kind of activity. It is against that background that the negotiation of this agreement was commenced with the United States some years ago.

The second part of the rationale which we should mention is that this agreement sets out ways in which assistance can be requested by one of the parties and the ways in which it can be provided. Importantly, it also sets out some ways to guard that information. However, the agreement does not really extend the assistance to be provided beyond that which can now be made available by Australia under the provisions of mutual assistance treaties. In the absence of this agreement, Australia could provide assistance to the United States authorities in relation to antitrust matters under two pieces of legislation—the Mutual Assistance in Criminal Matters Act 1987 and the Mutual Assistance in Business Regulation Act 1992. Both those statutes are administered by the Attorney-General.

The benefit of the agreement to Australia is that it would allow the United States to provide assistance to the ACCC in relation to competition enforcement matters on a reciprocal basis. At the moment, US authorities are not able to provide assistance to the ACCC in the absence of a mutual treaty unless it relates to matters that are already public. This is the result of a US piece of legislation called the US International Enforcement Assistance Act 1994. The second important rationale there is that it is to the benefit of Australia to be able to receive assistance from the United States. My understanding is that this is the first such agreement which the United States has concluded and it has some precedent value for the United States.

I will mention quickly a few of the provisions of the agreement and some of the those things that it does not do. It does not involve any change or extension in Australian competition laws, nor does it imply that there is a harmonisation of Australian and US laws. Information provided in accordance with the agreement will be done under the mutual assistance laws of the country which is providing the advice, rather than its competition laws. That means that differences in competition laws between the two countries, to the extent they exist, do not represent a difficulty in the operation of the agreement.

The agreement has been drafted to make the provision of information subject to a number of conditions. Apart from the obvious need that it had to be provided in accordance with Australian laws, these conditions are set out in article IV of the agreement. They

include two key points. Firstly, execution of a request will have to be consistent with the Australian public interest. Secondly, a request will need to be within the reasonably available resources of the ACCC or the Attorney-General's Department.

The other point that I wanted to mention is that the agreement includes important provisions which go to some length to protect the confidentiality of information. Each party is to maintain confidentiality of any request made to it and of any information communicated to it in confidence by the other party. The other rule governing that information is that information which may be exchanged between the authorities of the two countries is to be used essentially for the purpose of enforcing their competition laws. There are other aspects of the agreement that we could go into, but I might leave it there, Mr Chairman, and see whether my colleagues would like to also make some comments.

CHAIR—Given that there are three organisations represented, I will ask Ms Willing from A-G's to give her perspective on it and then I will ask Mr Spier.

Ms Willing—I will speak briefly on the role of the Attorney-General and his department in relation to this agreement and also outline the distinction between requests made for the purposes of criminal as opposed to civil proceedings. As my colleague from the Treasury has noted, there are two pieces of existing Australian legislation by which this agreement will be implemented. They are the Mutual Assistance in Criminal Matters Act 1987 and the Mutual Assistance in Business Regulation Act 1992. Both these acts are administered by the Attorney-General, although in each case the actual execution of requests made by foreign countries is carried out by a separate regulatory investigating or prosecuting body.

The two acts operate in a complementary way. Essentially they are designed to ensure that, where evidence for use in foreign proceedings is obtained by compulsory measures, those measures are appropriate to the use to which that evidence will be put. International assistance under the Criminal Matters Act is normally governed by a bilateral treaty, whereas assistance under the Business Regulation Act is generally provided pursuant to a non-binding arrangement.

The requirement for a treaty in this particular case arises from United States law. The agreement provides for assistance in what are described as antitrust matters. In Australian law, conduct tending to significantly lessen competition is dealt with by means of purely civil proceedings arising under part IV of the Trade Practices Act. However, in the United States law such conduct can be addressed by both civil and criminal proceedings. Accordingly, depending on the circumstances of each United States request for assistance under the agreement, it may be more appropriate to provide such assistance under either the Criminal Matters Act or the Business Regulation Act.

In order to facilitate Australia's identifying and pursuing the more appropriate of these courses, article III.B 2 of the agreement specifically requires that a request by the United States states whether the purpose of the request includes possible criminal proceedings. Where it is not intended to use material obtained under the request in criminal proceedings, the United States is required to provide an undertaking that it will not be so used unless there is subsequent Australian authorisation under article VII.

The decision as to which Australian legislation should govern the processing of the request will then be taken in accordance with the normal procedures under the Business Regulation Act. If there is no undertaking not to use any material provided for the purposes of a criminal proceeding, or if the ACCC decides for any other reason that it would be more appropriate for the matter to be dealt with under the Criminal Matters Act, the request would be referred to the Attorney-General's Department. We would then treat the request as being made under the Criminal Matters Act and proceed accordingly under that act.

To that end, a general mutual assistance in criminal matters treaty with the United States will shortly enter into force. That treaty was signed in April 1997. It was tabled together with a national interest analysis in August 1997 and the treaties committee supported binding treaty action in relation to that treaty. To implement that treaty, regulations providing that the Criminal Matters Act applies to the United States, subject to the treaty, were made on 29 June 1999 and they have been tabled in both houses of parliament. This present antitrust agreement has been drafted so that requests made under it can, where appropriate, be dealt with under these regulations consistently with both the antitrust agreement and the general mutual assistance treaty.

Turning now to non-criminal matters, where the ACCC considers that a request should be dealt with under the Business Regulation Act and that it should be granted, it must still obtain authorisation from the Attorney-General or his delegate. The purpose of this procedure is to ensure that consideration is given to broader national and international interests which fall outside the remit of the ACCC or other business regulatory agencies. Once that authorisation is obtained, the ACCC will be able to use the compulsory procedure set out in the Business Regulation Act to obtain the information, documents or evidence requested and forward those to the United States government subject to any conditions imposed by the Attorney-General.

That is a very brief sketch of the way in which the two pieces of legislation operate and the process of consultation between the ACCC and the Attorney-General's Department under the agreement. I want to emphasise that the agreement will not impose obligations on Australia to provide assistance otherwise than in accordance with the existing mutual assistance legislation. So there is nothing new in the agreement from that perspective.

CHAIR—Many thanks. Mr Spier, we would like to hear about it from the point of view of the ACCC.

Mr Spier—After the two presentations so far, there is not all that much that I would wish to add except to say that, as the agency most affected on a day-to-day basis by this treaty, we certainly welcome it. The market is becoming more and more global and there are more and more cases that transcend national barriers. We are involved in a number of international cartel cases currently and the US, in fact, is involved in some 37 such cases that involve companies outside the US, some including Australia, although the bulk do not. We see this as an important precedent. We would wish to see cooperation agreements or, if need be, treaties developed with other antitrust agencies around the world, particularly in our immediate area, so that competition law enforcement can be made more effective.

I will give you one current example: you may have read in the press a little while ago that the US took proceedings against the multinational vitamin companies with an ultimate fine of $750 million for a very serious cartel. We have reason to believe that similar conduct may have happened in the Australian market and certainly any information that we can get from the US would be very helpful and will certainly make our investigations much quicker in the Australian market.

CHAIR—Thank you for those opening statements.

Mrs DE-ANNE KELLY—Ms Willing, you were saying that basically the same procedure under these two mutual assistance acts is going to be followed. In other words, every possible criminal matter is going to be referred to the Attorney-General's Department. Non-criminal matters will also be referred to the Attorney-General's Department. Is that so?

Ms Willing—Yes. Every possible criminal matter will be referred to the Attorney-General's Department and will be dealt with under the Mutual Assistance in Criminal Matters Act. The ACCC may decide that non-criminal matters should be dealt with under the Business Regulation Act—that is, there are no criminal proceedings involved.

Mrs DE-ANNE KELLY—Or they can choose not to, and proceed on their own basis. Is that right?

Ms Willing—They may decide that a request should be granted, but according to the Mutual Assistance in Business Regulation Act they would still need to refer that to the Attorney-General for the final decision as to whether—

Mrs DE-ANNE KELLY—On every non-criminal matter?

Ms Willing—Yes.

Mrs DE-ANNE KELLY—I have some concerns that, while we have a situation where the US antitrust laws are so much more severe that the Australian anticompetition laws and, let's face it, the American authorities are far more vigilant in pursuing outcomes under their legislation than we are in Australia, you are going to have a situation where the neighbours have got a Rottweiler that can come and run around in your territory but your poodle at home is not going to have the same opportunity to exploit the situation. What are we going to do about the fact that they are far more vigilant and aggressive with their legislation than we are? Isn't that going to give them an opportunity, for instance, to investigate Australian companies?

Ms Willing—I might just say that this agreement does not alter in any way our existing legislation and does not impose obligations broader than our current legislation. The ACCC and the Treasury might want to add to this, but the agreement itself makes it quite clear that any assistance provided under it is subject to the party's laws. So we will not be able to do anything further under our legislation than we can already do.

Senator COONEY—Is the answer you have just given correct? I want to follow on that question. This is really a procedural issue and the United States, as Mrs Kelly said, will want

to apply its law. What it is looking for is not to apply its law directly in Australia, but as a result of applying its law in its own country it will invoke procedures which are going to be used much more than they otherwise would be. So have you really answered the question Mrs Kelly was asking?

Ms Willing—The US can already ask for that assistance now. The situation without this agreement is that the US can ask for any assistance it likes. We process it under either the Criminal Matters Act or the Business Regulation Act. The fact is that we cannot get reciprocal assistance from the United States in enforcing our antitrust laws.

Mrs DE-ANNE KELLY—Mr Jepsen has already said there was no harmonisation of legislation, though, by which, I assume, Mr Jepsen means that they are not the same, with the same aims. Is that so?

Mr Jepsen—No. The purpose of the agreement is to establish processes which facilitate enforcement of our law. It does not imply any harmonisation of laws between Australia and America. It does not need to, because the law which is actually being acted in accordance with here is the Attorney-General's two pieces of legislation. You can have the two different sets of law, to the extent they are different, coexist. I am not an expert on American trade practices law, nor am I one on Australian trade practices law. I understand that essentially both go in the same direction, but they do not have to be the same for there to be mutual benefit from this treaty. As Ms Willing and I have said, the benefit to Australia from this is that we can actually get some enforcement assistance from America which we are not able to get in the absence of this treaty. So there is no change in law coming from it; it just facilitates our enforcement.

Senator COONEY—You have not answered Mrs Kelly's question: processes which are available in Australia will be much more often used than they would previously, now that you have got this agreement, because the American law—as Mrs Kelly said—is much more vigorous and much more widely spread. Since this really is about process, what the Americans will do is to ask Australia to initiate a process where it would not otherwise be initiated. She is right, isn't she, in saying this is going to impact on the Australian community much more than it otherwise would have.

Mr Spier—To come in on some of this discussion, I think there is some misunderstanding here. On one of the points: US law and our law are basically the same. Sure, they differ, but the basic aims are the same. The basic offences—particularly, the main issues that this treaty would impact on would be cartels and mergers—are exactly the same in the two jurisdictions. The US has had access, through two pieces of legislation which have already been described, for many years. We do not have access to US information, and that is an important difference. I am not aware of any incident in the last 25 years where the US has actually used the power it can use now to seek information on antitrust matters. It does informally, because it is semi-public information, and we do the same with the US. But we cannot get information from the US about conduct that is affecting the Australian market. Under this treaty we will be able to; we cannot at the moment.

Mrs DE-ANNE KELLY—The reality is, though, that the Americans are very aggressive. You have just got the figures. You have investigated one merger in 1997-98 as against the Americans challenging 51. The reality is that Australia is just—

Mr Spier—May I say that your figures are fundamentally wrong.

Mrs DE-ANNE KELLY—You can argue with the Parliamentary Research—

Mr Spier—We had 180 mergers last year. The Americans have got pre-notification, which means all mergers must be notified. It is also one heck of a bigger country. In terms of mergers opposed or scrutinised, we are exactly the same as the US, where about five per cent are opposed or looked at in a way where they are changed. We are almost identical.

Mr ADAMS—Can we have those figures?

Mr Spier—Sure.

Mrs DE-ANNE KELLY—If you can give us the figures we will be happy to have a look at them.

Mr Spier—Yes. I do not think a lot of business would agree with you that we are not vigilant when it comes to trade practices law.

Mr ADAMS—That depends on who you talk to.

Mrs DE-ANNE KELLY—To be honest, there is very much a view—it may be incorrect—that the antitrust laws in America are much tougher than Australia's anticompetitive laws, and that they are pursued far more vigorously.

Mr Spier—Perhaps I will put forward some figures which show that that is incorrect.

Mrs DE-ANNE KELLY—We would be very happy to see them.

Senator LUDWIG—Perhaps when you are doing that you could also highlight the points of difference between the two pieces of legislation, the US Sherman Act and ours. You said that harmonisation is not considered as part of this, and I accept that. You went on to say that there was a lot of similarity between the two pieces of legislation. My understanding is that there are some major points of differentiation between the two.

Mr Spier—In the two areas that impact here, which are mergers and cartels, they are exactly the same, except to say that the US law is criminal—which has been spelled out—and ours is civil.

Senator LUDWIG—As a consequence, there is a different onus of proof. Is that so?

Mr Spier—Yes, which makes US law harder to enforce rather than easier.

Senator LUDWIG—Yes, but then higher sanctions as a consequence.

Mr Spier—To have $10 million per offence here is not low sanctions.

Senator LUDWIG—When was the last time that was done?

Mr Spier—The law was only changed in 1993, as Senator Cooney said.

Senator LUDWIG—You have not done a $10 million, have you?

Mr Spier—Yes, we have. We have a number of cases where the fines are well over $1 million. There was one case where the fines were $21 million.

Senator LUDWIG—Perhaps you could also provide some of that for us.

Mr Spier—It is all in our reports which were tabled in the House. I would be more than happy to provide it.

Mr WILKIE—Obviously you are supportive of us going into a treaty of this nature, and therefore there is a lot of positive benefits that are outlined in these documents and in what has been said. Do you see any disadvantages, and what are they?

Mr Spier—Of course, whilst we support a treaty, it is the US that require the treaty; we do not. Our law already allows this cooperation. We see, in the broad, that international cooperation in competition law enforcement or antitrust enforcement—it depends what you call it—is critical to in any way get international cartels. Obviously, those cartels damage us, they damage others. We are often the smaller partner in the world economy and we may be quite damaged by cartels which happen in Europe or Asia or North America. So we see this as of great value in getting information or pursuing conduct that is starting to become pretty prevalent, anecdotal-wise anyway. If you look at US cases like the vitamins one I mentioned which clearly is a global cartel, we would be foolish to assume it does not affect us.

Mr WILKIE—So you do not see any disadvantages or risks to Australia in being a signatory to this agreement?

Mr Spier—It does not change anything. We see this as a great benefit to us. The law is not changed vis-a-vis the US getting information or getting cooperation from us. There is no change. By the way, they have not done it—they have not sought any using the current ways of getting information from us.

Senator MASON—My question relates to something that Senator Ludwig and Senator Cooney just touched on, and that is the process. I can easily understand the idea of exchanging information for the purposes of intelligence and so forth in any antitrust or anticompetitive investigations. I understand that. But article II.E.2 also contemplates the taking of evidence, where it says:

obtaining antitrust evidence at the request of an Antitrust Authority of the other Party—

Given what Senator Ludwig raised before, that these are potentially criminal proceedings as opposed to civil ones, given the fact that the law of evidence of Australia is different from

the United States law of evidence, both common law and statutory, and given the American Bill of Rights, that must complicate any evidence being taken in Australia by Australian tribunals and then being used for potentially criminal proceedings in the United States where they have a bill of rights.

Ms Willing—Yes, but that is a fairly common way of assisting a large number of countries that currently works under our mutual assistance in criminal matters legislation. There are certain requirements set out in that legislation for the taking of evidence for use in other countries. That is a fairly common procedure in a wide range of areas.

Mr Spier—Also, article II.I provides some protections for the US. That is particularly for US purposes.

Senator MASON—I see. Perhaps this is just as a matter of interest, or perhaps a matter of academic interest, but isn't it then possible that someone could give evidence in accordance with the Australian law of evidence that is contrary to the American law of evidence and it could be used in an American court?

Mr Manning—I am not quite sure that I follow exactly what you are saying, but perhaps it would help if I quickly outlined the position under the Mutual Assistance in Criminal Matters Act and the specific situation in relation to the American treaty. The general position under the Mutual Assistance Act is that, where a person sought to argue that they were not obliged to give evidence by reason of an immunity such as the possibility of self-incrimination under either Australian law or the law of the country requesting the evidence, normally we would accept that, subject to the requirement that the country requesting the evidence should give us some confirmation that that is the correct position—that is to say, the immunity claimed under the foreign state law.

Senator MASON—I understand that. When our tribunals in this country are taking evidence relating to an American matter, what law of evidence do we employ?

Mr Manning—In that case, we employ only Australian.

Senator MASON—In that case, surely there is a potential conflict if that evidence is to be used in an overseas proceedings.

Mr Manning—When it is taken to the US, the person is then entitled to oppose the admission of that evidence there to the extent that it would not be acceptable under US law. They cannot use our evidence law to get around an immunity that exists under their own law. That is understood. But, in the particular case of the United States, they require that we send it to them for them to make the judgment over there as to what the position is. More commonly, we simply ask for a certificate that this type of evidence is immune under the law of the requesting state.

Senator MASON—Thank you.

Senator COONEY—I know this is not of particular interest to this inquiry in a way, but if you were a defence lawyer worth his or her salt in a criminal charge in the United States,

you would talk about the status of this agreement and you would bring in the matters that Senator Mason has brought in. Why have we done it this way? It seems to be the sort of thing that would attract strong resistance in the following instances: 1) when the evidence is taken in Australia; and 2) when the evidence is given in America. Included in a strong defence would be: what is the status of this agreement to allow this evidence to be taken? The Bill of Rights would be an argument you would use. Have the various departments contemplated how much time and money will be needed to make this work? If you were any sort of criminal lawyer at all, you would see all sorts of ways around this. Even if you were a civil lawyer here, with the money that people do have, it looks a joy for those who like to see things go through courts.

Senator MASON—For example, the law of hearsay in the United States is quite different from that in Australia. So that would complicate it.

Senator COONEY—You do not have a treaty, you have an agreement between two governments.

Mr Manning—A treaty is a matter of its legal status. The term ‘agreement’ does not—

Senator COONEY—But that is an argument you can use. People can say, ‘Was this evidence collected within the terms of the agreement, then within the terms of the act?’ It is not unknown in Australia that people have argued that the evidence has to be gathered strictly in accordance with the law.

Mr Manning—It is certainly our experience in relation to the general process of extradition or mutual assistance in criminal matters treaties that people do take every point they can. There is nothing new about that.

Senator COONEY—Have you thought about that in reference to this because, as you said, it is breaking new ground?

Mr Manning—As a number of other speakers here have said, from Australia’s point of view it is basically allowing us to obtain information overseas, but it is not actually altering the availability of information from within Australia.

Senator COONEY—What you are saying is that it is worth a try—which it probably is. That is how it is being put, isn’t it?

Mr Jepsen—I am not sure that we were saying that it is worth a try. It is not changing our laws. It is not changing what we can do now. It is giving some more precision to the enforcement arrangements and allowing us to get a benefit through information from the United States.

Senator COONEY—I do not want to persist but, by the very fact that you say it will enable us to get what we did not get before, it must be changing the law.

Mr Spier—It changes the law in terms of what we can seek, not what the US can seek from us.

Mr Jepsen—Its citizens' rights.

Mr ADAMS—There must be something in it for the Americans as well. They proposed it, didn't they?

Mr Spier—It was a precedent, and they certainly are now looking at developing similar treaties with other jurisdictions.

Mr ADAMS—Have you got any problem in getting this through the US Senate?

Mr Spier—No. Under US law there has to be very extensive US scrutiny—which there has been, and they have not had any problems.

Mr ADAMS—Have they passed this as a treaty?

Mr Spier—Yes. It has been passed.

Mrs DE-ANNE KELLY—On page 31, it says there is a requirement to 'inform the other Party's Antitrust Authorities about investigative or enforcement activities'. Is that presently in place under the mutual assistance acts?

Mr Spier—No.

Mrs DE-ANNE KELLY—So that is an addition?

Mr Spier—It is under various OECD protocols already. Any enforcement actions are public anyway, so it is not exactly confidential.

Mrs DE-ANNE KELLY—With the actions that the ATO are taking presently with regard to their investigation of transfer pricing and so on—for example, face-to-face interviews with directors of companies in Australia—would that sort of information have to be handed over? That is investigative.

Mr Spier—The ATO?

Mrs DE-ANNE KELLY—The Australian Taxation Office. Or is it only matters that the ACCC is concerned with?

Mr Spier—If you read the treaty, you will see that it is only the ACCC.

Mrs DE-ANNE KELLY—I have not read the treaty. I am asking you, Mr Spier.

Mr Spier—This treaty only deals with the ACCC and antitrust matters.

Mrs DE-ANNE KELLY—So it is only matters that the ACCC is investigating, not other departments?

Mr Spier—No, not other departments.

Mrs DE-ANNE KELLY—With the vitamin case that you have mentioned, obviously the Americans are pursuing that vigorously.

Mr Spier—They have been.

Mrs DE-ANNE KELLY—Do you hope to be able to benefit from the information?

Mr Spier—Yes, most definitely.

Mrs DE-ANNE KELLY—When that comes your way, is the Australian legislation going to enable you to pursue it to the same extent that the Americans do?

Mr Spier—Yes, exactly the same. They have one difference, in terms of damages, which we do not have. That is treble damages for those affected, which is not something that we would deal with nor would our US counterparts. Private litigants can seek treble damages, which they are doing.

Mrs DE-ANNE KELLY—So this arrangement is going to assist you to improve your results?

Mr Spier—Yes. It also stops double-handling.

Mr ADAMS—Can we take it from that that we are not in a position to be able to pursue that matter now because the decision was made outside Australia?

Mr Spier—No. We can, but they have done the work. They have got the material; they have gone to court and obtained very high penalties. We can get some of that information from them, except the bits which are totally confidential. We can also pursue it here but it is much harder and a lot of the information is probably overseas.

Mr ADAMS—But we can subpoena information, we can—

Mr Spier—Not if they are overseas.

Mr ADAMS—The question I put to you was: the decisions have been made overseas, therefore we cannot get the information to undertake an investigation?

Mr Spier—No. It is not so much the decision—it is where the evidence is.

Mr ADAMS—So the evidence is overseas?

Mr Spier—There could be evidence here but what they have in the US will hopefully help us to pinpoint what might be here, or there may be no evidence here and we get it through the treaty.

Mr ADAMS—But it would be public documents in a court case.

Mr Spier—Some would be. Not if it was a settlement case and it did not go to hearing.

Mrs DE-ANNE KELLY—Will this prejudice the ACCC's investigation of American companies that may be involved in anticompetitive behaviour at all?

Mr Spier—No. In fact, it will help very much because currently we cannot approach our US counterparts and get certain vital information from them. They are simply precluded from giving it to us despite the fact that they can get information from us—although they have not done so.

Senator LUDWIG—Look at the national interest analysis, page 30 of 36, the penultimate paragraph, where it begins 'Request from Australia'. Do you have that?

Mr Spier—We do not have the same page numbers.

Senator LUDWIG—It is going to be hard for us to find it, isn't it?

Mr Spier—What is the heading?

Senator LUDWIG—It is the 'National Interest Analysis', and it is page 30 of 36.

Mr Spier—What is the side heading you are looking at?

Senator LUDWIG—It is on the second page. I thought this might have been an easier way to refer to it rather than to read it to you.

Mr Spier—Sure.

Senator LUDWIG—That is the nub of what you are talking about, as I understand, that you will then be able to obtain information which would assist the ACCC with its investigation.

Mr Spier—Yes.

Senator LUDWIG—This is really a query more than anything else. Where the points of law are different, is the ability of the US to cooperate dependent on the laws being similar where they may otherwise feel obliged to participate? Or, if the laws are different on that aspect, have you explored with them whether or not they will continue to participate at the same or similar level—in other words, where they may expose where the law might be different? For argument's sake, there may be a penalty that you are seeking to impose which does not exist in the US. They may be unwilling, as you can imagine, where it might be an American company operating in Australia.

Mr Spier—I take your point.

Mr Wing—What the arrangements are directed at is attacking conduct where—to give it in the Australian content—American companies have been involved in an alleged violation of the competition laws in Australia and we want to get information from that US company.

Senator LUDWIG—Yes, that is where I am going; and where in Australia it is illegal or per se illegal, so there is a problem, but in the US the law may be different. Have you explored with them the ability of the US to participate where their law might say, 'In the US we do not have a problem with that. Why are you investigating a US company in Australia? If we then cooperate with you, it may result in a prosecution under Australian law, whereas in the US there is no such breach.' Have you explored those sorts of things? It may not arise, but it begs the question.

Mr Wing—Requests for assistance can be refused on national interest, or public interest, grounds. However, the similarities between Australia's competition laws and the US competition laws are such there would not—

Senator LUDWIG—It may be academic?

Mr Wing—It would be academic.

Mr Spier—Unless there is a dramatic difference, they could not refuse.

Ms Masters—In fact, the treaty does deal with that in article II, subparagraph F, where it says:

> Assistance may be provided whether or not the conduct underlying the request would constitute a violation of the antitrust laws of the Requested Party.

Senator LUDWIG—And, as I understood, article II.B also assists.

Ms Masters—That is right.

Senator LUDWIG—But I was interested in whether or not you had actually explored that with them.

Mr Spier—We did. Basically, it was not seen as a problem. And if it was, as Mr Wing said, there would always be that national interest 'out', if it was a very unusual situation. But our laws and US laws are so similar.

Senator TCHEN—Under this agreement, the central authority in the United States is described as the US Attorney-General in consultation with the Federal Trade Commission. In Australia, it is the ACCC in consultation with the Attorney-General's Department. Is this difference deliberate or is it just the way it is written? It is a question of who is the lead agency, isn't it?

Ms Masters—I think it simply reflects the status of the agencies in each particular country. In the United States, the department with responsibility is the Attorney-General's Department, but they would consult with the Federal Trade Commission in respect of their responsibilities under the treaty, and vice versa in Australia—the ACCC would take prime responsibility but would do so in consultation with the Attorney-General's Department. It is just the way it is set up in each particular country.

Mr Spier—To clarify, in the US there are two competition agencies—they actually have competition in regulation as well. The Department of Justice and the Federal Trade Commission both have roles in terms of competition law, and the Attorney-General is the relevant minister for the Department of Justice.

Senator TCHEN—What happens if there is a difference in opinion between the agencies?

Mr Spier—Where—in the US?

Senator TCHEN—In Australia, say.

Mr Spier—There will not be here—well, I hope not. The Attorney-General has the final say.

Senator TCHEN—But not according to the wording here. You are actually the lead agency rather than the Attorney-General's Department.

Mr Spier—Sure, but we need the Attorney-General.

Senator TCHEN—In that case, can I lead on to a provision?

Mr Wing—This is subject to the statute.

Senator TCHEN—In that case, I point you to article X paragraph A of your agreement. It says that the requests should be generally justified under domestic laws. However, the central agent's authority 'shall confer, as needed, on alternative, equally effective procedures for compelling or obtaining' and so on. What do you have in mind, Mr Spier, on our side of the law?

Mr Spier—We cannot search and seize anyway. That is not a power that we have, although the US does.

Senator TCHEN—I see.

Mr Spier—We do have powers under the act and under the business regulation of seeking information.

Senator TCHEN—So it does not mean that, if the request does not accord with the law here, you can seek alternatives?

Mr Spier—Anything we do must accord with our law here.

Senator TCHEN—This particular sentence seems to read to me that you have alternative ways.

Ms Willing—I think it really envisages the central authority in Australia consulting with the central authority in the United States to see if there is some other alternative, less

intrusive way of obtaining the evidence that they want. There might be another way apart from search and seizure in which they could still get the information. For example, it might be on the public record or there might be some other way that is less intrusive.

Senator TCHEN—It is just a bit worrying the way it reads. Finally, can the agreements be terminated without cause by the other party, without giving notice?

Mr Spier—With notice.

Senator TCHEN—It can be?

Mr Jepsen—Yes, with 30 days notice.

CHAIR—Thank you. That concludes the program for today. Next Monday we will take evidence on the other agreements that were tabled on 11 August.

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

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

Committee adjourned at 12.07 p.m.